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Consumer Law in a Nutshell

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CONSUMER LAW
IN A NUTSHELL

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PREFACE

This book is designed to introduce the major problems and issues in the consumer law area and to summarize as clearly and concisely as possible the significant legal rules and principles that govern this area. Both the particulars of the rules that govern consumer transactions and the policies that underlie these rules are discussed. The emphasis is on what the law is as of August 1, 1980—not on what the law should be.

We have learned a lot about consumer law by writing this book. We hope that you too will learn about the subject by using this book as a place to begin (but not end) your study of consumer law.

David G. Epstein
Steve H. Nickles

Fayetteville, Arkansas
December, 1980
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XXIX
IN A NUTSHELL

CHAPTER I

INTRODUCTION TO AND OVERVIEW OF CONSUMER TRANSACTIONS LAW

A. WHAT IS CONSUMER TRANSACTIONS LAW?

This nutshell deals with consumer transactions, i.e., a man or woman obtaining credit, goods, real property or services for personal, family or household purposes. For example,

(1) Ward and June Cleaver obtain a $50,000 loan from Mayfield Savings and Loan to buy a home at 428 Mapleton.

(2) Shana Alexander buys a used hearse from Steven Weed for $500 to take ego trips in.

(3) Sluggo hires John Wayne Gacy to babysit with Mr. Bill for $5 an hour under a long-term contract.

The fact that a transaction is a "consumer transaction" does not usually cause a "general"
statute or common law rule to be inapplicable. The Mayfield Savings & Loan Mortgage on the Cleavers’ house would be subject to the general real property recording requirements; the sale of the hearse would be governed by Article 2 of the Uniform Commercial Code; the John Wayne Gacy long-term employment contract would be within the Statute of Frauds.

The fact that a transaction is a “consumer transaction” does, however, often cause special consumer protection statutes to be applicable.

Consumer transactions law is primarily statutory law. While there are some reported cases that seem to recognize rights in consumers beyond those provided by statute, there is no body of consumer transactions case law. In these cases, the courts tend to be non-disclosive about the basis of the decision. Accordingly, this book will focus primarily on the consumer transaction statutes.

The Truth in Lending Act is perhaps the best known of the consumer transactions statutes. Truth in Lending is the official short title of Title I of the Consumer Credit Protection Act of 1968. It requires that creditors extending consumer credit disclose essential credit terms, especially the cost of credit, before the credit is extended. Truth in Lending includes disclosure in advertising as well as person-to-person transactions. Truth in Lending is considered infra at pages 80–207. (Truth in Lending was significantly amended in 1980. Most of the amendments do not affect consumer transactions.)

The Consumer Credit Protection Act of 1968 contained more than 100 consumer transactions. Title II, labeled “Consumer Credit Protections,” was intended to establish a crime, which derives in part from extortionate credit practices. The targets are “loan sharks,” i.e., usurious rates of interest, and other means of collection. Garnishment, has a cap on the amount of earnings a consumer may lose to creditors. Second, it allows an employee to fire an employee because of 

Title IV establishes a disclosure on Consumer Finance. Title VI establishes the Consumer Finance Protection Board. Title VII contains further registration of credit card issuers. Title VIII contains regulation and trade recommendations. Title IX contains references will be made to these recommendations.

Credit card provisions in the Consumer Credit Protection Act. The former prohibited unreasonably high interest rates; it also contained provisions on cardholder liability. These provisions were subject credit card
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The amendments do not become effective until 1982. The Truth in Lending Simplification and Reform Act of 1980 is considered infra at pages 189-207).

The Consumer Credit Protection Act of 1968 contained more than the Truth in Lending provisions. Title II, labeled “Extortionate Credit Transactions,” was intended as a blow against organized crime, which derives a substantial part of its income from extortionate credit transactions. The primary targets are “loan sharks,” who extend credit at usurious rates of interest and then use force as a means of collection. Title III, Restrictions on Garnishment, has a dual impact. First, it limits the amount of earnings subject to garnishment by creditors. Second, it limits the employer’s right to fire an employee because of garnishment.

Title IV established a bipartisan National Commission on Consumer Finance which investigated the consumer finance industry generally and recommended further reforms in the area of rate regulation and trade practices. From time to time references will be made to the NCCF’s findings and recommendations.

Credit card provisions were added to the Consumer Credit Protection Act in both 1970 and 1974. The former prohibit the distribution of unauthorized cards and establish a fifty dollar limitation on cardholder liability for unauthorized use of his or her credit card. The 1974 credit card amendments subject credit card issuers to defenses arising out of
the transaction between a merchant and the cardholder. See pages 324–29, infra.

A title dealing with credit reporting agencies was also added to the Consumer Credit Protection Act in 1970. The Fair Credit Reporting Act regulates both the contents and confidentiality of the reports of “consumer reporting agencies” and provides for consumer access to such reports. When a consumer is denied credit, insurance, or employment in whole or in part because of information in a consumer report, the user of the consumer report must inform the consumer of this fact and must provide the consumer with the name and address of the consumer reporting agency that furnished the report. Whether or not adverse action was taken, the consumer has the right to obtain disclosure of the substance of the information about himself or herself in a reporting agency’s file. If the consumer takes issue with the information, the agency must reinvestigate and make any indicated changes. See pages 58–72, infra.

In 1974, the Equal Credit Opportunity Act and the Fair Credit Billing Act were added to the Consumer Credit Protection Act. The former prohibits discrimination based on sex or marital status in connection with extensions of credit. See pages 72–79, infra. The latter requires creditors to maintain procedures whereby consumers will be able to make complaints about billing errors. The creditor will then be required to correct the bill or correct it. See infra at 376–79.

In 1977, Congress amended the Fair Credit Reporting Act to the Fair Debt Collection Practices Act. FDCPA governs the conduct of debt collectors—persons who collect debts owed to someone else. See infra at pages 376–79.

The Consumer Credit Protection Act is not the only federal act that addresses consumer transactions. Section 1 of Title I of the FTC Act, the Consumer Commissions Act regulates consumer protection practices. The role of the FTC as a consumer protection agency and as a regulator of unfair, deceptive, or fraudulent practices is a direct result of the Consumer Credit Protection Act and Title II of the FTC Act, the Magnuson-Moss Warranty Improvement Act, which extends FTC’s jurisdiction to cover matters relating to consumer protection. FTC’s jurisdiction extends to various law suits and potential are considered by it.

Title I of the FTC Act requires disclosure of the minimum disclosure of the terms of a consumer product warranty. A “limited” warranty is defined as one “limited” in either “limited” or “full.”
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creditor will then be required either to explain the bill or correct it. See pages 346–53, infra.

In 1977, Congress added the Fair Debt Collection Practices Act to the Consumer Credit Protection Act. FDCPA governs the conduct of only certain debt collectors—persons who regularly collect debts owed to someone else. Its provisions are considered infra at pages 376–79.

The Consumer Credit Protection Act, as amended, is not the only federal statute affecting consumer transactions. Section 5 of the Federal Trade Commission Act regulates deceptive or unfair trade practices. The role (or lack of role) of the FTC in consumer protection has been criticized by President Nixon’s son-in-law and others. Title II of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act significantly increased the FTC’s jurisdiction and power. The Federal Trade Commission consumer protection past, present, and potential are considered infra at pages 12–29.

Title I of the Magnuson-Moss Act provides minimum disclosure standards for written consumer product warranties. If a “consumer product firm” issues a written warranty, it must comply with the disclosure requirements of the Act as supplemented by rules promulgated by the FTC. For example, all written warranties of consumer products costing more than $10 must be designated as either “limited” or “full.” The meaning of “limited” and “full” and other requirements of
Magnuson-Moss are discussed infra at pages 282-89.

Still another important federal consumer protection statute is the Real Estate Settlements Procedure Act, discussed infra at pages 149-51. The primary purpose of this act is to protect buyers and sellers of residential real estate from unreasonably high settlement costs by requiring advance disclosure of such costs and by outlawing certain “kickbacks.”

There are also state consumer protection statutes: rate regulation provisions, truth in lending disclosure statutes, deceptive trade practices acts, etc. The types and particulars of the statutes vary considerably from state to state. Two “uniform” statutes have been proposed. The National Conference of Commissioners on Uniform State Laws proposed a Uniform Consumer Credit Code in 1968 and a revised UCCC in 1974. Because of the expected opposition of creditors’ groups and the unexpected opposition of consumers’ groups, the Uniform Consumer Credit Code has only been adopted by nine states: Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, Utah, and Wyoming. And, even in these states, the UCCC has been revised considerably.

The other Model Act, originally the National Consumer Act but revised in 1973 as the Model Consumer Credit Act, was promulgated by the National Consumer Law Center at Boston College. It is much more pro-consumer than the UCCC.

Neither the National Conference nor the National Consumer Law Center has been enacted anywhere in a number of states, partly for the reasons stated above.

Generally, the Uniform Commercial Code and the Uniform Consumer Credit Code have been enacted in most states. The Code of Civil Procedure, Title 13, sections 1122-1126, contains the definition of “unconscionability” and the “good faith” standards, which are helpful in determining whether a contract is unconscionable. These sections are found in §§ 1122-1126, 1128-1132.

B. HOW IS A CONSUMER PROTECTION LAWSUIT FILED?

Under our adversary system, the primary mechanism for protecting the consumer is to hire an attorney and to seek a number of probable causes of action for services in consumer transactions. Time, embarrassment, and expense of going to court, which are substantial, are compensated in at least the cost barrier.
Neither the National Consumer Act nor its successor has been enacted anywhere. The NCA has however influenced consumer protection legislation in a number of states, particularly Wisconsin.

Generally, the Uniform Commercial Code does not treat consumer transactions differently than commercial transactions. But c.f., sections 9-505 and 9-507. The UCC provisions that have had the greatest impact on consumer transactions—section 2-302 unconscionability and the warranty provisions—are not limited to consumer transactions. These sections are considered infra at pages 271–73, 275–82.

B. HOW IS CONSUMER TRANSACTIONS LAW ENFORCED?

1. PRIVATE ACTIONS

Under our adversary system of justice, the primary mechanism for redress is private litigation: hire an attorney and "sue the bastards." There are a number of problems of access to private legal services in consumer disputes. Consumers are reluctant to go to court for a variety of reasons: Time, embarrassment, fear and cost, to cite a few. Consumer grievances often involve small amounts which are substantially less than the fees required to compensate members of the private bar. Mechanisms have developed which purport to offset at least the cost barrier to private litigation: free legal
services, small claims courts, recovery of attorney's fees and class actions. The last two merit further consideration.

a. ATTORNEYS' FEES

Attorney's fees are not generally included in the costs of litigation taxed against the losing parties. In Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975), the Supreme Court reversed an award of attorney's fees to environmentalist groups which had instituted litigation to prevent issuance of Government permits required for the construction of the trans-Alaska pipeline. The Court rejected the "private attorney general's" approach adopted by the Court of Appeals. After Alyeska, it would seem that attorney's fees will be recoverable in federal consumer credit litigation only where there is express statutory authorization.

A number of the recently enacted consumer protection statutes do expressly authorize recovery of "reasonable" attorney's fees by consumers who are successful in asserting certain statutory rights. Note that only a successful party is entitled to recover attorney's fees; the consumer must still gamble on winning his or her suit. Accordingly, it seems doubtful that the possibility of attorney's fee awards in consumer cases will substantially increase the involvement of private attorneys.

Statutes providing for recovery of attorney's fees by successful plaintiffs have raised the question of whether attorney's fees may be awarded to a pro bono client who is not entitled to such an award. There is a line of cases which indicate that policy considerations support recovery of attorney's fees to a pro bono client where the party of plaintiff's cost-limitation statute (12 U.S.C. §1701 et seq., Home Loan of Mississippi, 394 U.S. 257 (1969); Harris, 394 U.S. 286 (1969); Snyder, 394 U.S. 238 (1969)). Such cases appear to encourage private attorneys to undertake the costs of litigation and thus imposing the costs of litigation on the government.

b. CLASS ACTIONS

Class actions provide another vehicle for bringing private rights into suit without the necessity of private counsel. Subject to limitations on the avoidance of abuse, consumer class actions are allowed in federal courts only if the requirements of Rule 23 are met. Any case four between the representative plaintiffs and the defendants provision provides that the class must be "certified" and that the representative plaintiffs have a common zone of interest in the claims of class members. Note that they have a common zone of interest in the claims of class members. The Snyder ruling effectively allows private attorneys to undertake the cost of litigation and thus imposing the costs of litigation on the government.

Note that only a successful party is entitled to recover attorney's fees; the consumer must still gamble on winning his or her suit. Accordingly, it seems doubtful that the possibility of attorney's fee awards in consumer cases will substantially increase the involvement of private attorneys.
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whether attorney's fees should be awarded to a legal aid client who is not liable for costs of counsel. There is a line of Truth in Lending cases holding that policy considerations justify the award of attorney's fees to a legal aid client despite the lack of plaintiff's cost-liability. E.g., Harris v. Tower Loan of Mississippi, Inc., 609 F.2d 120 (5th Cir. 1980). Such cases stress the importance of (1) encouraging private enforcement of the law and (2) imposing the costs of litigation on violators of the act.

b. CLASS ACTIONS

Class actions provide a mechanism for aggregating small claims into suits of sufficient size to cover fees of private counsel. There are, however, numerous limitations on the availability of class actions.

Consumer class actions may be brought in the federal courts only if jurisdictional requirements are met. Any case founded upon diversity of citizenship between the representatives of a class and the defendants provision must meet the jurisdictional requirement that the amount in controversy exceed $10,000. The Supreme Court has held in Snyder v. Harris, 394 U.S. 332 (1969), that the individual claims of class members can be aggregated only if the class members are enforcing a single right in which they have a common interest. Because most consumer claims are separate and distinct, the Snyder ruling effectively limits consumer class
actions in federal courts to claims under Federal statutes that have waived the jurisdictional amount requirement.

The requirements of rule 23 of the Federal Rules of Civil Procedure must also be considered. In order for a consumer right to be maintained as a class action in federal court, it must meet all of the general criteria established in rule 23(a) and come within one of the three categories listed in rule 23(b).

Rule 23(a) requires that (1) there be a definable class of plaintiffs; (2) the class be too numerous to permit joinder; (3) there be common questions of law and fact and (4) representatives fairly and adequately protect the interests of the class. Rule 23(a) has rarely presented problems for the consumer plaintiff.

Rule 23(b) has presented problems for the consumer plaintiff. The Advisory Committee, in its comments seem to place consumer class actions in rule 23(b)(3). Almost all law review writers agree. Accordingly, it is necessary to consider the criteria of rule 23(b)(3). It requires that a court determine not only that common questions of law or fact exist but also that such common questions predominate over individual questions. Additionally, rule 23(b)(3) requires a judicial determination that the class action be superior to other available methods for a fair resolution of the controversy.

Finally, rule 23(c) requires, limited to rule 23(b)(3) “the best possible circumstances, including members who can fairly represent the members who can fairly represent the class.” The Supreme Court quoted language must be given the full costs of identifiable class members who can be identified within the class. It held that the representatives must define the full costs of identifiable class members who can be identified within the class.

A number of state and class action provisions are based on rule 23(b)(3).

2. ADMINISTRATION AND IMPLEMENTATION

In part because of the enforcement of Federal statutes, agencies have assumed a state role in consumer protection. A whole host of agencies have a role.

A detailed consideration of Federal and state consumer protection.
Finally, rule 23(c)(2) sets forth a special notice requirement, limited to class actions under rule 23(b)(3) "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The Supreme Court recently held that the quoted language means what it says; individual notice must be given to all class members who can be identified with reasonable effort. The Court held that the representatives of the class must pay the full costs of individual notice to 2 million readily identifiable class members in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). At the very least, rule 23(c)(2) and Eisen mean that consumer plaintiffs must define their classes within the limitation of their budgets for notice costs.

A number of states now have general or limited class action provisions; a number of such provisions are based on rule 23.

2. ADMINISTRATIVE ACTION

a. GENERAL

In part because of the problems with private enforcement of consumer rights, public agencies have assumed a major responsibility for consumer protection. A wide variety of federal and state agencies have a wide variety of responsibilities.

A detailed consideration of each of the federal and state consumer protection agencies is beyond the
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scope of this book (and the patience of its authors). Rather, the following section examines the past, present and potential of the governmental agency that "stands as the premier governmental bulwark against the onslaught of consumer fraud"—the Federal Trade Commission.

b. FTC: AN ABBREVIATED CASE STUDY

The Federal Trade Commission was established in 1915 pursuant to the provisions of the Federal Trade Commission Act of 1914. There are five Commissioners, appointed by the President for terms of seven years. Not more than three Commissioners can be members of the same political party.

Since its creation, the FTC has been given enforcement responsibilities by a number of statutes. A list of these statutes is set out in S. Oppenheim and G. Weston, Unfair Trade Practices and Consumer Protection 596-598 (3d ed. 1974). The focal point of the FTC's consumer protection responsibility, is in the Federal Trade Commission Act itself—section 5 of the FTC Act.

As originally enacted in 1914, section 5 proscribed unfair methods of competition in commerce. In 1938, section 5 was amended to extend the jurisdiction of the FTC to cover "unfair or deceptive acts or practices in commerce". The phrase "in commerce" was held to confer less...
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than Constitutionally permissible jurisdiction over interstate commerce. In FTC v. Bunte Bros., Inc., 312 U.S. 349 (1941), the Commission charged Bunte with violating section 5 of the FTC Act in selling, in Illinois, "break and take" packages in which the amount received by the purchaser is dependent on chance. The Supreme Court held that the Commission lacked jurisdiction on the facts of the case. "The 'commerce' in which these methods are barred is interstate commerce. Neither ordinary English speech nor the considered language of legislation would aptly describe the sales by Bunte Brothers of its 'break and take' assortment in Illinois as 'using unfair methods of competition in [interstate] commerce.' When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly. * * * This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in [interstate] commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestations of intention than Congress has furnished."

Since Bunte Bros., Congress has furnished a much clearer manifestation of intention. The Magnuson-Moss Warranty-FTC Improvement Act amends
section 5 so that it now reads: “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” According to the Senate Commerce Committee Report, the expansion of the Commission’s jurisdiction is “intended to permit more effective policing of the market place by bringing within reach practices which are unfair or deceptive and which, while local in character, nevertheless have an adverse impact upon interstate commerce.”

What is an “unfair or deceptive act or practice”? The FTC has long issued interpretative “industry guides” (also known as trade practice rules). These are set out in Subchapter B of Title 16 of the Code of Federal Regulations. These guides or rules describe in lay language acts or practices in a particular industry that the Commission considers to be a violation of section 5’s prohibition of “unfair or deceptive acts or practices”. These interpretations do not have the force and effect of law.

In 1962, the Commission decided to enact “trade regulation rules” that delineate specific practices which the Commission considers to be prescribed by the FTC Act. These rules are set in Subchapter D of Title 16. While industry guides are merely interpretative, violations of trade regulation rules are considered violations of the statutory provision from which the rule is derived.
The following example illustrates the difference between industry guides and trade regulation rules. Assume that the Commission issues a trade regulation requiring that all aspirin advertisement include the statement “ALL ASPIRIN IS ALIKE.” If the FTC decided to prosecute a violation of the rule, the complaint would charge a failure to include the required legend rather than allege a “deceptive practice.” All the Commission would have to show was the absence of the required language; it would not have to prove the conclusion which underlies this hypothetical rule that the omission of the required language is a deceptive act. If on the other hand, the Commission merely issues an industry guide on aspirin advertising, an action by the FTC would have to be based on violation of the statute, not violation of the guide. The Commission would have to prove the commission of a deceptive act or practice rather than merely a violation of the industry guide.

The power of the FTC to promulgate trade regulation rules was tested and upheld in National Petroleum Refiners Ass’n v. FTC, 482 F.2d 672 (D.C.Cir. 1973). The trade regulation rule there involved provided that failure to post octane ratings on service station gasoline pumps would be a “deceptive practice” in violation of section 5. The court found that the FTC substantive rulemaking power was consistent with the plain lan-
guage of the FTC Act and was a desirable means of effecting the Act's purposes.

The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act confirms the Commission's authority to issue substantive rules defining unfair or deceptive acts or practices and details the procedures the Commission is to observe in promulgating such rules.\*1

Magnuson-Moss also significantly increased the FTC's remedies. Until 1973 the only procedure available for enforcement of section 5(a) of the Act was the cease and desist order. Under this procedure whenever the FTC has reason to believe that any person is violating section 5(a) and that action by the Commission would be in the public interest it may issue a complaint and notice of hearing. In most instances before a complaint is issued, however, the party involved is given an opportunity to "consent" to a formal "cease and desist" order or it may be permitted to agree informally to discontinue the practice. "Consent" to such an order refers to future practices. It does not admit of violations in the past. In the event the case is not settled by a consent order or an informal agreement, a complaint is issued and a public hearing is held before an administra-

\*1 For a detailed consideration of the procedure, see Kintner & Smith, The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency, 26 Mercer L.Rev. 651, 675-70 (1975), a very helpful article.
a desirable means

The Federal Trade Commission confirms the Commission's substantive rules defining unfair or deceptive practices and determines action is to observe in

recently increased the only procedure under section 5(a) of the order. Under this provision, as reason to believe section 5(a) and

a consent order becomes final on the 60th day after it is served. In the event review of a cease and desist order is sought the order of the Commission does not become final until affirmance is obtained from the Court of Appeals or by the Supreme Court of the United States if taken to that Court for review. Some cases have taken years from the filing of the original complaint to a cease and desist order becoming final.

It was only the violation of a cease and desist order that could be punished. No penalty for the first violation—the conduct that gave rise to the cease and desist order. And, the sanction for the second violation—the violation of a cease and desist order was only a $5,000 civil penalty.
In 1969, “Nader’s Raiders” published a very critical report of the FTC’s consumer protection efforts. Shortly thereafter, an American Bar Association Special Commission studied the FTC. Although couched in somewhat more subdued terms than the Nader book, the report of the ABA’s Special Commission supported the findings of Nader’s Raiders. Both reports noted the need for additional statutory authority to permit the FTC to carry out its consumer protection responsibilities.

Both the Nader and ABA reports recommended that the FTC be empowered to obtain preliminary injunctions against unfair or deceptive acts or practices which are unfair or deceptive to consumers. This authority was granted by section 408 of the Alaska Pipeline Act, which authorized the FTC to obtain temporary restraining orders and preliminary injunctions of violations or threatened violations of any provision of law administered by the Commission. In addition, section 408 increased the penalty for violation of cease and desist orders from $5,000 to $10,000 and gave the Commission the right to represent itself through its own attorneys in civil actions if, after notifying the Attorney General and giving him 10 days to take the action proposed by the Commission, the Attorney General failed to do so.

Even after adopting the Trans-Alaska Oil Pipeline Act, Congress continued to consider broader amendments to the Commission’s authority field. Early into the law the Consumer Credit Case confirms the Act significantly weapons in the consumer credit law,” B. Clause Consumer Credit Case confirms the Act significantly weapons in the consumer credit law,” B. Clause Consumer Credit Case confirms the Act significantly weapons in the consumer credit law,” B. Clause Consumer Credit Case confirms the Act significantly weapons in the consumer credit law,” B. Clause Consumer Credit Case confirms the Act significantly weapons in the consumer credit law,” B. Clause Consumer Credit Case confirms the Act significantly weapons in the consumer credit law,” B. Clause Consumer Credit Case confirms the Act significantly weapons in the consumer credit law,” B. Clause Consumer Credit Case confirms the Act significantly weapons in the consumer credit law,” B. 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amendments to the FTC that would buttress the Commission's authority in the consumer protection field. Early in 1975, the President signed into the law the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.

"The Act makes a number of far-reaching changes which greatly increase the power of the FTC to become an important source of consumer credit law," B. Clark & J. Fonseca, Handling Consumer Credit Cases § 62 (1979). As already noted, the Act confirms the Commission's authority to promulgate trade regulation rules. Additionally, the Act significantly increases the FTC's arsenal of weapons in the consumer protection field.

Remember, until 1975, no civil penalties until the second violation. The FTC could only recover civil penalties from a person, partnership or corporation which violated a cease and desist order that had been previously issued against it. Section 5(m)(1) of the FTC Act as amended imposes civil penalties for first violations in two instances: (1) knowing violation of a trade regulation rule and (2) knowing violation of a cease and desist order issued against another person. To illustrate the second situation, if the FTC issues a cease and desist order directed at General Motors prohibiting advertising of mileage tests performed by professional drivers without disclosing that the drivers were professionals, the FTC could seek
a civil penalty against Ford if it advertised mileage test results without making such a disclosure.

Section 19 of the newly amended Act also authorizes the FTC in two situations to seek damages for persons injured by unfair or deceptive acts or practices. The Commission may bring civil actions in federal or state court in order to obtain redress for consumers or other persons, partnerships or corporations which have been injured (1) by violations of existing Commission trade regulation rules defining unfair or deceptive acts or practices, or (2) by persons violating the FTC Act, where the violation resulted in a cease and desist order and where a reasonable man would have known under the circumstances that the act or practice was dishonest or fraudulent. The phrase “dishonest or fraudulent” is not defined in the Act. It would seem to be a stricter standard than “unfair or deceptive.” Otherwise, Congress would not have added this new test.

An action under section 19 for redress does not prevent the Commission from also bringing an action under section 5(m) for a civil penalty. Similarly, civil penalty actions brought by the FTC under section 5(m) do not affect the Commission’s authority to seek redress under section 19. Thus, for example, if a person violates a trade regulation rule defining an unfair or deceptive act or practice with constructive knowledge that
the act or practice was proscribed by the rule, the Commission can, without first resorting to a cease and desist order proceeding, file an action in federal court for civil penalties and for redress of the injury resulting from the rule violation.