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Poverty Law Practice Manual

Consumer Law

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Welcome to the Poverty Law Practice Manual. This manual is designed to help legal aid and pro bono attorneys better understand poverty law issues in Arkansas. The Center for Arkansas Legal Services and Legal Aid of Arkansas, Inc., maintain this manual. You can learn more about free legal aid in Arkansas by visiting arlegalservices.org.

Consumer Law: I of III—Debt Collection Practices and Selected Arkansas Consumer Protection Statutes

I

Fair Debt Collection Practices Act

Introduction

The Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.A. §§ 1692-1692o (West 1982), was enacted by Congress to "eliminate abusive debt collection practices by debt collectors." § 1692(e). According to the preamble, "[t]here is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." The act was designed to "eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." § 1692.

The Act places restrictions on the activities of collection agencies and other bill collectors. If the Act is violated, an individual consumer debtor may recover his actual damages and a penalty of up to $1,000 plus attorney's fees. § 1692k. If a class action, the award may be "such amount for each named plaintiff as could be recovered" by each individual and "such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector." 15 U.S.C.A. § 1692k (West).

A. Coverage of the Act

The FDCPA applies only to "debt collectors" as defined in § 1692a(6). “Debt collector” may include any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due, or asserted to be owed or due, another. Basically, a debt collector is anyone who regularly collects, on behalf of others, debts owed primarily for personal, family, or household purposes. Further, a creditor who uses an assumed name to collect his own debts is covered by the Act, since the use of another name indicates to the consumer that a third person is collecting the debt. 15 U.S.C.A. § 1692a.

The exclusion of attorneys from the Act was removed in 1986. 15 U.S.C.A. § 1692a(6) (Supp. 1987). Attorneys are now covered as debt collectors if the other requirements of the Act are met. Romea v. Heinberger & Associates,163 F.3d 111 (2d Cir. 1998), Cook v. Hamrick, 278 F. Supp. 2d 1202, 1203 (D. Colo. 2003).

The FDCPA “should be construed liberally in favor of the consumer.” Johnson v. Riddle, 305 F.3d 1107, 1117 (10th Cir. 2002) Citing, Pfennig v. Household Credit Servs., Inc., 286 F.3d 340, 344 (6th Cir.2002) (TILA); Rossman v. Fleet Bank Nat'l Assoc., 280 F.3d 384, 390 (3d Cir.2002) (TILA); Ellis v. General Motors Acceptance Corp., 160 F.3d 703, 707 (11th Cir.1998) (TILA); Plummer v. Gordon, 193 F.Supp.2d 460, 463 (D.Conn.2002) (FDCPA); Ross v. Commercial Fin. Servs., 31 F.Supp.2d 1077, 1079 (N.D.Ill.1999) (FDCPA); Harrison v. NBD, Inc., 968 F.Supp. 837, 844 (E.D.N.Y.1997) (FDCPA).

B. Activities Restricted by the Act

1. Request for Locations Information

The FDCPA restricts what a debt collector may say when contacting employers, relatives, neighbors, or other persons to obtain location information about the consumer (address, phone number, place of employment). § 1692b. The debt collector may not state that the consumer owes a debt, call any person more than once, send post cards to any person, or use any symbol on an envelope which indicates that he/she is collecting a debt. He can only identify himself by name. He may not state for whom he/she works unless specifically requested to do so. West v. Nationwide Credit Inc., 998 F. Supp. 642.

Once the collector discovers that the consumer is represented by an attorney concerning the debt and can reasonably determine the attorney's name and address, he/she can communicate only with the attorney. § 1692b.

2. Communication with the Debtor

Except with the permission of the consumer, the debt collector cannot call at unreasonable times (generally before 8:00 a.m. and after 9:00 p.m.) or at the consumer's job if the collector has reason to know that the employer prohibits such calls. § 1692c(a). This protection also extends to the debtor's "spouse, parent (if the consumer is a minor), guardian, executor, or administrator." § 1692(c). Unless to acquire location information consistent with 1692(b), or with the permission of the debtor, the debt-collector is also prohibited from communicating regarding the debt "with any person other than the consumer, his [sic] attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector." § 1692(c).

If the consumer notifies the debt collector in writing that he/she refuses to pay the debt or does not want to receive further communication, the debt collector must stop contacting the consumer except (1) to advise him/her that he/she is terminating further efforts and (2) to notify the consumer that the collector intends to invoke specified remedies which are in fact ordinarily invoked by him/her or the creditor. § 1692c(c).

Legislation proposed during the Summer of 2011 would also require that where the statute of limitations on a debt has expired,

> . . . a debt collector shall disclose to a consumer the following: (1) The debt has been transferred to the debt collector. (2) The creditor no longer holds the debt. (3) As a result of the expiration of the statute of limitations with respect to such debt, the debt collector may not bring legal action against the consumer to collect such debt. (4) Any payment by the consumer towards the debt may cause the statute of limitations for such debt to reset.

see 112th CONGRESS, 1st Session, 112th CONGRESS, 1st Session.

3. Harassment

The FDCPA generally prohibits any conduct by the debt collector that tends to harass, oppress, or abuse anyone during the collection of a debt. A debt collector, for example, may not threaten violence, curse, publish "deadbeat" lists, or harass a debtor by phone (as by calling repeatedly or refusing to disclose the caller's identity). §1692d. Immediately recalling after the consumer hangs up, Bingham v. Collection Bureau, Inc., 505 F. Supp. 864 (D.N.D. 1981), and sending letters that, in an intimidating tone, threaten an embarrassing investigation, Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980 (N.D. Ill. 1979), have been held to be harassment under the Act. The burden of proving such harassment is on the debtor. Harvey v. United Adjusters, 509 F. Supp. 1218 (D. Or. 1981).

For an excellent case index of what constitutes harassment, see Sherry S. Zimmerman, *What Constitutes Harassment or Abuse Under Provisions of Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692d, Which Proscribes Conduct the Natural Consequence of Which Is to Harass, Oppress, or Abuse Any Person in Connection with Collection of Debt*, 9 A.L.R. Fed. 2d 645 (Originally published in 2006). The "Practice Pointers" are excerpted below:

> Since the language of 15 U.S.C.A. § 1692d prohibits a debt collector from engaging in conduct the natural consequence of which is to harass, oppress, or abuse "any person" in connection with the collection of a debt, persons other than the debtor who have been harmed by the debt collection practices proscribed therein may pursue claims under the statute. (Montgomery v. Huntington Bank, 346 F.3d 693, 2003 FED App. 0362P (6th Cir. 2003) (debtor's son)).
>
> It has been held that a summons can be subject to the anti-harassment provisions of 15 U.S.C.A. § 1692d. (Frye v. Bowman, Heintz, Boscia, Vician, P.C., 193 F. Supp. 2d 1070 (S.D. Ind. 2002), concluding that, while the summonses themselves did not demand payment, each one contained a statement that it was a communication from a debt collector and was an attempt to collect a debt and were thus communications covered by the statutory prohibitions).
>
> Although the Federal Debt Collection Practices Act (FDCPA) does not provide relief to plaintiffs unless a violation occurs within one year of the filing date of an action, evidence of violations of 15 U.S.C.A. § 1692d occurring prior to the limitations period may be admissible to demonstrate that a debt collector's conduct occurring within the limitations period was part of a continuing pattern of abuse or harassment. (Joseph v. J.J. Mac Intyre Companies, L.L.C., 281 F. Supp. 2d 1156 (N.D. Cal. 2003); also see Pittman v. J.J. Mac Intyre Co. of Nevada, Inc., 969 F. Supp. 609 (D. Nev. 1997)).

The FDCA specifically excludes from its coverage any person collecting on a debt to the extent that such activity concerns a debt which was not in default at the time it was obtained by such person. (15 U.S.C.A. § 1692a(6)(F)(iii)). Thus, the FDCPA is only applicable to a loan servicing agent who began servicing the loan after it was already in default. (Edler v. Student Loan Marketing Assn., 1993 WL 625570 (D. D.C. 1993) (unreported opinion)).

For useful litigation and pre-litigation checklists see: Fritz, Eward C., *Action for Harassment of Debtor*, 16 Am. Jur. Trials 619 (originally published in 1969). The checklist for "Interviewing the plaintiff" and "Steps to take before filing suit" are excerpted below:

In interviewing his [sic] client, attorney for the plaintiff should bear in mind and develop from his [sic] discussion the elements of the cause of action for improper coercion to collect a debt and the consequent emotional disturbance and physical injury to the plaintiff.

There are three such elements involved: an explanation of the delinquency; the nature of the improper and excessive collection contacts; and the nature and cause of the emotional and physical illness suffered by plaintiff, with any other damages, and their causal connection to the acts of coercion committed by the defendant.

Following is a checklist of matters that should be discussed and covered in the interview of the client:

1. The details of the opening transaction between the debtor and creditor, including date, sales price, amount of charges, amount lent, if any, nature of each agreement signed, and other details.
2. The same types of facts as to each subsequent transaction between the debtor and creditor.
3. If insurance was required, the details as to whether an option was given as to agent and insurance company.
4. If a purchase of automobile or merchandise was concerned, the representations of the seller or creditor as to the merchandise.
5. The facts as to whether or not the creditor fully explained the nature and percentage of the charges.
6. Complete details as to whether or not the charges were excessive, or the merchandise was misrepresented or was unsatisfactory.
7. The facts as to whether or not the debtor communicated his displeasure as to the sale of charges to the creditor or collector, and if so, the date and name of the person to whom the communication was made.
8. The response of said person and the details of any further proceedings or arrangements in connection with the dispute over the sale or its terms.
9. The dates and amounts of all payments by the debtor.
10. All facts explaining how the collector came into the picture (whether the collector was the creditor himself, an employee of the creditor, the assignee of a note, before or after delinquency, an employee of an organization commonly owned with the creditor, or an employee of a collection agency).
11. A list of the names and descriptions of everyone who dealt with the debtor on behalf of the creditor.
12. All papers and documents of any nature pertaining to any of the transactions, and the entire series of transactions with the creditor, including any notes, mortgages, insurance papers, or breakdowns of the charges (discovery processes can be used in this connection).
13. All receipts, canceled checks, payment books or other evidences of payment (these will sometimes be in the possession of his plaintiff-client).
14. All samples of literature, merchandise, and other matters that may be used as demonstrative evidence. If the sale of a large object is involved, such as a car or a refrigerator, the attorney should see that photographs are obtained showing any possible defects.

The attorney's secretary can be trained to see that these details are accomplished and that the papers are placed in chronological order. However, the attorney must remember that the final responsibility for the preparation of his/her file rests upon him/her.

In the interview with his client, the attorney should review completely and comprehensively with him/her the nature of the collection contacts made upon him by defendant. A checklist follows:

1. The general types of collection contacts employed by the creditor or collector, including letters, open cards, telegrams, special delivery letters, telephone calls, and personal visits.
2. The name and description of each such person engaged in each such type of contact.
3. The beginning date, the ending date, and the date of maximum incidents of each type of collection contact.

4. The names and addresses of all persons who were contacted, such as the debtor's next-door neighbors, the debtor's employer, spouse, children, relatives, friends, cosigners, and fellow employees.
5. The details as to each of the collection contacts, especially those which tend to indicate a willful disregard by the creditor for the proprieties, impute dishonesty to the debtor, throw the debtor into disgrace or ridicule, or invade his right of privacy. (One way to obtain these details is to hand the debtor sheets of blank paper and ask him/her to write a separate description of each of the contacts, giving his/her best recollection as to the date, the person making the collection contact, who said what, and how he/she felt immediately thereafter.)
6. All written notations, memoranda, letters, cards, telegrams, and other documentary evidence (organized in chronological order) pertaining to the entire series of collection efforts.
7. The details of collection contacts as written by the client. The attorney should organize these in chronological order and painstakingly go over each of them with the client more than once so that the client will understand the nature of the testimony to be given by him/her at the trial of the action. It is probably a good suggestion for the attorney to handle the final review of such testimony in question-and-answer form, so that the client can become familiar with this type of interrogation.

Before discussing the plaintiff's illnesses in any great detail, his/her attorney should explain to him/her how science is increasingly discovering a relationship between emotional stress and physical illness. Many people are not aware of recent scientific advances in this field and, unless the attorney alerts them, do not understand the importance of digging into their memories for full disclosure. In making a general assessment of the nature and causes of plaintiff's illnesses, the attorney will need the following data:

1. A list of all the illnesses the plaintiff has experienced as far back as he/she can remember.
2. The names and addresses of all doctors, company nurses, or other persons who have treated the plaintiff for the past five to ten years, with approximate dates of treatment.
3. The closeness in time between the various outrageous collection contacts or periods of intense harassment, and the development of illnesses and treatment thereof.
4. A list of the names and address of all persons who may have observed changes in the physical condition or health of the plaintiff after the harassment by defendant began. (These persons may or may not have known about the harassment. It is not necessary that they knew anything about it as a prerequisite to their testifying about how much weaker, or older, wearier, or less capable on the job, they observed the plaintiff to be.)
5. An authorization for each doctor who treated the plaintiff to give a report of his/her treatment of the plaintiff and a diagnosis and opinion as to the cause of the illnesses suffered by the plaintiff.
6. All plaintiff's medical bills, receipts for payments, canceled checks, and other evidences of medical treatment.
7. Containers of any medicine that he/she may have used, whether or not prescribed, in the care of his/her health. Any additional bottles and boxes of medicine later used should also be kept.
8. All the above seven items likewise concerning any members of plaintiff's family who may also have been affected by the excessive collection contacts engaged in by the defendant.
9. A complete medical report from the client's doctor on the client.

In addition to the client interview certain other matters should receive the attention of the attorney for the plaintiff as he engages in the preparation of his/her lawsuit in behalf of his/her client. The following checklist is intended to suggest further steps that the plaintiff's attorney should take in preparation for the litigation to follow:

1. Interview the client's spouse and other persons who received collection contacts, or who observed the change in physical condition or in actions of the plaintiff and obtain complete statements from them as to facts that they may have observed.
2. Obtain a report from each physician who has treated the injured person.
3. Interview a psychiatrist to be called at the trial to establish the relationship between physical injury or illness and emotional disturbance. This testimony is highly desirable in some cases in order to complete the chain of causation between defendant's wrongful acts and plaintiff's ultimate physical injury.
4. Obtain a statement from the debtor's employer as to any contacts made upon him by the creditor or collector, and any action taken by the employer in connection therewith, including any demotion or discharge of the plaintiff from his employ.
5. Request the creditor and collector to produce their records of the entire series of transactions, the payments made, and the collection contacts. (Under small-loan laws in many states, and certain consumer laws in other states, lenders and consumer finance companies are required to divulge to the borrower or his/her representative the contents of their records reflecting a breakdown of the advances and charges, and an itemization of the payments made. In the event that such information cannot be obtained at this stage of the

proposed litigation, plaintiff's attorney will, in most jurisdictions, be able to secure such information by proper discovery procedures after the case has been started.

6. Ascertain the correct ownership of the creditor and collector, particularly if they are corporations, and determine whether they are financially able to pay a substantial judgment. If corporations, investigate the facts as to ownership of stock therein so that alter egos may be named as individual defendants, in addition to the corporate defendant, in order that the court may upon proper proof disregard the corporate entity and hold the proper defendants liable.

Many loan chains segregate each of their offices into a small subsidiary corporation that may not have sufficient funds to pay a judgment. Partnerships or proprietorships are sometimes operated under the name of a manager or friend of small means. It may not be possible at this stage of the litigation to determine the factual situation involved in the particular case, but the attorney must take pains to name as defendants all who, as disclosed by his/her investigation, may be liable for the actions of a corporate defendant or in the collection of an account. After the litigation has been commenced, of course, the true factual situation may be learned by the plaintiff by deposition and other discovery processes. After such discovery, it may be possible to amend the complaint so as to reflect the true factual situation involved.

4. False Representation

The Act prohibits the use of any false, deceptive, or misleading representation by a debt collector to collect a debt. 15 U.S.C.A. §1692e. In Gammon v. GC Servs. Ltd. Partnership, 27 F.3rd 1254 (CA7 Ill. 1994), the court found that the test should be whether the message would be deceptive or misleading to the "least sophisticated" (i.e., "unsophisticated") consumer.

Examples of Specific Violations

- Representing that the debt collector is affiliated with any government agency. § 1692e(1).
- Misrepresenting the amount or legal status of the debt. § 1692e(2). This includes the agency practice of adding a $15 fee to the amount of the debt. West v. Costen, 558 F. Supp. 564 (W.D. Va. 1983). However, “[i]n considering whether a fee is permitted by state law for purposes of FDCPA liability, federal courts must ... defer to state law. See Ozkaya v. Telecheck Serv., Inc., 982 F. Supp. 578, 585 (N.D.Ill.1997) (Federal courts look to state law in determining whether a fee is “permitted by law” under section 1692f(1)) Johnson v. Riddle, CIV. 2:98CV599C, 2000 WL 33980012 (D. Utah Dec. 21, 2000) rev'd, 305 F.3d 1107 (10th Cir. 2002)).
- Misrepresenting that the collector is an attorney or that letters are from an attorney. § 1692e(3).
- Representing that arrest, garnishment, attachment, or sale of the consumer's property will occur, unless the action is lawful and the debt collector actually intends to take such action. § 1692e(4). A collection agency violated § 1692e(4) by writing "warrant pending" on forms sent to a debtor when, in fact, the agency never intended to prosecute.
    - In United States v. ACB Sales & Service, Inc., 590 F. Supp. 561 (D. Ariz. 1984), the court considered three form collection letters. To determine if the letters violated the Act, the court looked at whether they reasonably would be interpreted by the average debtor to threaten legal action, and whether the debt collector intended to file lawsuits when the letters were mailed. The court held that a letter which stated that the ACB Agency was "authorized to proceed with any necessary lawful action" clearly implied that the agency would file a lawsuit. Another letter advised that lawsuits were filed in an unspecified percentage of cases handled by the agency. The letter described how judgment might be entered and collected "if this account is referred to counsel." The next-to-last paragraph, however, disclaimed that legal action "has been or is being taken against you at this time." This, the court held, implied that a lawsuit would be filed in the future. The collector did not seek the authority to sue most debtors who received these letters. The court held that the collector's actions had violated the Act.
    - Similarly, in Blackwell v. Professional Business Services of Georgia, Inc., 526 F. Supp. 535 (N.D. Ga. 1981), the court considered how a reasonable debtor would interpret a form letter stating that the account "may" be referred to an attorney, that the debtor "may" be responsible for additional costs, and that, with a judgment, the creditors "can" garnish wages or attach property. The court held that this letter was not deceptive or misleading under the Act. See also Wright v. Credit Bureau of Georgia, Inc., 555 F. Supp. 1005, 1005 (N.D. Ga. 1983) holding modified by Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985).
- Threatening to take any action that cannot be legally taken or that is not intended to be taken. § 1692e(5).
- Misrepresenting that the sale or transfer of the debt will defeat the consumer's defense to the debt. § 1692e(6).

- Misrepresenting that the consumer has committed a crime. § 1692e(7).
- Communicating or threatening to communicate false credit information to a third party, such as a credit reporting agency, or failing to report that the debt is disputed by the consumer. § 1692e(8).
- Using forms which simulate legal process. § 1692e(9).
- The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer. § 1692e(10).
- Misrepresenting that accounts have been sold to innocent purchasers for value. § 1692e(12).
- The false representation or implication that documents are legal process. § 1692e(13).
- The false representation or implication that documents are not legal process forms or do not require action by the consumer. § 1692e(15).
- Using any false names. § 1692e(14).
- Misrepresenting that the debt collector is employed by a credit reporting agency. § 1692e(16).

The prohibition against threatening any action that cannot legally be taken, § 1692e(5), can be particularly useful. Some actions that a debt collector may threaten, such as contacting the consumer's employer, are prohibited by the FDCPA and, therefore, cannot legally be taken. Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980 (N.D. Ill. 1979).

5. Unfair Means to Collect Debts

The FDCPA limits unfair practices to collect a debt. 15 U.S.C.A. § 1692f. Besides the general prohibition against "unconscionable means to collect or attempt to collect any debt," specific violations include:

- the collection of a fee from the consumer unless the collection fee is authorized by the contract creating the debt
- the solicitation of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution
- depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument
- tricking the consumer into accepting collect phone calls by concealing the purpose of the call, or causing the consumer to accept other such charges
- threatening or taking any non-judicial action to seize the consumer's property if there is no legal right or present intent to do so
- sending the consumer post cards concerning the debt
- using any names or symbols on an envelope that disclose the nature of the debt collector's business; the use of the name "Collection Accounts Terminal" was found to violate the FDCPA in Rutyna, supra

Multiple Debts

Where a consumer owes multiple debts, "any single payment to any debt collector ... may not apply ... to any debt which is disputed by the consumer and, where applicable, [the debt collector] shall apply such payment in accordance with the consumer's directions. § 1692h.

6. Validation of Debts

The FDCPA provides the consumer with specific rights to request validation of the debt. It also gives the debt collector specific duties to notify the consumer of the right to validation. 15 U.S.C.A. § 1692g. The "least sophisticated consumer" standard has been applied to assess whether a validation statement was sufficiently communicated to the consumer. Bukumirovich v. Credit Bureau, 155 FRD 146 (MD La. 1994).

- within five days after the initial contact with the consumer, the debt collector must send the consumer a written notice specifying:
  - the amount of the debt
  - the name of the creditor

- a statement that the debt will be assumed to be valid unless the consumer notifies the collector within 30 days that the debt is disputed; a collection agency violated § 1692g by failing to include in its validation notice the fact that the debtor could dispute a portion of the debt as well as the entire debt Baker v. G.C. Services CorpBaker v. G.C. Services Corp., 677 F.2d 775, 778 (9th Cir, 1982)
- a statement that the collector will send the consumer verification of the debt if the debt is disputed within 30 days
- a statement that the collector will provide the name and address of the original creditor if requested.

- if the consumer disputes any part of the debt or requests the name and address of the original debtor, the debt collector must stop collection efforts until the debt has been verified or the original creditor's name and address has been provided; failure to dispute the debt, however, cannot be considered an admission of liability in court; this section has been held to require that if the initial communication with the consumer is in writing, it must contain the notice of right to validation; Bingham v. Collection Bureau, Inc., 505 F. Supp. 864, 871 (D.N.D. 1981); the notice of the right to validation must be conspicuous and not hidden in fine print; Ost v. Collection Bureau, Inc., 493 F. Supp. 701 (D.N.D. 1980)

7. Venue of Collection Actions

The FDCPA requires that debt collectors only bring suit against consumers in the judicial district where the consumer resides, where the contract was executed, or where real property is located if it is the subject of the suit. § 1692i. This section has been held to applicable to proceedings for a writ of garnishment, and "encompasses all judicial proceedings, including those in enforcement of a previously-adjudicated right." Fox v. Citicorp Credit Services, 15 F.3d 1507 (A9 Ariz. 1994).

A very useful article is "Construction and Application of Venue Provision of Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692i" by Philip White Jr., J.D., available in 28 A.L.R. Fed. 2d 523 (originally published in 2008). The "Practice Pointers" are excerpted below:

> An attorney representing a consumer who apparently has been sued in the wrong venue has several options to consider as to the best way to raise the Fair Debt Collection Practices Act (FDCPA) claim: (1) as a counterclaim in the debt collection action; (2) by filing a motion for change of venue so as to mitigate the client's damages; or (3) filing a separate FDCPA suit. (see McKnight v. Benitez, 176 F. Supp. 2d 1301 (M.D. Fla. 2001); and Student Loan Fund of Idaho, Inc. v. Duerner, 131 Idaho 45, 951 P.2d 1272, 124 Ed. Law Rep. 413 (1997)).
>
> The FDCPA does not provide for nationwide service of process of a suit by a consumer against a debt collector, (See Merrill Lynch Business Financial Services, Inc. v. Marais, 1995 WL 608573 (N.D. Ill. 1995)) and questions of personal jurisdiction and proper venue should be considered before filing suit. (See Krambeer v. Eisenberg, 923 F. Supp. 1170 (D. Minn. 1996); Merrill Lynch Business Financial Services, Inc. v. Marais, 1995 WL 608573 (N.D. Ill. 1995); and Blakemore v. Pekay, 895 F. Supp. 972 (N.D. Ill. 1995)).
>
> Counsel should be mindful of the one-year statute of limitations set forth in 15 U.S.C.A. § 1692k that applies to actions for violations of the Fair Debt Collection Practices Act. (See In re Lord, 270 B.R. 787 (Bankr. M.D. Ga. 1998)). As with all litigation, the parties must be sure to raise in the trial court all arguments that might have value to their cases because, for example, the appeals court may not consider a venue argument based on state law raised in an appeal when the only venue argument raised below was based on the Fair Debt Collection Practices Act's venue provision (15 U.S.C.A. § 1692i(a)(2)). (See Welch v. Credit Adjustment Company Inc., 161 F.3d 19 (10th Cir. 1998)).
>
> In at least one state, a court has said that the legislature provided that the state consumer credit act was to be liberally construed to coordinate the regulation of consumer credit transactions with the policies of the federal consumer credit protection act, including the policy expressed in 15 U.S.C.A. § 1692i(a)(2) that prevents consumers from having to travel to distant fora to defend. (See Kett v. Community Credit Plan, Inc., 228 Wis. 2d 1, 596 N.W.2d 786 (1999).)

C. Damages for Violations, Jurisdictions, and Limitations

Section 1692k of the FDCPA creates civil liability for violations of any section of the Act in the sum of:

- all actual damages
- statutory damages up to $1,000 in an individual action, or in a class action, actual damages plus statutory damages for each named plaintiff of up to $1,000 plus damages to the rest of the class up to the lesser of $500,000 or 1% of the net worth of the debt collector

In determining the amount of statutory damages, the Act provides that the court should consider the frequency and persistence of the violations by the debt collector, the nature of the violations, and the extent to which the violations were intentional. The consumer is entitled to statutory damages even where no actual pecuniary damages are proven. Harvey v. United Adjusters, 509 F. Supp. 1218 (D. Or. 1981). See also, Baker supra. The extent of the debtor's deception has also been used as a guide in assessing statutory damages. Jeter v. Credit Bureau, Inc., 760 F.2d 1168 (11th Cir. 1985).

Attorney's Fees

Attorney fees may be awarded to a successful plaintiff. However, if the court finds that the action was brought in bad faith, it may award attorney fees to the defendant. § 1692k(a)(3).

Jurisdiction

An action may be brought in federal or state court within one year of the date a violation occurs. No minimum amount in controversy is required to invoke federal jurisdiction. § 1692k(d). The violation could be addressed in a counterclaim to a collection action by the collection agency. See Ark. R. Civ. P. 13(b).

Jury Trial

In Sibley v. Fulton Dekalb Collection Services, 677 F.2d 830 (11th Cir. 1982), the court held that upon timely demand, a party is entitled to a jury trial under the FDCPA.

D. Defenses

The FDCPA provides two defenses to debt collectors. First, the defendant may escape liability if the violation was not intentional and was a bona fide error. § 1692k(c). However, this defense is only available when the debt collector maintains procedures designed to avoid such errors. § 1692k(c). In Carrigan v. Central Adjustment Bureau, Inc., 494 F. Supp. 824 (N.D. Ga. 1980), the defendant was held liable when its employee called the debtor after failing to notice debtor's letter asking that communication cease. Although the error was not intentional, the defendant failed to prove that its procedures were adopted to prevent the error. Second, the Act provides that there is no liability for acts committed in good faith conformity with advisory opinions issued by the Federal Trade Commission. § 1692k(e). However, it has been held that, "[s]ince FDCPA charges FTC with enforcement but prohibits it from issuing rules or regulations on debt collection practices, FTC's advisory opinions are not entitled to deference in FDCPA cases except perhaps to [the] extent their logic is persuasive." Dutton v. Wolpoff & Abramson, 5 F.3d 649 (CA3 Del 1993).

II

Tort Theories for Debtor Harassment

Overview

Although debt collection methods which may be considered harassment of the debtor form the basis for one or more violations of the Fair Debt Collection Practices Act, extreme abuse by debt collectors may result in tort liability under various theories. These theories may also provide a remedy to reach the conduct of creditors collecting their own debts who are not within the coverage of the FDCPA.

A. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress has been recognized in Arkansas as a distinct cause of action in tort without the requirement of physical injury. M. B. M. Co., Inc. v. Counce, 268 Ark. 269, 596 S.W.2d 681 (1980) ("[O]ne who by extreme and outrageous conduct willfully or wantonly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from the distress.") To recover, the debtor must establish:

- extreme and outrageous conduct
- wantonly or willfully committed by debt collector
- resulting in severe emotional or physical injury

The key disadvantages of this cause of action are the requirements of extreme and outrageous conduct by the individual collecting the debt, and emotional distress which is "so severe that no reasonable person could be expected to endure it." Id. at 280, 596 S.W.2d at 687.

B. Invasion of Privacy

The right to privacy in Arkansas is summarized in Dodrill v. Arkansas Democrat Co., 265 Ark. 628, 590 S.W.2d 840 (1979), cert. denied, 444 U.S. 1076 (1980). To establish an action for invasion of privacy, as it relates to a debt collection, the debtor must prove either:

- an unreasonable intrusion upon his seclusion
- disclosure of information by the debt collector that unreasonably publicizes the debtor's private life (for example, publicizing a debtor's inability to pay a particular debt) or that unreasonably places the debtor in a false light before the public (for example, a statement that the debtor is a "deadbeat" or refuses to pay just debts)

The "intrusion" arm of the privacy right was held applicable to a debtor who received 70 phone calls, often during her rest hours, from a collection agency seeking to collect a $400 debt. CBM v. Bemel, 274 Ark. 223, 623 S.W.2d 518 (1981).

When asserting the "false light" invasion of privacy, the plaintiff must establish the falsity of the disclosure and, in an action for libel, that the false information was published with knowledge of its falsity or with reckless disregard for the truth. Dodrill, supra. When asserting the "publicity of private life" theory, the debtor must show that disclosure of nonpayment of a debt would be considered highly offensive to a reasonable person. Id.

III

Evictions

Overview

A debtor who is illegally harassed by bill collectors can also seek relief through the licensing board for collection agencies. The board may restrict the activities of collection agencies. It may also strip them of their right to do business in Arkansas and impose monetary fines A.C.A. § 17-24-103(b)(1).

A. Powers of the Board

A.C.A. §17-24-201 creates the State Board of Collection Agencies. The board has authority to license agencies, promulgate rules and regulations, and revoke or suspend licenses for violations of the statutes or rules and regulations of the board. While the Fair Debt Collection Practices Act applies only to consumer debts, the Arkansas statutes regulating collection agencies apply to collection agencies seeking payment of any debt. See, A.C.A. § 17-24-101. ("As used in this chapter, unless the context otherwise requires, "collection agency" means any person, partnership, corporation, association, limited liability corporation, or firm which engages in the collection of delinquent accounts, bills, or other forms of indebtedness owed or due or asserted to be owed or due to another or any person, partnership, corporation, association, limited liability corporation, or firm using a fictitious name or any name other than its own in the collection of their own accounts receivable, or any person, partnership, corporation, association, limited liability corporation, or firm which solicits claims for collection or any person, partnership, corporation, association, limited liability corporation, or firm that purchases and attempts to collect delinquent accounts or bills.")

Collection agencies doing business in Arkansas are subject to the provisions of A.C.A. §§ 17-24-101 to -404. A.C.A. § 17-24-102 excludes from coverage certain financial institutions, banks, real estate agents (when claims are related to business), attorneys handling claims in their own name, and anyone who handles claims, accounts, or collections under an order of any court. Also excluded are persons, firms, corporations, or associations which, for valuable consideration, purchase accounts of another and then, in their own name, proceed to assert or collect the accounts. A.C.A. §§ 17-24-102(a)(10).

B. Grounds for Revocation

The statute does not provide any private cause of action for violations, but lists the grounds for revocation, suspension, or refusal of a license in connection with collection practices. § 17-24-307. These include:

- publishing "deadbeat lists"
- violating postal regulations by collection methods
- impersonating a law enforcement officer
- using forms simulating legal process or government documents
- advertising any claim for sale
- using unethical practices or illegal means to collect debts
- using profanity during collection efforts
- contacting the debtor by letter or phone at his place of employment unless good faith efforts to contact the debtor at home have failed

In addition to the statutory grounds, the rules and regulations of the board provide for revocation or suspension of license for the following violations:

- harassment, including repeated telephone calls, calls at unreasonable hours, and demanding payment in the presence of others (except spouse); Rule 1(J)
- threats, defined as "a declaration of intention or determination to inflict punishment, loss or pain on a debtor or competitor, or to otherwise injure a debtor by commission of some unlawful act; Rule 1(K)
- false representation that the collector is an attorney; Rule 68-11

C. Hearing Procedure

Upon violation of the statute or agency rules and regulations, a debtor may file a written complaint with the board at:

523 Louisiana Street #460
Little Rock, AR 72201
Phone: (501) 371-1438
Fax: (501) 372-5383
Email: jwilson@asbca.com

The complaint form is available at: asbca.org/pdf/complaint_form.pdf, and a sample affidavit of complaint is appended as Form 5. Upon receiving the complaint, the board must set a hearing, giving all parties 20 days' notice. § 17-24-308. A.C.A. § 17-24-203, amended by Act 288 of 1995 requires the board, when possible, to use the use the FDCPA and other debt collection laws in interpreting and applying Arkansas statutes and the board's own regulations. The board may subpoena business records of the collection agency and take testimony or receive affidavits and depositions. Any party may appeal an order of the board to the circuit court of Pulaski County within 30 days. "Judicial review of a decision by the Board is governed by the APA, codified at Ark. Code Ann. §§ 25-15-201 to -218 (Repl.2002 & Supp.2007). The appellate court's review is directed, not toward the circuit court, but toward the decision of the agency, because administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts, to determine and analyze legal issues affecting their agencies." Staton v. Arkansas State Bd. of Collection Agencies, 372 Ark. 387, 390, 277 S.W.3d 190, 192 (2008). When reviewing the Board's decisions, the court will "uphold them if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion." Id.

Service on an out of state collection agencies is addressed by Ark. Code Ann. § 17-24-401 through 404. To obtain service on an out of state agency, the moving party must submit three copies of the complaint and summons issued, with notification that service is being perfected, and twenty-five dollars to the Secretary of State's office. The Secretary of State will then forward a copy to the out of state agency at their last known address.

Although the requirements of Arkansas laws are not as stringent as those of the Fair Debt Collection Practices Act, the possibility of loss of the debt collector's license may be a greater deterrent to abusive practices than are the damages available under the federal act.

IV

Home Solicitation

Overview

The Home Solicitation Sales Act, A.C.A. §§ 4-89-101 to -110, provides that any buyer has the right to cancel a home solicitation sales contract within a cooling-off period. However, the Act also provides a private right of action with remedies to the buyer when the seller fails to give proper notice of the right to cancel or commits deceptive trade practices as defined in the Act and establishes a defense against enforcement of the contract when statutory requirements have not been met.

A. Home Solicitation Sales Defined

The definition of home solicitation sales includes any cash or credit sale over $25 of goods (other than insurance) or services (except attorneys, real estate brokers, salesmen, securities dealers, investment counselors, physicians, optometrists, and dentists) in which the seller solicits the sales anywhere except at his business location. Sales from telephone solicitation are included, but any sales in which the buyer initiated the contract or requested the solicitation are excluded. A.C.A. § 4-89-102. Specifically excluded from the definition of home solicitation sales, § 4-89-102, are orders for goods to be delivered at one time if all of these occur:

- the order is evidenced only by a sales ticket or invoice which the buyer is not required to sign
- no payment is made before delivery
- the goods are not delivered within three business days
- the buyer may refuse the goods without cost
- the buyer's right to cancel the order or refuse the goods without charge is clearly printed on the sales ticket or invoice

Also excluded from the Act are contracts for emergency repairs or services to protect persons or property, sales made by a seller who makes 75% or more of its sales at its "local appropriate trade premises," and sales made pursuant to pre-existing credit arrangements. § 4-89-103.

B. Right to Cancel

The buyer has the absolute right to cancel a home solicitation sale within three days after the buyer signs the agreement. A.C.A. § 4-89-107. The buyer cancels by returning to the seller the cancellation notice, which must accompany the contract. Upon cancellation, the seller must (within 10 days) return any payments made, any goods or property given as a trade-in, and any promissory note or evidence of indebtedness signed by the buyer. § 4-89-109. The buyer may keep any goods previously delivered unless the seller calls for them within 20 days of cancellation. § 4-89-110. During the 20-day period, the buyer has a duty to "take reasonable care of the goods." § 4-89-110.

C. Notice Required

The Act requires that the seller provide at the time of the sale a separate written completed notice of cancellation. The statute specifies the wording of the notice. The notice contains an accurate description of the buyer's rights and duties under the Act as well as spaces for the date of the sale, the date before which cancellation can be exercised, and the seller's address to which the cancellation notice should be sent. A.C.A. § 4-89-108.

If the seller fails to provide the required notice at the time the contract is signed, the running of the three-day cooling-off period is postponed until actual notice is given by the seller. A.C.A. § 4-89-108.

D. Deceptive Practices Forbidden

If a seller commits a deceptive trade practice, a home solicitation sale contract is unenforceable. A.C.A. § 4-89-102 defines deceptive trade practices as:

> "Deceptive trade practices" means the following acts of a seller in connection with any home solicitation sale, and the following acts constitute a violation of this chapter:
>
> - Failure to comply with any requirement of §§ 4-89-107 and 4-89-109; or
> - Misrepresenting in any manner the consumer's right to cancel; or
> - Representing directly or indirectly that the seller is primarily conducting or participating in any survey, quiz, or contest or is primarily engaged in any activity other than soliciting business or misrepresenting in any manner the purpose of the call or solicitation; or
> - Representing directly or indirectly that any offer to sell goods or services is being made only to specially selected persons or misrepresenting in any manner the persons or class of persons afforded the opportunity of purchasing the seller's goods or services; or
> - Representing directly or indirectly that any sale or service is being offered for any organization, individual, or firm other than the one engaged in soliciting business or misrepresenting in any manner the identity of the solicitor or his or her firm and of the business in which he or she is engaged; or
> - Representing directly or indirectly that any merchandise or service is free or is provided as a gift or without cost or charge in connection with the purchase of goods or services, unless the price of the goods or services required to be purchased in order to obtain the free merchandise or gift is disclosed; or
> - Representing directly or indirectly that any price is a special or reduced price, unless it constitutes a significant reduction from the seller's established selling price at which the goods or services have been sold in substantial quantities in the recent and regular course of trade or misrepresenting in any manner the savings which the consumer will receive; or
> - Failing to disclose clearly and unqualifiedly at the initial contact or solicitation and at all subsequent contacts or solicitations, whether by telephone, written communication, or person-to-person, that the purpose of the contact or solicitation is to sell goods or services; or
> - Failing to disclose clearly and conspicuously, both orally and in writing in the contract:
>   - The total cash price;
>   - The down payment;
>   - The unpaid balance of the cash price;
>   - The number, amount, and due dates of payments necessary to pay the unpaid balance in full; and
>   - An accurate description of the goods or services purchased

In addition, a contract is unenforceable if it does not contain all provisions included in the oral presentations. § 4-89-108.

E. Unenforceable Contracts and Damages

A home solicitation sale cannot be enforced if the seller engages in deceptive trade practices. In addition, it cannot be enforced if the seller fails to provide the customer with a fully completed, signed, and dated sales contract at the time the consumer signs the contract. The contract must include the seller's address and must contain all provisions included in the oral presentation. A.C.A. § 4-89-108.

Violation of these or of any other requirements of the Act also entitles the buyer to damages of:

- the greater of 10% of the transaction total or $100
- actual damages, including incidental, consequential, and special damages, suffered by the buyer; § 4-89-105

F. Enforcements

A consumer may seek damages for violations of the Act by bringing an action in circuit court. § 4-89-106(c).

In addition to the private right of action created by the Act, the Attorney General and the prosecuting attorneys of Arkansas are authorized to enforce the Act and to seek criminal sanctions for its violators. § 4-89-106(a).

G. Federal Trade Commission Enforcement

The Federal Trade Commission has authority to administratively enforce the federal counterpart to the Home Solicitation Act, 16 C.F.R. § 429.1 (1986). The federal rule concerning home solicitation sales contains provisions for notice of the right to cancel and limitations on deceptive practices that are similar to the Arkansas statute. However, the federal rule includes in the definition of door-to-door sales those in which the buyer invites the solicitation if the buyer's offer is made at a place other than the seller's business location. Written complaints of violation of the rule may be filed with the FTC, which may petition for injunctive relief or seek to impose civil liability on a violator. There is no private right of action. See FTC v. Klesner, 280 U.S. 19 (1929).

V

Health Spa Contracts

Overview

Arkansas's "Health Spa Consumer Protection Act," A.C.A. § 4-94-101, et seq., regulates contracts for health spa services by limiting the duration of such contracts, making non-complying contracts voidable, and requiring registration of all health spas.

Section 4-94-102(3)(A) defines a health spa as any person, firm, corporation, organization, club, or association engaged in the sale of memberships in a program of physical exercise. There are a number of specific exclusions, including the YMCA, YWCA, certain karate or judo schools, country clubs, and others.

Every contract for health spa services must be in writing and is subject to the provisions of the Act. A copy of the written contract must be given to the buyer at the time the contract is executed. § 4-94-104. The contract cannot require payments or financing by the buyer over a period in excess of 25 months from the date the contract is entered into. § 4-94-107. A contract term cannot be measured by or be for the life of the buyer. § 4-94-107.

The availability of the health spa facilities to the buyer may extend over a period not to exceed two years from the date the contract is signed, but there may be a right to renew. § 4-94-107. At an existing spa the contract must provide that performance of the services will begin in 45 days from the date the contract is entered into. § 4-94-108(a). If the spa is planned or under construction, the contract is voidable if the services are not available within 180 days from the date the contract is entered into. § 4-94-108(b).

A contract for Health Spa services may be canceled within three business days after the buyer receives a copy of the contract by written notice to the seller at the address specified in the contract. § 4-94-109(a)(1). The contract forms, membership cards, and other documents must be returned. § 4-94-109(a)(2). All monies paid pursuant to the contract must be refunded within 30 days. § 4-94-109(a)(3). The contract may be canceled under certain other conditions including if the buyer becomes totally and permanently physically disabled, by the buyer's estate if the buyer dies, or if the buyer moves more than 50 miles away. All monies paid pursuant to a contract canceled for these reasons must be refunded within 30 days of the seller's receipt of the notice of cancellation, but the refund may be prorated if the seller has provided services. § 4-94-109(b)(2) & (3).

A contract which does not comply with the applicable provisions of the act is voidable at the buyer's option. § 4-94-105(a). Contracts entered into in reliance on any willful and false, fraudulent, or misleading information, representation, or notice of advertisement of the seller are void and unenforceable. § 4-94-105(b). Attempted enforcement of a contract in violation of the Health Spa Consumer Protection Act constitutes an Deceptive Trade Practice as defined at § 4-88-101, et seq., and the Attorney has the use of all remedies available under the Deceptive Trade Practices Act to enforce this act. § 4-94-105(b)(2)(1993 Supp.).

Any waiver by the buyer of the provisions of the act are void and unenforceable. § 4-94-105(c).

An annual registration statement must be filed with the Secretary of State prior to the sale of contracts for health spa services. § 4-94-106.

VI

Consumer Defenses and Counterclaims

A. Warranties

A defense or counterclaim based on breach of warranty may be available if a merchant sells goods to a consumer. Of course, the seller must generally be a merchant, a dealer in goods under A.C.A. § 4-1-104(1), before the warranty provisions of the Uniform Commercial Code (U.C.C.), §§ 4-1-101 to -9-507 apply. The warranty provisions of the U.C.C. may also govern leases or sales disguised as leases by analogy to sales. KLPR TV, Inc. v. Visual Electronics Corp., 327 F. Supp. 315, 322-24 (W.D. Ark. 1971), aff'd in relevant part, 465 F.2d 1382 (8th Cir. 1972).

1. Warranty of Title

a. Scope

The warranty of title in A.C.A. § 4-2-312 creates in all contracts for sales a warranty that title conveyed is good and free from any security interest or lien except as disclosed to the buyer. Unlike most U.C.C. warranties, the warranty of title applies to non-merchants. See Fields v. Sugar, 251 Ark. 1062, 476 S.W.2d 814 (1972). "From the fact that the U.C.C. § 2-312 warranties arise when a sale is made, it necessarily follows that it does not matter that the seller did not make any statement as to the seller's title or right to convey, or the absence of encumbrances, or the absence of any patent violation. Thus, a warranty of title and a warranty against encumbrances arise even though the seller makes no statement as to ownership or to the absence of encumbrances." 2A Anderson U.C.C. § 2-312:31 (3d. ed.).

b. Damages

The measure of damages for breach of warranty of title usually is the price of the goods, since the measure under § 4-2-714 for accepted goods is the difference between the value of the goods as accepted and the value if they had been as warranted. The buyer may also be entitled to consequential damages in addition to the price. See § 4-2-715.

2. Express Warranties

Express warranties may be created by the seller in any sale by:

- affirmations of fact or promises by the seller which become part of the basis for the bargain
- description of goods which is part of the basis of the bargain
- any sample or model which is part of the basis of the bargain; § 4-2-313

The warranty is not created if the promise concerns only the value of the goods or is the seller's opinion, or "puffing." If the warranty is not in writing, the parole evidence rule, § 4-2-202, may prevent the buyer from establishing oral warranties. It will usually be a question of fact depending on the circumstances surrounding the contract whether the seller's promises are a basis for the bargain, creating an express warranty. Little Rock School District v. Celotex Corp., 264 Ark. 757, 574 S.W.2d 669 (1978). However, proof that the buyer relied on the affirmation, description, or sample goes to the basis of the bargain. If a buyer relies on a seller's expertise in selecting equipment for the buyer's particular use, the seller's statements become express warranties and a basis of the bargain. Wilson v. Marquette Electronics, Inc., 630 F.2d 575, 580 (8th Cir. 1980).

3. Implied Warranty of Merchantability

A.C.A. § 4-2-314 creates the implied warranty of merchantability. This warranty is read into a merchant's sales contract unless it is conspicuously disclaimed. § 4-2-316(2). The requirements for merchantability are that the goods:

- pass without objection in the trade for like goods
- are of average quality if fungible
- are fit for the ordinary purpose of such goods

- are of even kind, quality, and quantity
- are adequately packaged and labeled
- conform to the descriptions of the label

The key to breach of the implied warranty of merchantability is that there must be a defect in the manufacturer's design or labeling of the goods. See Flippo v. Mode O'Day Frock Shops of Hollywood, 248 Ark. 1, 449 S.W.2d 692 (1970).

4. Implied Warranty of Fitness for a Particular Purpose

a. Scope

The implied warranty of fitness for a particular purpose is created when the seller has knowledge that the buyer is relying on his particular skill or expertise to recommend goods for a particular purpose. A.C.A. § 4-2-315. The seller's knowledge of the buyer's reliance on his skill must exist at the time the contract is negotiated. The warranty of fitness may only be negated by a conspicuous writing. § 4-2-316(2).

b. Documentation

Because of the necessity of proving the seller's knowledge and the buyer's reliance, and the requirements of the parole evidence rule, § 4-2-202, it is a practical necessity to document the fact that the buyer is relying on the seller's recommendation to prove a case for implied warranty of fitness for a particular purpose. In any event, these factors make this particular warranty more useful in commercial situations where documentation and specifications for goods are likely to be maintained by the buyer than in sales to consumers for household purposes. Nonetheless, the reliance of a purchaser on a truck dealer's oral assurances that a certain truck would do the desired job was held to create a warranty of fitness in DeLamar Motor Co. v. White, 249 Ark. 708, 460 S.W.2d 802 (1970). A small-print disclaimer of warranties was held not to be effective. Id.

B. Remedies for Breach of Warranty

1. Damages

In the consumer context, the remedy for breach of warranties is "the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been warranted." In addition, incidental and consequential (or special) damages may be awarded "in a proper case." § 4-2-714. Consequential damages are not foreseeable, but arise from special circumstances that, in Arkansas, the other party must have been aware of. A consumer buyer is unlikely to sustain most consequential damages, such as costs of transportation and care of goods rightfully rejected. Additionally, Arkansas is one of the only states to apply the tacit agreement test to an award of consequential damages. Consequently, the injured party is required to show not only that special circumstances were brought to the attention of the other party, but that the defendant tacitly or impliedly agreed to bear that risk. Deck House, Inc. v. Link, 98 Ark. App. 17, 249 S.W.3d 817 (2007). However, the comments to UCC Section 2 does away with tacit agreement test, and it remains unclear whether the test will remain. Furthermore, injury to persons or property from the breach is also available; this is the type of damages likely to be suffered by a consumer. § 4-2-715.

2. Rejection, or Revocation of Acceptance

When the goods fail to conform to the description in the contract, the buyer may reject the goods on delivery. § 4-2-601. However, rejection must be exercised soon after delivery or tender, and the buyer may not first use the goods as his own. § 4-2-602. Thus, rejection is unlikely to benefit the buyer in the average consumer contract for an automobile, mobile home, or appliance.

After acceptance, the buyer may revoke acceptance of the goods if he/she discovers a hidden defect that substantially impairs the goods' value to him/her. A buyer may also revoke if the seller fails to cure a defect that he/she said he/she would repair at the time of sale. § 4-2-608. For revocation to be successful, though, the buyer must notify the seller of the defect within a reasonable time after its discovery and give the seller a reasonable opportunity to cure the defect. Whether the defect is a substantial impairment of the goods will usually be a question of fact. Frontier Mobile Home Sales, Inc. v. Trigleth, 256 Ark. 101, 505 S.W.2d 516 (1974). In Frontier, the court held that a new mobile home with faulty paneling, faulty wiring, loose sewer pipes, a missing air conditioner, a hole in the wall, and the wrong furniture was substantially impaired. These impairments, the court held, justified revocation of the acceptance nine months after purchase where the seller had not cured most of the defects despite his assurances to the contrary.

Where revocation of acceptance is rightfully exercised, the buyer is entitled to cancel the contract and recover all payments made. In addition, on revocation the buyer retains a security interest in the goods for the amount of the price paid. A.C.A. § 4-2-711. The time in which the buyer can revoke acceptance usually depends on whether the seller continually assures him that the defects will be cured. In Gramling v. Baltz, 253 Ark. 352, 485 S.W.2d 183 (1972), the Arkansas Supreme Court held that it was error to direct a verdict for the seller when the buyer revoked acceptance of a truck two years after purchase. The court cited the seller's continued assurances that it would repair the serious engine problems.

In Ozark Kenworth, Inc. v. Neidecker, 283 Ark. 196, 672 S.W.2d 899 (1984), the court held that use of a truck for six months after revocation of acceptance did not necessarily cancel the revocation. Revocation is determined on a case-by-case basis. The reasonableness of post-revocation use will be taken into consideration along with the other elements necessary to effect a justifiable revocation.

3. Retaining Goods and Recovering Loss

Under the U.C.C., the buyer of defective goods may forgo revocation of acceptance, retain the goods, and sue for loss caused by the defect. In this case, the damages under A.C.A. § 4-2-714 are the difference between the value of the goods as delivered and as warranted. Union Motors, Inc. v. Phillips, 241 Ark. 857, 410 S.W.2d 747 (1967).

4. Filing the Complaint or Counterclaim

A consumer seeking to recover the damages he suffered because of a seller's breach of warranty may file an action in circuit court for damages. More often, the consumer will seek to vindicate his rights by counterclaiming for the breach in his answer to a lawsuit filed by the seller to recover money due under the sales contract. The complaint or counterclaim often should allege violation of the Magnusson-Moss Warranty Act, 15 U.S.C.A. §§ 2301-2313 (West 1982), as an alternative basis of relief. The Act is more fully discussed below.

C. Disclaimer for Breach of Warranty

Under some circumstances, the seller can disclaim a warranty. Disclaimer of the implied warranty of merchantability must mention "merchantability," "as is," or some other phrase commonly understood to exclude warranties. The disclaimer must be conspicuous if in writing. Disclaimer of the warranty of fitness for a particular purpose must be in writing and must be conspicuous to be effective, but no "magic words" are required. A.C.A. § 4-2-316; see Mack Trucks, Inc. v. Jet Asphalt & Rock Co., 246 Ark. 101, 437 S.W.2d 459 (1969).

D. Magnusson-Moss Warranty Act and Attorney's Fees

The Magnusson-Moss Warranty Act, 15 U.S.C.A. §§ 2301-2312 (West 1982), sets minimum standards and requirements for all warranties issued with the sale of consumer goods worth more than $5.

Section 2302 requires that all terms and conditions be fully and conspicuously disclosed. The following items, if pertinent to the warranty, fall within the requirements of the Act:

- the names and addresses of the warrantors
- the identity of the warranted party
- the products or parts covered and not covered
- what the warrantor and the consumer will do in the event of a defect, malfunction, or failure to conform with such written warranty, as well as at whose expense and for what period of time they will do it
- exceptions and exclusions from the terms of the warranty
- the procedure which the consumer should take in order to obtain performance of any obligation under the warranty
- information respecting the availability or requirement of any informal dispute settlement procedure
- a brief, general description of the legal remedies available to the consumer
- the time at which the warrantor will perform any obligations under the warranty
- the elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

The warranty must be conspicuous and be designated either a "full warranty" if it meets the requirements of § 2304 or a "limited warranty" if it falls below the requirements of § 2304.

If a written warranty is given, implied warranties cannot be limited to a shorter time than the written warranty. § 2308.

Under the Act, a consumer may obtain damages both for violation of the requirements of the Act, and for breach of warranty. § 2310(d)(1). Thus, the Act provides relief similar to that available for breach of warranties under the U.C.C. However, an action under the Magnusson-Moss Act may be preferable to one under the U.C.C., since a plaintiff who prevails may be entitled to attorney's fees. 15 U.S.C.A. § 2310(d)(2). See e.g., Champion Ford Sales, Inc. v. Levine, 49 Md. App. 547, 433 A.2d 1218 (Ct. Spec. App. 1981). The coverage of the Act, however, is not as broad as the warranties provisions of the U.C.C. See Skelton v. General Motors Corp., 660 F.2d 311 (7th Cir. 1981), cert. denied, 102 S. Ct. 2238 (1982).

An action for damages under the Act, as a practical matter, must be filed in state court. State court jurisdiction is provided for at § 2310(d)(1)(A). Federal court jurisdiction is limited to class action claims in excess of $50,000 where there are 100 or more named plaintiffs, each having a claim in excess of $25. § 2310(d)(3); Watts v. Volkswagen Artiergesellschaft, 488 F. Supp. 1233 (W.D. Ark. 1980).

Section 2304(a)(4) provides that after a reasonable number of attempts to correct a defect in a warranted product, the warrantor must permit the consumer to elect either a full refund or a free replacement of the product. When applied to a defective automobile, this section has been held to provide that upon the warrantor's refusal to allow the consumer to elect, the consumer had a cause of action for damages for breach of warranty. The elements of the cause of action under the Act are that the car is defective and that the dealer failed to repair the defect after a reasonable number of attempts. Sadat v. American Motors Corp., 114 Ill. App. 3d 376, 448 N.E.2d 900, 904 (Ct. App. 1983). Equitable relief, however, will not generally be available under the Act; the court cannot order the dealer to replace the car. Id.

The attorney's fees provision has been upheld in Arkansas in an action for breach of warranty based on misstatement of the odometer reading. Although no actual damages were awarded for the breach, the buyer's promissory note was canceled, and a $1,000 attorney's fee was upheld. Sherer v. DeSalvo, 5 Ark. App. 178, 634 S.W.2d 149 (1982).

At least one court has found that the lessee of an automobile was a "consumer" entitled to invoke the protections of the Magnusson-Moss Warranty Act. Business Modeling Techniques, Inc. v. General Motors Corp., 123 Misc. 2d 605, 474 N.Y.S.2d 258 (Sup. Ct. 1984). The court made this finding even though the lessee admitted that the automobile was used mainly for business purposes. The court held that the use of the word "normally" in § 2301(1), required a determination of the common, ordinary or usual use of a particular product and does not affect its classification for purposes of the Act.

In Walsh v. Ford Motor Credit Co., 113 Misc. 2d 546, 449 N.Y.S.2d 556 (Sup. Ct. 1982), the court held that the Magnusson-Moss Act did not apply to the sale of a tractor-trailer because it is the type of goods normally used for commercial trucking. Similarly, the court in Crume v. Ford Motor Co., 60 Or. App. 224, 653 P.2d 564 (Ct. App. 1982), found that the plaintiff's occasional use of a flatbed truck to transport groceries did not transform it into a consumer product because its normal use was not for personal, family, or household purposes.

VII

Arkansas Deceptive Trade Practices Act

Overview

Statutes prohibiting unfair and deceptive practices exist in one form or another in every state. These are commonly referred to as UDAP statutes. UDAP statutes in other jurisdictions have been applied in a variety of consumer transactions including debt collection, repossessions, warranties, foreclosure, mobile homes, and landlord-tenant relations.

In discussing a problem with a consumer client, the attorney should explore potential UDAP violations in all aspects of the transaction from advertising to collection practices. This would include the sales presentation, consummation of the sale, credit terms, and the seller's performance after the case. For example, if the client is being sued for a deficiency following an automobile repossession, there may be a UDAP counterclaim arising out of the original sale, credit terms, warranty performance (or lack thereof), and repossession techniques. The National Consumer Law Center publication *Unfair and Deceptive Acts and Practices*, a part of the Consumer Credit and Sales Legal Practice Series, is an excellent reference source.

The Arkansas Deceptive Trade Practices Act is found at A.C.A. § 4-88-101 et seq. A.C.A. § 4-88-101 outlines transactions not covered by the Act, including advertising practices regulated by the Federal Trade Commission; practices regulated by the Federal Trade Commission; and activities by broadcasters, printers, publishers, and others who may disseminate information without actual knowledge of the deceptive nature of the advertising or practice. Actions which are permitted under laws administered by certain regulatory bodies are not covered unless the director of the agency specifically requests the Attorney General to implement the powers of the Act. § 4-88-101.

The Act creates the Consumer Protection Division of Attorney General's Office. The Consumer Protection Division is to serve as a coordinating agency and clearinghouse for receiving complaints of illegal, fraudulent, or deceptive practices; assist advise, and cooperate with other governmental agencies and officials to protect and promote the interests of the consumer public; to conduct investigations, research, studies, and analyses of matters, to issue reports, and to take appropriate action affecting the interests of consumers; to promote consumer education and encourage business and industry to maintain high standards; and to investigate violations of consumer protection laws and rules and regulations. Section 4-88-105.

Deceptive and Unconscionable Trade Practices A.C.A. § 4-88-107

"Deceptive and unconscionable" trade practices include, but are not limited to:

- knowingly making a false representation as the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval, or certification of goods or services, or as to whether goods are original or new, or of a particular standard, quality, grade, style, or model
- disparaging the goods, services, or business another by false or misleading representation of fact
- advertising goods or services with intent not to sell them as advertised
- refusal or retailer to provide record of warranty or statement of service availability under certain circumstances
- employment of bait-and-switch advertising
- knowingly failing to identify flood, water, fire, or accidentally damaged goods such damages
- making false representations that contributions solicited for charitable purposes shall be spent in a specific manner or for specified purposes
- knowingly taking advantage of a consumer who is reasonable unable to protect his or her interest because of physical infirmity, ignorance, illiteracy, inability to understand the language of the agreement, or a similar factor
- offering for sale, assembly, drafting of any trust document, including a living trust, by a non-lawyer—excluding bank trust departments and trust companies
- engaging in any other unconscionable, false, or deceptive act or practice in business, commerce, or trade, or from engaging in other unfair trade practices actionable at common law or under other Arkansas statutes

A.C.A. § 4-88-107 (1993 Supp.), as amended by Act 1306 of 1995.

The use of deception, fraud, or false pretense, or the concealment, suppression, or omission of any material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the sale or advertisement of any goods or services is an unlawful practice. A.C.A. § 4-88-108.

Pyramiding devices are also an unlawful practice. A.C.A. § 4-88-109.

Generally

The Act provides that any person who knowingly and willfully commits an unlawful practice covered within the Act is guilty of a Class A misdemeanor. A.C.A. § 4-88-103. The Attorney General may seek an injunction in chancery court to prohibit any person from engaging in a practice prohibited by the Act. § 4-88-104. Upon petition of the Attorney General, the court may order suspension or forfeiture of franchise, corporate charter, or other licenses or permits or authorization to do business in this state. § 4-88-113(b). The court may also assess penalties to be paid to the state. § 4-88-113(a)(3). It may make other orders necessary to prevent a prohibited practice and restore to the consumer any money or real or personal property acquired by means of the unlawful act. The court may also award other damages. § 4-88-113(a)(1) and (2).

Section 4-88-113 includes a private cause of action for individuals who suffer actual damages or injury as a result of an offense or violation of the deceptive trade practices act. This cause of action is in addition to the authority the attorney general already has to seek damages or injunctions against an individual or entity that violates the provisions of the act. The individual is also entitled to reasonable attorney fees. Ark. Code Ann. Section 4-88-113 (f).

A.C.A. § 4-88-113(d) provides that every person who directly or indirectly controls another person who violates the act, and every partner, officer, or director of another person who violates the act, shall be jointly and severally liable for any penalties and monetary judgments awarded in for civil enforcement of this Act. The test for being held jointly and severally liable, is whether the person knew or reasonably should have known the existence of facts by reason of which the violation or liability exists. § 4-88-113(d)(1)(1993 supp.). "Person" includes an individual, organization, group, association, partnership, corporation, or any combination of them. A.C.A. § 4-88-102(3).

In New Equity Security Holdings v. Phillips, 97 B.R. 492 (E.D. Ark. 1989) the court allowed the defendants to affirmatively raise alleged violations of the Deceptive Trade Practices Act as a defense in a collection action. The Arkansas Supreme Court, in Berkeley Pump Co. v. Reed-Joseph Land Company, 279 Ark. 384, 653 S.W.2d 128 (1983), a products liability case, found no error in the instruction given by the trial court that a violation of Ark. Stat. Ann. § 70-904 (now codified as A.C.A. § 4-88-107) could be considered as evidence of negligence. The court stated: "[h]ere, the statutes were designed to protect the public from deceptive marketing and advertising practices and there is sound authority that such statutes imply a right of enforcement by civil action by persons injured by their breach." 653 S.W.2d at 128.

In Lemarco, Inc. v. Wood, 305 Ark. 1, 804 S.W.2d 724 (1991), the Arkansas Supreme Court upheld the lower court certification of a class to litigate, among other issues, alleged violations of the Deceptive Trade Practices Act.

Enhanced Penalties when Elder or Disabled Persons are Targeted.

An elderly person (aged 60 and over) or disabled person who suffers damage or injury as a result of a deceptive trade practice has a cause of action to recover actual damages, punitive damages (if appropriate), and reasonable attorneys' fees. Restitution ordered pursuant to this section has priority over a civil penalty imposed pursuant to this subchapter. A.C.A. § 4-88-204 (1993 supp.). An additional civil penalty in an amount of up to $10,000 per violation may be imposed for each violation. § 4-88-202 (1993 supp.). The civil penalties imposed shall be placed in the Elder and Disabled Victims Fund. A.C.A. § 4-88-202.

The court can consider the following factors to determining whether a civil penalty should be imposed:

- whether the defendant's conduct was in disregard of the rights of the elder or disabled person
- whether the defendant knew or should have known that the defendant's conduct was directed to an elder or disabled person
- whether the elder or disabled person was more vulnerable because of that status and whether the elder or disabled person actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct
- whether the defendant's conduct caused an elder or disabled person to suffer mental or emotional anguish, loss of or encumbrance upon a primary residence, loss of or encumbrance upon the principal employment or source of income, loss of funds received under a pension or retirement program or a government benefits program, loss of property set aside for retirement or for personal or family care and maintenance, or loss of assets essential to the health and welfare of the elder or disabled person
- any other factors the court deems appropriate; A.C.A. § 4-88-203 (1993 supp.)

VIII

Arkansas Mail and Telephone Consumer Product Promotion Fair Practices Act

Overview

A.C.A. § 4-95-101 et seq. applies to agreements for sale, lease, or rent of a consumer product by a product promoter.

Violations of the Act render any agreement for sale, lease, or rent of a consumer product by a product promoter void and unenforceable. (§ 4-95-108).

Specific definitions contained in A.C.A. § 4-95-102:

- "consumer product" is defined as a good or service purchased, leased, or rented primarily for personal, family, or household purposes; a course of instruction or training, regardless of the purpose for which it is taken, is specifically included
- “division” means the Consumer Protection Division of the Office of the Attorney General as created under § 4-88-105. § 4-95-102(2).
- "gift or prize" means any premium, bonus, award, or any similar language of inducement or incentive to purchase a consumer product; § 4-95-102(3)
- “pay-per-call” means telecommunications services which permit simultaneous calling by a large number of callers to a single telephone number and for which the calling party is assessed, by virtue of completing the call, a charge that is not dependent on the existence of a presubscription relationship and for which the caller pays a per-call or per-time interval charge that is greater than, or in addition to, the charge for transmission of the call. § 4-95-102(4).
- "product promoter" means any person who individually or through an agent, by means of a written notice sent through the mail or by telephone, either:
    - offers a gift, prize, or award with the intent to sell, lease, or rent any consumer product
    - solicits to sell, lease, or rent a consumer product, in which the consumer product and all the material terms of the transaction, including the price, handling, shipping, delivery, or any other fee are not fully described and which requests the consumer contact the seller to complete the transaction
    - offers by gift, prize, or award any consumer product in which all material terms regarding the requirements of receiving such gift, prize, or aware are not fully described; § 4-95-102(6)(A)(iii)
    - the term does not include any activities of nonprofit or charitable organizations; exempt from federal income taxation under §501(c)(3) of the United States Internal Revenue Code, 26 U.S.C. §501(c)(3) § 4-95-102(6)(B)
- "person" means any individual, organization, group, association, partnership, corporation, or any combination of them § 4-95-102(5).
- the Act contains a technical definition of "pay-per-call" which seems to cover 1-900 phone calls; § 4-95-102(6)(1993 supp.)

To be enforceable, an agreement by a consumer to obtain a consumer product from a promoter must meet the following criteria.

- it must be in writing; § 4-95-106(a)
- it must contain the signature of the consumer; § 4-95-106(a)
- it must contain the name, address, and telephone number of the product promoter; § 4-95-106(a)(1)
- a list of the price or fee, including any handling, shipping, delivery, or other charges, being requested from the consumer; § 4-95-106(a)(2).
- the date of the transaction. §4-95-106(a)(3).
- a detailed description of the consumer product; § 4-95-106(a)(4)
- it must contain, in at least 12-point type size, in a space immediately preceding the space allotted for the consumer's signature, the disclosure statement: "YOU ARE NOT OBLIGATED TO PAY ANY MONEY UNLESS YOU SIGN THIS CONTRACT AND RETURN IT TO THE SELLER" §4-95-106(a)(5).

A consumer may cancel the transaction under the following circumstances:

- If the consumer sends a payment to the product promoter in the form of cash, check, money order, or other form of payment without having included a signed copy of the agreement to obtain the consumer product, the consumer may cancel the transaction by notifying the product promoter in writing by certified mail with return receipt requested and returning the consumer product to the product promoter in substantially the same condition as he or she received the product.§
- the agreement has not been signed: notify the product promoter in writing by certified mail with return receipt requested and returning the consumer product to the product promoter in substantially the same condition as he or she received the product; § 4-95-106(b)(1)
    - Within ten (10) business days after receipt of the written notice the product promoter must refund all payments, including any down payments made under the agreement, return any good or product traded in, in substantially the same condition as when it was received by the product promoter, and promptly take action to terminate any security interest created in connection with the agreement. §4-95-106(b)(2)(A)-(C).

A consumer product transaction is considered to have taken place in the State of Arkansas:

- Regardless of the location of the product promoter, when the consumer has received an offer of a gift or prize or an initiation of a product transaction from the product promoter through the mail at an address within the state or through a telephone contact at a site within the state. §4-95-106(c).

The Act does not apply to certain consumer product transactions:

- those made in accordance with prior negotiations in the course of a visit by the consumer to a merchant operating a business establishment that has a fixed permanent location and where the consumer products are displayed or offered for sale, lease, or rent on a continuing basis; § 4-95-107(1)
- when the business establishment making the solicitation has had a related prior transaction with the consumer or has clear, continuing business relationships with the consumer that result in the consumer becoming aware of the full name, business address, and phone number of the business establishment; § 4-95-107(2)
- when the consumer obtains the consumer product in response to a television, radio, or print advertisement or a sample brochure, catalog, or other mailed material of the product promoter that contains: the name, address, and telephone number of the product promoter; a full description of the product; a list of the price or fee, including any handling, shipping, or delivery charge; and any limitation or restrictions which apply to the offer; § 4-95-107(3)(A)-(C)

Violation of the Act renders an agreement void, and any waiver or attempt to waive any provisions of the Act shall be void and unenforceable. § 4-95-108.

Any person who knowingly commits a practice defined as unlawful shall be guilty of a Class B misdemeanor. If the amount in question solicited exceeds $200, then the offense is a Class D felony. § 4-95-103 (1993 Supp.).

The Attorney General's Consumer Protection Division may seek injunctive relief against persons, firms, partnerships, corporations, or any other entity from violating the Act by petitioning the Pulaski County Circuit Court. Violation of any of the provisions of the Act shall constitute an unfair or deceptive act or practice as defined by the Deceptive Trade Practices Act, §4-88-101 et seq. All remedies, penalties, and authority granted to the Attorney General by the DTPA shall be available to him or her for the enforcement of the Act. §4-95-104.

A violation of any provision of the Act is an unfair or deceptive practice as defined by § 4-88-101 et seq. and all remedies provided in that Act apply. § 4-95-104(1993 supp.).

IX

Rent-to-Own Transactions

Overview

A.C.A. § 4-92-101 et seq. is known as the "Rental Purchase Act."

- specific definitions are contained in A.C.A. § 4-92-102; a rental purchase agreement is defined as an agreement for the use of merchandise by a consumer for personal, family, household, or business purposes for an initial period of four months or less that:
  - is automatically renewable with each payment after the initial period
  - does not obligate or require the consumer to continue leasing or using the merchandise after the initial period
  - permits the consumer to become the owner of the merchandise
  - does not obligate the consumer to purchase or become the owner of the merchandise; A.C.A. § 4-92-102(7)
- a consumer damaged by a violation of this act by a lessor is entitled to recover: actual damages, 25% of an amount equal to the total amount of payments required to obtain ownership of the merchandise, but not less than $100 or more than $1,000, and reasonable attorney's fees not to exceed 15% of the consumer's allowable recovery and court costs; A.C.A. § 4-92-103; an execution or enforcement of a rental-purchase agreement in violation of the Act is also an unfair or deceptive act or practice as defined in A.C.A. § 4-88-101, et seq. § 4-92-103(b)(1)(2015 supp.)
- If the agreement meets the definition of a "Rental Purchase Agreement" at § 4-92-102(7), it shall be considered a true lease and not a credit sale, retail installment contract, etc., nor shall it constitute a security interest as defined in A.C.A. § 4-1-201(37). Until the lessor transfers title to the merchandise to the consumer, the relationship of the parties to a rental-purchase agreement shall be that of a lessor and lessee and not that of a seller and buyer, and title to the merchandise shall remain vested with the lessor. A.C.A. § 4-92-104. a rental-purchase agreement may not contain provisions either:
  - requiring a confession of judgment
  - authorizing a merchant or agent of a merchant to commit a breach of the peace while repossessing merchandise
  - waiving a defense, counterclaim, or right the consumer may have against the merchant or an agent of the merchant
  - requiring the purchase of insurance for the merchant to cover the merchandise; A.C.A. § 4-92-105
- a rental-purchase agreement must disclose:
  - whether the merchandise is used or new
  - the amount and timing of regular rental payments
  - the total number of payments necessary and the total amount to be paid to acquire ownership
  - the amounts and purpose of any other payment, charge, or fee in addition to the regular periodic rental payment
  - that the consumer does not acquire any ownership rights until she has complied with the ownership terms of the agreement
  - whether the consumer is liable for loss or damage to the merchandise, and if so, the maximum amount for which they may be liable
  - notice of the right to reinstate an agreement as provided in § 4-92-106(a); A.C.A. § 4-92-105(b)(1-7)
- reinstatement of the agreement:
  1. the consumer who fails to make a timely rental payment may reinstate a rental-purchase agreement without losing any rights or options by paying all rental and other charges due or returning the merchandise within five business days from the last scheduled rental period if paid monthly, or within two business days from the last scheduled rental payment if paid more frequently than monthly § 4-92-106(a)
  2. late charges or reinstatement fees may be charged § 4-92-106(b)
  3. the lessor may attempt to repossess during the reinstatement period, but the consumer's right to reinstate an agreement shall not expire because of the repossession § 4-92-106(c)
  4. if the merchandise is returned during the applicable reinstatement period, other than through judicial process, the right to reinstate shall be extended for not less than 30 days after the date of the return of the merchandise § 4-92-106(d)
  5. no consumer shall have the right to reinstate more than three times during the term of a rental-purchase agreement § 4-92-106(e)
  6. on reinstatement, the lessor shall provide the same merchandise or substitute merchandise of comparable quality and condition A.C.A. § 4-92-106(f).

7. the lessor is not required to provide new disclosures upon reinstatement; A.C.A. § 4-92-106

- advertisements for rental-purchase agreements must clearly and conspicuously state that the advertised transaction is a rental-purchase transaction; A.C.A. § 4-92-107

In Bell v. Itek Leasing Corp., 262 Ark. 22, 555 S.W.2d 1 (1977), the Arkansas Supreme Court found that a lease transaction was in reality a credit sale. The court held that if a transaction is actually a mere device to cover the exaction of usurious interest, the form of the transaction is immaterial. The Court further stated that the issue of whether a transaction is usurious is a constitutional question in Arkansas and therefore must be decided by the courts rather than the legislature. The Rental Purchase Act may be subject to challenge on this basis.

Federal Provisions

15 U.S.C.A. § 1667 et seq. is the federal provision which applies to consumer leases.

- definitions:
  - the term "consumer lease" applies to a contract in the form of a lease or bailment for the use of personal property by a natural person for more than four months, and with a total contractual obligation not exceeding $50,000, primarily for personal, family, or household purposes, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the end of the lease except that such term shall not include any credit sale as defined in § 1602(g) of the Act. Such term does not include a lease for agricultural, business, or commercial purposes, or to a government or governmental agency or instrumentality, or to an organization. 15 U.S.C.A. § 1667(1). the "lessee" is a natural person who leases or is offered a consumer lease; 15 U.S.C.A. § 1667(2)
  - the "lessor" is a person who is regularly engaged in leasing, offering to lease, or arranging to lease under a consumer lease; 15 U.C.S.A. § 1667(3)
  - "personal property" is any property which is not real property under the laws of the State where situated at the time offered or otherwise made available for lease; 15 U.S.C.A. § 1667(4)
  - the terms “security” and “security interest” mean any interest in property which secures payment or performance of an obligation. 15 U.S.C.A. §1667(5).
- required disclosures
  - brief description or identification of the leased property; 15 U.S.C.A. § 1667a(1)
  - amount of any payment required at inception of lease; 15 U.S.C.A. § 1667a(2)
  - amount payable by lessee for official fees, registration, certificate of title, or license fees or taxes; 15 U.S.C.A. § 1667A(3)
  - amount of charges payable by lessee not included in the periodic payment, a description of the charges and that the lessee shall be liable for the differential, if any, between the anticipated fair market value of the leased property and its appraised actual value at termination of lease; 15 U.S.C.A. §1667a(4). amount or method of determining amount of liability imposed upon lessee at end of term of lease and whether lessee has option to purchase the leased property and at what price and time; 15 U.S.C.A. § 1667a(5)
  - all express warranties and guarantees on the leased property and identifying the party responsible for maintaining or servicing the leased property together with description of the responsibility; 15 U.S.C.A. § 1667a(6)
  - description of insurance provided or paid for by the lessor or required of the lessee, including the types and amounts of the coverages and costs; 15 U.S.C.A. § 1667a(7).
  - description of security interest held or to be retained by the lessor and a clear identification of the property to which the security interest relates; 15 U.S.C.A. § 1667a(8).
  - number, amount, and due dates or periods of payments under the lease and the total amount of such periodic payments; 15 U.S.C.A. § 1667a(9)
  - if lessee is liable for anticipated fair market value of the property on expiration of the lease, the fair market value of the property at the inception of the lease, the aggregate cost of the lease on expiration, and the differential between them; 15 U.S.C.A. § 1667a(10)
  - conditions under which lessor or lessee may terminate the lease prior to the end of the term and the amount or method of determining any penalty or other charge for delinquency, default, late payments, or early termination; 15 U.S.C.A. § 1667a(11)
- lessor's liability on expiration or termination of lease; 15 U.S.C.A. § 1667b
- restrictions on consumer lease advertising; 15 U.S.C.A. § 1667c (Amendment Pending)

Damages

- a lessor who fails to comply with the requirements imposed under sections 1667a or 1667b is liable for 25% of the total amount of monthly payments under the lease, but not less than $100 nor greater than $1,000, together with a reasonable attorney's fee and actual damages; 15 U.S.C.A. § 1640; action alleging a failure to disclose or otherwise comply with these requirements shall be brought within one year of the termination of the lease agreement; 15 U.S.C.A. § 1667d and 15 U.S.C.A. § 1640
- state attorney generals and federal agencies responsible for enforcement under section 1607 may also bring actions under the Rental Purchase Act

X

Arkansas New Motor Vehicle Quality Assurance Act

Overview

The Arkansas New Motor Vehicle Quality Assurance Act is codified at A.C.A. § 4-90-401, et seq. (1993 Supp.). This Act creates protections for the consumer who purchases or leases a new automobile or for automobiles licensed, purchased, or leased within a "motor vehicle quality assurance period" (24 months or 24,000 miles after delivery, whichever is later). It requires manufacturers to repair nonconformities covered under warranty, requires warranty repairs even if repairs are made after the expiration of the warranty period, requires a consumer to notify the manufacturer of a claim under the act, defines a reasonable number of attempts to repair a nonconformity, requires a refund or replacement of a vehicle that has not been repaired after a reasonable number of attempts, provides for refund of sales tax collected on a returned vehicle, requires disclosure and warranty upon subsequent resale of a returned vehicle, and requires the manufactured to establish an informal hearing process which is certified by the Attorney General.

There is a two-year period of limitations which can start to run either when the buyer reports the non-conformity, or, if the buyer requests an informal dispute settlement procedure, at the time that procedure is commenced. A.C.A. § 4-90-416. Failure to provide the buyer with a written statement of rights and obligations, and phone number of the Consumer Protection Division of the A.G.'s office results in a penalty of $25 to $1,000. Private civil remedies are provided and a consumer who prevails is entitled to recover costs and expenses including reasonable attorney's fees. Additionally, violations of the act are unfair or deceptive trade practices pursuant to A.C.A. § 4-88-101 et seq.

XI

Motor Vehicle Transfers

Overview

The provisions of A.C.A. § 4-100-101, et seq. prohibit the subleasing or transferring of a motor vehicle which is subject to a lease, security interest, or lien without the consent of the lessor, secured party, or lienholder. ACA § 4-100-103. A violation of this act is a deceptive trade practice as defined by A.C.A. § 4-88-101 et seq. and the remedies provided therein are available. Civil remedies of three times the amount of the actual damages or one thousand five hundred dollars ($1,500) are provided, together with attorneys' fees and costs, and any other relief which the court deems just. Violation of this act is also a class D felony. ACA § 4-100-102.

XII

Salvage Titles

Overview

Pursuant to A.C.A. § 27-14-2301, et seq., when a motor vehicle is water damaged or sustains damage in an amount equal to or exceeding 70% of its average retail value, the owner, or insurance company if it obtains ownership of the vehicle through transfer of title as the result of a settlement of an insurance claim, shall forward the properly endorsed certificate of title to the Office of Motor Vehicle. ACA § 27-14-2301.

A new certificate of title must be issued with the work "salvage" printed in the remarks section on the face of the title. A certificate of title cannot be issued from an out-of-state junking certificate or other ownership document bearing a designation of "junk," “parts only,” “non-repairable,” etc. ACA § 27-14-2302.

Motor Vehicle dealers must provide disclosure of the branded title and damage to any prospective buyers or purchasers. The Act requires any owner to disclose to a prospective purchaser, prior to sale or trade, the nature of the title brand, and to disclose (on an attorney general-prescribed form) a description of the damage as on file with the Office of Motor Vehicles. The disclosure shall be on a buyer’s notification form to be prescribed by the Consumer Protection Division of the Office of the Attorney General, and the form shall be fully filled out and affixed to a side window of the motor vehicle with the title “Buyer’s Notification” facing to the outside. The seller shall require the buyer to sign an acknowledgement form prior to completion of the sale. Failure to procure the signature shall render the sale voidable at the election of the buyer. The sale is voidable up to sixty (60) days after the sales transaction. In the event the seller makes full refund of the purchase price to the buyer within ten (10) days after receipt of the buyer’s election to void the transaction, the seller shall be subject to no further liability in connection with the sales transaction. ACA § 27-14-2303.

Sale or attempted sale of a motor vehicle in violation of the provisions of the Act constitute an unfair or deceptive trade practice pursuant to A.C.A. § 4-88-101 et seq. Any person found guilty under the provisions of the Act shall be guilty of a Class A misdemeanor.

XIII

Telephone Sales

Overview

A.C.A. § 4-99-101, et seq. regulates the use of telephonic sales of goods, real property, and investment opportunities. Telephonic sellers and telemarketing personnel must be registered. A.C.A. § 4-99-104 and 105. Telephone sellers must file a surety bond with the Consumer Protection Division of the Attorney General's Office in order to do business in the state. A.C.A. § 4-99-107.

Certain disclosures to prospective purchasers are required, including the manner in which the telephonic seller decides which items a particular prospective purchaser is to receive, the odds of receiving such items, and all rules, regulations, terms, and conditions which must be met in order to receive the item, the complete street address of the location from which the salesperson is calling the prospective purchaser, and, if different, the complete street address of the telephonic seller's principal location, and the total number of individuals who have actually received from the telephonic seller, during the preceding twelve (12) months or, if the seller has not been in business that long, during the period the seller has been in business, the item having the greatest value and the item with the smallest odds of being received. ACA § 4-99-108(a)(1-5).

No telephonic seller may: make or authorize the making of any reference to its compliance with the Act to any prospective or actual purchaser ACA § 4-99-108(b); and no telephonic seller shall display or cause to be displayed a fictitious or misleading name or telephone number on an Arkansas resident's telephone caller identification service. ACA § 4-99-108(c).

Any salesperson who solicits on behalf of an unregistered company shall be guilty of a Class A misdemeanor. ACA § 4-99-110(a). Any person who willfully violates any provision of the Act or who directly or indirectly employs any device, scheme, or artifice to deceive in the connection with the offer or sale, or who willfully, directly or indirectly engages in any act, practice, or course of business which operates or would operate as fraud or deceit upon any person in connection with a sale by any telephonic seller shall be guilty of a Class D felony. ACA § 4-99-110(b).

Violations of the Act constitute unfair or deceptive acts or practices pursuant to A.C.A. § 4-88-101 et seq.

XIV

Arkansas Pay Per Call Consumer Protection Act

Overview

The "Arkansas Pay Per Call Consumer Protection Act", A.C.A. § 4-98-101 et seq. requires an information and disclosure preamble message a minimum of twelve (12) seconds of delayed timing which is reasonable in speed and easily understandable (ACA § 4-98-103(a)(1)), as well as a three (3) second delay following such a message on 900 number calls. ACA § 4-98-103(2). Such disclosures must provide: an accurate description of the service that will be provided; an accurate summation of the cost of the service including, but not limited to initial flat rate charge, per charge minute charges; that if the caller disconnects within the delayed timing period, the consumer will not be charged for the call; and before the end of the delayed timing period, that the billing will commence after a specified event following the disclosure message, such as a signal tone. ACA § 4-98-103(5)(A-D). Any pay-per-call service aimed or likely to be of interest in children under eighteen should include a message indicating the caller should hang up unless they have parental permission. ACA § 4-98-103(5)(b).

Advertisements for pay-per-call services require disclosures that accurately describes the message content, terms, conditions, and price of the offered service in a clear and understandable manner in all print, broadcast, or telephone advertising and announcements promoting its offers, including: the per-call charges; any geographic, time of day, or other limitation on the availability of the offer; a requirement that callers under eighteen (18) must request parental consent; display the charges in broadcast advertising with the telephone numbers and a voice announcement of the chrges during the course of the commercials; repeated voice announcements of these charges at regular intervals for commercials in excess of two (2) minutes; and charges for all subsequent calls if the program refers to and requires another pay per call. ACA § 4-98-104.

Violation of the act is an unfair or deceptive act or practice pursuant to A.C.A. § 4-88-101 et seq., and for other remedies.

XV

Prize Promotion

Overview

The "Arkansas Prize Promotion Act," A.C.A. §§ 4-102-101, et. seq., is a disclosure statute aimed at deceptive and fraudulent prize promotions, including those promotions used in conjunction with charitable fund-raising.

Required Disclosures or Prohibitions

It requires the "sponsor" of the promotion to provide the consumer with written prize notice which contains a number of required, conspicuous disclosures (in the case of tele-marketed prize promotions, prior to the phone call). Among the disclosures are the requirements to reveal the actual retail value and the odds of receiving each prize. Also, if the sponsor represents that the consumer is a "winner," a "finalist," or has otherwise been "specially selected," the sponsor must disclose the number of persons in the specially selected groups. ACA 4-102-106.

The Act requires the sponsor to provide the consumer with the prize, another listed prize of equal or greater value, or prize equal to the value of the prize within 30 days after representing that the prize has been awarded. ACA 4-102-107.

The Act prohibits a sponsor from offering or alerting the recipient of a prize in a manner which would mislead as to the source of the prize, or the exclusivity of the offer. The sponsor is also prohibited from misleading a recipient or contestant that they are being notified of a final or subsequent notice or have an increased chance of winning if multiple applications, payments, etc. are made. The sponsor is also prohibited from misrepresenting the urgency of the notice. Any financial data obtained in connection with prize cannot be furnished to a third party for purchase. ACA 4-102-105

Exceptions

The Act does not apply to "newspaper, periodical, radio station, television station, cable television station system, or other advertising medium," where all prizes are free, purchase of media through a membership or subscription service, horse and greyhound racing ACA 4-102-104.

Penalties

4-102-103 provides that each "prize offer made in violation of this chapter, as to each separate person to whom such offer is made, shall constitute a separate violation of this chapter," and is also a separate violation of the Deceptive Trade Practices Act. Any intentional violation of the statute is remediable with costs, reasonable attorney's fees, and the greater of $500 or twice the amount of the pecuniary loss.

XVI

Telephone Sales

Overview

For many Americans, credit standing is a significant asset. Their credit reporting file affects their access to home mortgages, car loans, and other forms of consumer credit, as well as residential tenancies, employment, and even insurance. In an effort to deter the kind of abuses which can easily occur in a business environment replete with computerized access to nearly unlimited information about consumers, Congress and state legislative bodies have enacted various laws specifically designed to deal with consumer credit problems.

A. Fair Credit Reporting Act (FCRA)

The Fair Credit Reporting Act (FCRA) (15 U.S.C. § 1681 et seq.) is a federal statute that regulates the activities of credit reporting agencies (CRAs) and the users of credit reports and provides rights to consumers affected by such reports. The FCRA's purpose is "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681(B). A "consumer" is broadly defined as "an individual" in 15 U.S.C. § 1681a.

In general, the Act applies to situations in which a person collects information on a "consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or "mode of living," and this information is used by a third party as a basis for denying or increasing the charge for "credit or insurance to be used primarily for personal, family, or household purposes." 15 U.S.C. § 1681 A(D). The Act also applies if this information is used for purposes relating to employment opportunities, government benefits (including child support enforcement), or certain other business transactions, which can include a landlord's credit check on a prospective tenant. (George L. Blum, J.D., *What Constitutes "Consumer Report" Within Meaning of Fair Credit Reporting Act (FCRA),* 15 U.S.C.A. § 1681a(d)).

The FCRA attempts to protect consumers from the invasion of their privacy and the dissemination of false, outdated, or misleading information by placing various obligations on persons who provide, use, or disseminate credit information about consumers. CRAs must adopt reasonable procedures to ensure that the information they disseminate is accurate and up-to-date, and that it is furnished only to users with certain permissible purposes as listed in 1681b. Additionally, the Act excludes several categories of information from appearing on a consumer credit report, such as: Title 11 bankruptcies that are 10 years old or older, some civil suits and arrest records, paid tax liens that antedate seven years, etc.

However, these exceptions do not apply to a credit transaction involving, or which may reasonably be expected to involve, a principal amount of $150,000 or more, life insurance involving, or which may reasonably be expected to involve, a face amount of $150,000 or more, or the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal, $75,000 or more. 1581c.

There are also disclosure obligations for both CRAs and users. These are designed to ensure that consumers will know when a consumer report has been used as the basis of action adverse to their interest and to ensure that consumers will be informed about the nature of the information being disseminated about them. CRAs and providers of credit information also have an obligation to reinvestigate information which consumers dispute and to inform users of the report of the dispute. 1681i. The statute also provides for mandatory fraud alerts and disclosure to consumers to prevent identity theft (1681c-1 and 1681c-2), and any disputed item on a credit report must be labeled as such. 1681(C)(f).

The FCRA also prohibits the obtaining of a consumer credit report unless "it is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made." 1681d. Additionally, the CRA must, upon request from the consumer within a reasonable time, "make a complete and accurate disclosure of the nature and scope of the investigation requested." Id. Certain mortgage lenders must also provide the mortgagor with information obtained from the CRA. 1681g.

In addition to administrative enforcement of the Act by the Federal Trade Commission, or, in some cases, through another designated federal agency (15 U.S.C. § 1681s), a consumer may bring a civil suit under the Act for willful or negligent noncompliance with a duty prescribed by the law. 15 U.S.C. §§ 1681n, 1681o. There are statutory damages ($100-$1,000, or actual damages, which is greater) for willful damages, punitive damages (only for willful noncompliance), costs and attorneys' fees. Additionally, it is a criminal offense for a user to obtain information on a consumer under false pretenses (15 U.S.C. § 1681q), and for an officer or an employee of a reporting agency to furnish such information to an unauthorized person. 15 U.S.C. § 1681r.

However, the consumer who now brings an action for willful noncompliance under false pretenses or knowing without a permissible purpose, will be liable for actual damages or $1,000, whichever is greater. Also, the consumer who rings an action for either willful or negligent noncompliance "in bad faith or for purposes of harassment," will be charged with attorneys' fee of the defendant.

The obligations of users and furnishers of credit information under the FCRA are summarized in Proof of Violation of Fair Credit Reporting Act, 153 AMJUR POF 3d 415.

B. Credit Repair Organizations Act (CROA)

1. Overview and Legislative Purpose

As a natural business consequence of our credit driven society, and the easy availability of credit reports, hundreds of fly-by-night credit repair schemes have sprung up, preying upon the desperation of consumers (especially low-income consumers) with poor credit histories. These consumers are desperate to avail themselves of a marketplace dominated by credit transactions yet foreclosed to them by their negative credit history or lack of credit history. On September 30, 1996, U. S. Congress passed the Credit Repair Organizations Act (CROA), codified at 15 U.S.C.A. § 1679, and made the following findings:

> Consumers have a vital interest in establishing and maintaining their credit worthiness and credit standing in order to obtain and use credit. As a result, consumers who have experienced credit problems may seek assistance from credit repair organizations which offer to improve the credit standing of such consumers.
>
> Certain advertising and business practices of some companies engaged in their business of credit repair services have worked a financial hardship upon consumers, particularly those of limited economic means and who are inexperienced in credit matters. The purpose of the CROA is to ensure that prospective buyers of the services of credit repair organizations are provided with information necessary to make an informed decision regarding the purchase of such services, and to protect the public from unfair or deceptive advertising and business practices by credit repair organizations. 15 U.S.C. § 1679.

In reality, the purpose of the CROA is to outlaw for-profit credit repair organizations, virtually all of which are fraudulent.

2. Key Provisions

The CROA prohibits generally the use of deceptive, untrue, or misleading representations to consumers in the sale of credit repair services. (§ 1679B(a)). More effectively, the Act absolutely prohibits advance fees—the credit repair organization may neither charge or receive any money before the service is fully performed. (§ 1679B(b)). Since credit repair organizations cannot, in fact, follow through on promises made in the solicitations, the prohibition of an advance fee is akin to a prohibition of the business outright.

The CROA also requires all credit repair organizations to provide the consumer with a separate written disclosure entitled "Consumer Credit File Rights under State and Federal Law" and containing the statutory language of § 1679c(a), which sets out consumers' rights under the Fair Credit Reporting Act (FCRA) and the CROA and refers the consumer who needs further information to the Federal Trade Commission. 1679d requires that all contracts for credit repair be in writing; be signed; and contain the terms and conditions of payment, a full and detailed description of the services to be performed, all guarantees, expected completion dates, the credit repair organization's name and principal business address, and a conspicuous statement using the required statutory language alerting the consumer of their right to cancel.

There is a three-day right to cancel which requires a "notice of cancellation" similar to that required by the Arkansas Home Solicitation Sales Act. (§ 1679e). There is also an "antispiking" rule, which prohibits the provision of services prior to the expiration of the three-day right to cancel. The consumer must receive a copy of the contract, the notice of cancellation, and a copy of a separate disclosure statement at the time the contract is signed (§ 1679e(c)).

All contracts not in compliance are void. 1679h.

3. Enforcement

The Federal Trade Commission and State Attorneys General are empowered to enforce this federal law. In addition, there is a private right of action, including a specific provision for class actions. (§ 1679G). Attorneys' fees and punitive damages are available, and the Act includes specific factors to be used by the court to determine punitive damages. (§ 1679G(b)). For most violations, the statute of limitations is five years from the date the consumer discovers the violation of the Act.

4. Comparison with Other Laws

Arkansas Credit Services Organizations Act

Arkansas passed legislation similar to the Federal Credit Repair Organizations Act (CROA) in 1987. The Arkansas law, known as the Arkansas Credit Services Organizations Act (CSOA), is found at A.C.A. § 4-91-101 et seq. The CSOA has similar provisions to the federal Act (including a private right of action), but the advance fee prohibition has an exception for credit repair organizations which have obtained a surety bond of $10,000 and have a true account at a federally insured banking institution within Arkansas. The CSOA requires a five-day notice of cancellation, as compared to the three-day requirement under federal law. Additionally, the CSOA also provides that any person who violates the chapter is guilty of a Class A misdemeanor. A.C.A. § 4-91-104.

The Federal Trade Commission Telemarketing Sales Rule (TSR)

The Federal Trade Commission's Telemarketing Sales Rule (TSR) (16 C.F.R. § 310.4 (a)(2)) addresses credit repair organizations which solicit by telemarketing (either out-bound or inbound), but it has a more restrictive private right of action. 16 C.F.R. § 310.7. Interestingly, the TSR provides that a credit repair organization cannot charge the consumer until the consumer has been provided with a credit report at least six months after the services of the organization have been rendered, which demonstrates that the promised results have been achieved. As much as anything, that provision reflects the low esteem in which credit repair organizations are generally held. § 310.4(a)(ii).

XVII

Arkansas Wheelchair Lemon Law

Overview

The Arkansas Wheelchair Lemon Law is codified at Ark. Code Ann. Section 4-105-201 to 4-105-206, (supp. 1999). This Act creates protection for individuals who purchase an assistive device such as a motorized scooter, van lift, or a manual or motorized wheelchair designed to enhance the mobility of a person with a disability. However, the Act does not cover an assistive device that is less than $750 in value. ACA § 4-105-201. The Act generally applies to manufactures who sell assistive devices. The manufacturer, pursuant to the act, is to give a one year expressed warranty; however, Section 2 of the Act holds that a one year expressed warranty will be applied even though the manufacturer may not have provided for one. ACA § 4-105-202. The consumer will have a cause of action under the Arkansas Wheelchair Lemon Law if within one year of purchase of the device there is a nonconformity which is reported to the manufacturer. The manufacturer is then given a reasonable amount of time to repair the device. A reasonable attempt to repair is held to be 30 days ACA § 4-105-204. If, after a reasonable attempt to repair, the manufacturer shall: (1) Have the manufacturer to accept the return of the assistive device and replace it with a comparable device, while refunding any collateral costs, or (2) Accept return of the assistive device and refund to the consumer and to any holder of a perfected security interest in the consumer's assistive device, as their interest may appear, the full purchase price plus any finance charge paid by the consumer at the point of sale and collateral costs, less a reasonable allowance for use. The Manufacturer then has fifteen days to replace the device or tender a refund. The Act allows a prevailing consumer to recover the amount of the costs and expenses incurred in connection with their cause of action. Costs includes attorney fees based upon the actual time expended by the attorney in the action. Ark. Code Ann. Section 4-105-201 through 4-105-206.

XVIII

Check-Cashers Act

Overview

The Arkansas Supreme Court recently held that the Check Cashers Act: A.C.A. § 23-55-201 "authorizes usurious interest rates . . . [and] cannot stand." McGhee v. Arkansas State Bd. of Collection Agencies, 375 Ark. 52, 63, 289 S.W.3d 18, 27 (2008). The court declined to sever the unconstitutional clause, which would have potentially authorized the usurious loans, and instead ruled the entire act unconstitutional. Id. This essentially closed "what had once been as many as 275 payday lenders . . . in Arkansas." Adam L. Bodeker, Mcghee v. Arkansas State Board of Collection Agencies: Arkansas Shows Predatory Lenders the Door, 63 Ark. L. Rev. 645, 653 (2010).

Additionally, 12 U.S.C. § 1831u(f)(1)(B) (2006 & Supp. 2009) preempted parts of the act by limiting interest rates on non-depository lending to the lesser of the State's usury rate or 17%.

For a history of the Arkansas act, and usury laws in Arkansas, see Adam L. Bodeker, Mcghee v. Arkansas State Board of Collection Agencies: Arkansas Shows Predatory Lenders the Door, 63 Ark. L. Rev. 645, 653 (2010).

XIX

Residential Telephone Sales Collection Practices Act

Overview

Act 566 of 1999 is codified as Ark. Code Ann. Section 4-99-202. The Act sets forth statutory law which regulates sales made by a business to an individual while communicating with a person on a residential telephone. It establishes that any person who sells merchandise, or offers prizes by telephone, and then sends an employee to the person's residence to collect payment or fees prior to the individual being able to view and inspect the merchandise can be held guilty of a class A misdemeanor.

XX

Transfer of Credit Card Debt

Overview

Act 1497 of 1999 is codified at Ark. Code Ann. Section 4-107-201 to 204. The Act regulates interest on transferred balances from one credit card to another. The initial creditor is prevented from charging interest on the amount of the balance after the consumer has transferred the balance to a different credit card account.

Any creditor that charges interest or fees to a consumer after a transfer has taken place is liable for all cost associated with the matter, including reasonable attorney's fees, as well as treble damages which consist of three times the amount of interest or fees charged. Additionally, a violation "by a credit card issuer or creditor issuing a credit card shall constitute an unfair and deceptive act or practice as defined by the Deceptive Trade Practices Act, § 4-88-101 et seq."

Consumer Law: II of III—Repossession of Secured Goods

I

Repossession of Secured Goods

Overview

Frequently, consumer goods are sold subject to a security interest retained in the goods by the seller. The goods subject to this security interest constitute the collateral. A secured seller who believes that the buyer has defaulted on the terms of the sales contract, may repossess the collateral. The seller may seek to obtain possession through replevin, a circuit court proceeding. More often, under the secured transaction provisions of the Uniform Commercial Code, A.C.A. §§ 4-9-101 to -507, the seller may take action on his/her own.

The following outline indicates the rights and duties of sellers and creditors when such goods are retaken. Appended to this outline is a sample answer to a seller's actions for deficiency judgment against a debtor from whom an automobile has been repossessed. Included in the answer is a counterclaim seeking damages for wrongful repossession. See Form 8. In addition, form interrogatories are appended. These seek to elicit information covering the circumstance of resale.

A. Retaking

1. Replevin

   A secured party may seek possession of collateral by filing an action at law. See A.C.A. §§ 18-60-801 to -822.

   Replevin is an action to recover personal property said or claimed to be unlawfully taken or it is also the term used for the writ or procedure of such an action.

   Replevin is used where the party having the right of property cannot simply invoke self-help and take the property back. Where the party has the ability to do this directly, it is referred to as repossession.

2. Self-Help

   Upon default a secured party may take possession of collateral if it can be done without breach of the peace. A.C.A. § 4-9-503; Teeter Motor Co. v. First National Bank, 260 Ark. 764, 543 S.W.2d 938 (1976). Even if the secured party has filed a replevin action, self-help is still permissible. McIlroy Bank v. Seven Day Builders, Inc., 1 Ark. App. 121, 613 S.W.2d 837 (1981).

B. Redemption

Before the collateral has been disposed of or retained by the secured party in satisfaction of the debt, the debtor may recover possession of the goods by tendering the remaining debt and reasonable expenses incurred by the secured party. A.C.A. § 4-9-506.

C. Disposition

Retention (Consumer Goods Generally)

If the debtor has paid 60% or more of a transaction secured by consumer goods, the secured party must dispose of the collateral as described below within 90 days unless the debtor has, after default, otherwise agreed in writing. § 4-9-505(1).

In any other instance, the secured party may retain the collateral in full satisfaction of the debt if written notice of such intention has been sent to the debtor and the debtor does not object in writing within 21 days. However, if an objection is timely made, the secured party must dispose of the collateral as described below. See § 4-9-505(2).

Resale

§ 4-9-504(3) imposes two significant requirements for resale:

Notice

- the secured party must send reasonable notification to the debtor of the time and place of public sale or the time after which a private sale may be made
    - "Notification" is the taking of such steps as may be reasonably required to inform the person to be notified; the debtor's actual knowledge is not required. See § 4-1-201(26).
    - Oral notice that the collateral will be sold without specifying the time or place of sale is not reasonable. Barker v. Horn, 245 Ark. 315, 432 S.W.2d 21 (1968).
    - Neither the debtor's knowledge of repossession nor his knowledge that the collateral will eventually be sold will excuse the secured party from giving the required notice. Wheeless v. Eudora Bank, 256 Ark. 644, 509 S.W.2d 532 (1974).
    - Notice by certified mail is not unreasonable, even if the debtor fails to call for the certified letter. Hudspeth Motors, Inc. v. Wilkinson, 238 Ark. 410, 382 S.W.2d 191 (1964).
    - Debtor's execution of a disposal of collateral agreement after repossession was a valid waiver of notice of resale. Teeter Motor Co. v. First National Bank, 260 Ark. 764, 543 S.W.2d 938 (1976).
    - The secured party has only a duty to give reasonable notice of the time after which a private sale will be made. No additional notice is required even though a significant period of time passes before resale. Brown v. Ford, 280 Ark. 261, 658 S.W.2d 355 (1983).
    - Notice of resale sent by certified mail and received by debtor's wife at debtor's usual place of abode was sufficient notice of resale. Clark v. First National Bank of Mena, 24 Ark. App. 52, 748 S.W.2d 42 (1988).
    - While notice of the place of sale is required when disposition is to be made by public sale, no such requirement exists for disposition by private sale. Anglin v. Chrysler Credit Corp., 27 Ark. App. 173, 768 S.W.2d 44 (1989).
    - In Beard v. Ford Motor Credit Co., 41 Ark. App. 174, 850 S.W.2d 23 (1993), the court upheld a lower court ruling that a dealers-only auction was a private sale.

Commercial Reasonableness

- every aspect of the disposition must be commercially reasonable
    - Method of sale—see generally § 4-2-706. A used automobile does not come within the phrase "a type customarily sold on a recognized market" for purposes of holding a sale without notice. Norton v. National Bank of Commerce, 240 Ark. 143, 398 S.W.2d 538 (1966).
    - Buyer—secured party may not purchase a used automobile at his own private sale. Carter v. Ryburn Ford Sales, Inc., 248 Ark. 236, 451 S.W.2d 199 (1970).
    - Time of sale - the price obtained after an excessive delay is of slight probative value as to the market price at the time of the breach and such a delayed sale is therefore commercially unreasonable. McMillan v. Meuser Material & Equipment Co., 260 Ark. 422, 541 S.W.2d 911 (1976) (14 months). However, delay in itself is insufficient to establish a commercial unreasonability. In Brown v. Ford, 280 Ark. 261, 658 S.W.2d 355 (1983), the resale occurred approximately 16 months after the repossession. When repossessed, the car had extensive physical damage and the evidence showed that the secured party immediately began trying to sell it. When the secured party was unable to find a buyer, it began making repairs. The court found that the secured party did everything it could to sell the vehicle as quickly as possible. Further, the consumer offered no proof as to what other steps the appellee could have taken. In light of this, the Supreme Court upheld the finding that the delay in reselling the car was commercially reasonable.
    - Price-inadequacy of the resale price alone is insignificant to establish commercial unreasonability. § 4-9-507(2); Goodin v. Farmers Tractor & Equipment, 249 Ark. 30, 458 S.W.2d 419 (1970).

Distribution of Proceeds

Commercially Reasonable Disposition

Section 4-9-504(2) provides that a debtor is liable for any deficiency arising after disposition of the collateral by the secured party. Section 4-9-504(1) provides that the proceeds of a commercially reasonable sale should be applied as follows:

- to the reasonable expenses of the secured party in retaking, holding, preparing and selling, including
    - reasonable attorney's fees for services rendered in obtaining possession of collateral; Svestka v. First National Bank, 269 Ark. 237, 602 S.W.2d 604 (1980)
    - reasonable expenses of preparing collateral for resale including necessary repair costs; Id.
    - reasonable storage costs; Affiliated Food Stores, Inc. v. Bank of Northeast Arkansas, 259 Ark. 690, 536 S.W.2d 693 (1976)

- a debtor is not liable for expenses that are incurred incident to doing business and which would not be incurred by the secured party regardless of whether a default occurs; Thomas v. International Harvester Credit Corp., 5 Ark. App. 244, 636 S.W.2d 296 (Ct. App. 1982)

- to the satisfaction of the indebtedness
- any surplus must be returned to the debtor

Commercially Unreasonable Resale
In First State Bank of Morrilton v. Hallett, 291 Ark. 37, 722 S.W.2d 555 (1987), the Arkansas Supreme Court abrogated the rule stated in Barker, supra., Carter, supra., and Norton v. National Bank of Commerce, 240 Ark. 143, 398 S.W.2d 538 (1966), to the extent that proof of commercially unreasonable resale created a presumption that the value of the collateral was equal to the amount of the debt, barring a deficiency unless the creditor would overcome the presumption. The rule stated in Hallett, supra., is that failure to give the debtor notice of the resale is an absolute bar to recovery of a deficiency.

Computation of the Deficiency
A debtor whose property is repossessed will, of course, receive credit for the amount obtained by the secured party when the collateral is sold. § 4-9-504. However, the debtor should not simply look to the negotiated price on resale to determine the credit to which he is entitled. For example, the secured party may accept a trade-in as part of the bargain when reselling the collateral to a third party. The trade-in later may be resold for less than the allowance given to the third party for the trade-in. If the resale of the trade-in was conducted in a commercially reasonable manner, the dealer may charge the loss on the trade-in (the "over allowance") against the debtor when calculating the deficiency. See Thrower v. Union Lincoln-Mercury, Inc., 282 Ark. 585, 670 S.W.2d 430 (1984) ($2,000 allowed in trade: $1,200 received in wholesale resale; remanded for consideration of evidence concerning reasonableness of resale).

D. Debtor's Remedies

See generally Nickles, Rethinking Some U.C.C. Article 9 Problems, 34 Ark. L. Rev. 1, 136-177 (1981).

Wrongful Repossession

The taking possession of collateral at a time or in a manner not sanctioned by the code constitutes conversion.

The measure of damages, based on the common law rule of conversion, is the market value of the collateral at the time of the taking. See Ford Motor Co. v. Herring, 267 Ark. 201, 589 S.W.2d 584 (1979).

Punitive damages may be addressed if there is an intentional violation of the debtor's rights to his property. Id.

Improper Disposition

Disposition may be restrained or ordered if the secured party is not complying with the code. § 4-9-507(1).

The measure of damages is the value of the collateral less the debt owed thereon. Mayhew v. Loveless, 1 Ark. App. 69, 613, S.W.3d 118 (1981).

Alternatively, in the case of consumer goods, the debtor may seek to recover the statutory penalty in addition to actual damages. § 4-9-507(1).

Consumer Law: III of III—Post-Judgment Relief

I

Nature and Effect of Judgment

A. Nature of a Judgment

1. Defined

"Judgment" is defined as "[an order] of such a nature as to not only decide the rights of the parties, but to put the court's directive into execution, ending the litigation or a separable part of it. Budget Tire & Supply Co. v. First Nat. Bank of Fort Smith, 51 Ark. App. 188, 191, 912 S.W.2d 938, 940 (1995) Administrative Order 2 requires that "all papers filed with the clerk, all process issued and returns thereon, all appearances, orders, verdicts and judgments shall be noted chronologically in the dockets and filed in the folio assigned to the action and shall be marked with its file number" and that "the entry of an order or judgment shall show the date the entry is made. Where there has been a demand for trial by jury it shall be shown on the docket along with the date upon which demand was made." Ark. Sup. Ct. R. ADMIN Order 2. A judgment or decree is effective only when entered in compliance with Ark. R. Civ. P. 54(b), 58 and Administrative Order Number 2, Morrell v. Morrell, 48 Ark. App. 54, 889 S.W.2d 772 (1994), Blaylock v. Shearson Lehman Bros., 330 Ark. 620, 954 S.W.2d 939(1997).

2. Judgment Interest

The judgment creditor is allowed to receive interest in the contract amount or 10% per annum from the date the judgment is entered, whichever is greater, and on any other judgment at 10% per annum, but not more than the maximum rate permitted by the Arkansas Constitution, Amendment 89. A.C.A. § 16-65-114.

3. Staying Execution for Appeal

Unless the court orders otherwise, no execution or enforcement proceedings shall issue on a judgment or decree until 10 days after it is entered. Ark. R. Civ. P. 62(a). In order to stay execution when an appeal is taken, the appellant must give a supersedeas bond. The clerk of the court rendering the judgment is authorized to issue a supersedeas until such time as the record is transmitted to the appellate court. After that time the clerk of the appellate court is authorized to issue the supersedeas when the appellant has submitted a supersedeas bond to the court for its approval. Arkansas Rules of Appellate Procedure, Rule 8.

B. Effect of a Judgment

1. Time Period

In Arkansas, a judgment is actionable for a period of 10 years from the date of rendition unless it is revived before the expiration of that period or if the judgment shall have been previously revived, then within ten (10) years from the order of revivor. A.C.A. § 16-65-501. A judgment that is revived every 10 years will remain actionable until it is satisfied or until the judgment debtor dies and his estate is probated. If a judgment is not revived within the 10-year period, it expires and may not be revived.

2. Reviving Judgment

In order to revive a judgment, the judgment creditor must sue out a scire facias within 10 years from the date the judgment was rendered. A.C.A. § 16-65-501. The scire facias is served on the defendant or, if the defendant cannot be found, a court order requiring all persons interested to appear and show cause why such judgment or decree should not be revived is posted at the courthouse door of the county where the judgment or decree was rendered. Id. The judgment or decree shall be revived if the defendant or other interested party does not appear and show cause why it should not be revived. The judgment lien on real estate (see below), then continues for another three-year period. Id.

3. Judgment Liens

A judgment rendered by the Arkansas Supreme Court, a circuit or chancery court in the state, or a United States District Court in this state, creates a lien on the real property owned by the judgment debtor in the county in which the judgment was rendered. Act 931 of 1989 amends Ark. Code Ann. § 16-65-117(a)(1)(A) to include municipal court judgments as liens

on real estate. However, Act 1179 of 1993 amended this section to provide that a municipal court judgment shall not be a lien on real estate owned (2001 Repl.) by the defendant in the county in which the judgment was rendered until the judgment has been filed and indexed in the judgment records of the circuit clerk in the county in which the judgment was rendered. In order to create a lien on the land of the defendant in any other county, a certified copy of the judgment must be filed in the office of the Circuit Clerk of the county in which the land lies. § 16-65-117. This judgment lien attaches to the debtor's legal or equitable interest in real estate. §§ 16-65-116 to -117 However, the homestead of any resident of Arkansas who is married or the head of a family is not subject to the lien of any judgment or decree, unless such judgment or decree is rendered for the purchase money or specific liens such as mechanic's or laborers' liens for improving the homestead, or for taxes, or against executors, administrators, guardians, receivers, attorneys for moneys collected by them, and other trustees of an express trust for moneys due from them, in their fiduciary capacity. Arkansas Savings and Loan Association v. Hayes, 276 Ark. 582, 637 S.W.2d 592 (1982); § 16-66-210. A judgment lien continues in force for ten years from the date of the judgment and may be revived only under § 16-65-501. §16-65-117.

4. Schedule of Property

A.C.A. § 16-66-221 requires the judgment debtor, after a final judgment order of a court of record is entered against him or her, to prepare a schedule verified by affidavit, of all his or her property, both real and personal, including moneys, bank accounts, rights, credits, and choses in action held by himself or herself or others for him or her and specify the particular property which he or she claims as exempt under the provisions of the law. The schedule must be verified and filed with the clerk of the court in which the final judgment order was entered within forty-five (45) days of entry of the final judgment order. All final judgment orders of a court of record must include a provision requiring the judgment debtor to comply. Act 120 of 1993 amends this section to provide that the absence of this provision in a final judgment will not invalidate the judgment. Act 267 of 1993, codified as A.C.A. § 16-65-122, provides that the records of all personal judgments rendered in circuit, chancery, or probate courts shall contain the judgment debtor's social security number unless it is otherwise prohibited by federal law or is unavailable.

This statute, enacted in 1991, is potentially troublesome, especially for low income judgment debtors who defaulted or were not represented. Determining exemptions and correctly listing personal and real property is not necessarily a simple task. The statute does not specify what happens if a judgment debtor fails to list property or claim exemptions. The relationship between this statute and other Arkansas statutes and case law addressing claims of exemptions is not at all clear. As to the other provisions and decisions, see Section III. A.3., below.

II

Methods of Collecting Judgment

A. Writ of Garnishment

1. Defined

Garnishment is a collection remedy designed to obtain property of the judgment debtor which is in the hands of a third party. The garnishment is a suit against the third party and is designed to discover whether the garnishee has any property belonging to the judgment debtor or is indebted to the judgment debtor. If such property or money is found to exist, the garnishment suit will result in a judgment that the money or property (subject to the debtor's exemptions) be paid to the judgment creditor.

2. Property Subject to Garnishment

Goods, money, chattels, wages and other non-exempt property of the debtor in the hands of a third party may be subject to garnishment. Most frequently, the writ of garnishment is directed towards wages owed to the judgment debtor by the employer- garnishee or toward monies, which the judgment debtor has deposited in a bank or savings and loan. A.C.A. § 16-110-402 requires that notice of the garnishment including notice of the debtor's exempt property rights be attached to the writ by the clerk and mailed to the debtor by the creditor's attorney, if any, within five (5) days from the date the writ of garnishment is served on the garnishee.

3. Procedure

The judgment creditor may obtain the writ of garnishment from the clerk of the court where the judgment was obtained. The writ must set out the judgment and contain an assertion that the judgment creditor has reason to believe that the garnishee is indebted to the judgment debtor or has in his possession property belonging to the judgment debtor. The judgment creditor files allegations and interrogatories, which will be served on the garnishee together with the writ of garnishment. The writ directs the garnishee to answer or appear in court on the return date and answer whether he or she is indebted to the judgment debtor, and to answer the interrogatories. A.C.A. § 16-110-401(a)(1).

The writ of garnishment served on a non-employer garnishee must contain a notice that failure to answer the writ within 30 days or failure or refusal to answer the interrogatories shall result in the court entering a judgment against the non-employer garnishee personally for the full amount specified in the writ together with costs of the action. A.C.A. § 16-110-401(2)(A).

The writ of garnishment served on an employer garnishee must contain a notice that failure to answer the writ within 30 days or failure or refusal to answer the interrogatories shall result in a judgment against the employer garnishee personally for the amount of the non-exempt wages owed to the debtor-employee on the date the employer was served with the writ. A.C.A. § 16-110-401(2)(B). The employer garnishee must also receive a notice concerning certain limitations on the amount of wages available for withholding for that particular judgment subject to certain prior claims. Under Arkansas law, income withholding for child support has a priority over all other legal processes. A.C.A. 16-110-416.

When a judgment creditor applies for a writ of garnishment, the clerk must attach or incorporate into the writ a "Notice to Defendant", advising that certain property, money or wages may be exempt under state or federal law and that the defendant can ask for a court hearing to claim these exemptions. The notice also provides information to assist the defendant in obtaining legal representation. A.C.A. § 16-110-402(1)(A) and (B).

The writ of garnishment and notice must be served in the same manner as a summons. In addition, the judgment creditor must mail a copy of the writ of garnishment and "Notice to Defendant" to the judgment debtor the same day that he serves the writ of garnishment and the "Notice to Defendant" on the garnishee. A.C.A. § 16-110-402(2)(A). The judgment creditor is not required to mail another "Notice to Defendant" to the judgment debtor for future garnishments on the same debt within 12 months of the original garnishment. A.C.A. § 16-110-402(3).

Upon filing a claim of exempt property or wages by the judgment debtor, a hearing shall not be required and a writ of supersedeas shall issue unless the judgment creditor files within ten (10) days from the date the judgment debtor or judgment debtor's attorney files an exemption claim a statement in writing that the judgment debtor's claim of exemption is contested. Id.

4. Failure of Garnishee to Answer

If the garnishee fails to file an answer on or before thirty (30) days after service of the writ, the court, upon motion of the plaintiff, may issue a notice requiring the garnishee to appear at a hearing not later than ten (10) days after receipt of said notice or at such other later date as the court may fix and answer the allegations and interrogatories of the plaintiff. § 16-110-407(a). If it rules in favor of the plaintiff, the court may enter judgment against the garnishee for such amount belonging to the defendant that the garnishee held at the time of service of the execution and which is not otherwise exempt. The court may also hold the garnishee liable for attorney's fees and reasonable expenses. § 16-110-407(b).

5. Garnishment of Wages

The employer-garnishee, to the extent of the amount due upon the judgment and costs, must hold, subject to the order of the court, any non-exempt wages due or which subsequently become due. The judgment or balance due is a lien on salaries, wages, or other compensation due at the time the writ of garnishment is served. A.C.A. § 16-110-415(a). This lien continues as to subsequent earnings until the total amount due on the judgment and costs has been paid. Ark. Code Annotated Section 16-110-415. This lien on subsequent earnings terminates sooner if the employment relationship ends or if the underlying judgment is vacated or modified. A.C.A. § 16-110-415(b).

The provisions at § 16-110-415 as amended by Act 192 of 1991 creating a "continuing garnishment," depending on how interpreted, may wipe out the benefits to a judgment debtor of filing a claim of wage exemptions. See Section III. A.4., below. The new provisions may encourage more bankruptcy filings by some low-income judgment debtors.

B. Writ of Execution

1. Defined

Execution is the statutory procedure for bringing the judgment debtor's non-exempt property within the jurisdiction of the court to be sold, with the proceeds being used to satisfy the judgment.

2. Property Subject to Execution

The person against whom the execution has been issued has the right to select which property, real or personal, will be sold to satisfy the judgment, and the sheriff must levy on that property. However, if in his opinion the officer deems the selected property to be insufficient to satisfy the execution, he may levy on additional property. §16-66-401. Nearly all non-exempt property of a debtor is subject to seizure and sale pursuant to a writ of execution. This includes all non-exempt goods and chattels, all improvements on the public lands of the United States, all rights and shares of stocks in banks, insurance companies, or other corporations, any current gold or silver coins, any bills or other evidence of debt, and all legal or equitable interests in real estate. §16-66-201. Also subject to execution are unexpired leases, property of married women and encumbered property. §§ 16-66-202, 203, 204.

3. Procedure

Execution may issue on any final judgment order of a court of record for a liquidated sum of money and for interest and costs. § 16-66-101. The writ of execution may not issue until 10 days after the judgment is entered unless the court rendering it orders otherwise. Ark. R. Civ. P. 62(a). After the expiration of the 10 days, execution may issue at any time within the 10-year period of actionability or thereafter if it is properly revived. §§ 16-66-103. A writ of execution is obtained from either the clerk of the court which rendered the judgment or from the clerk of the court where the judgment rendered by a court of competent jurisdiction has been registered pursuant to §§ 16-65-117, § 16-66-102. The writ of execution commands the sheriff of the county where the judgment debtor's property is located to collect and sell at public sale sufficient property of the debtor to satisfy the judgment. §§ 16-66-401, 408-409. For the form of the writ, see § 16-65-104. Executions issued on a judgment or decree of any court of record may be directed to and executed in any county in the state without first procuring an order of the court for that purpose. §16-66-109. An execution is returnable in ninety (90) days from its date. § 16-66-416(a). The sheriff's return must state whether the execution has been satisfied or if it has been satisfied in part. § 16-66-416(b)(1) and (2). If the execution has been levied but there has been no sale because there were no bidders or if no property of the debtor was found, this must be stated in the return. § 16-66-416(b)(3). The proceeds of the sale are applied

to the judgment. § 16-66-411 When property sold on credit sells for more than will satisfy the execution, costs, and commission, the officer making the sale shall take a bond payable to the defendant, the owner of the property, for the excess § 16-66-413. The judgment debtor may redeem real property sold under execution within twelve (12) months by paying to the clerk of the court from which the execution issued, the purchase price with fifteen percent (15%) per annum, and all lawful charges. §§ 16-66-501, 502, 503.

4. Indemnity Bonds

If the sheriff has doubt as to whether certain personal property is subject to levy and execution he may require the judgment creditor to post an indemnity bond. § 16-66-405. The officer may not demand an indemnifying bond in all cases before levying an execution. This demand may be made only when, acting in good faith, the sheriff doubts that the property is subject to execution. Endicott-Johnson Corp. v. Davis, 186 Ark. 788, 56 S.W.2d 178 (1933). The officer has no authority to demand an indemnity bond before levying an execution on real property. A.C.A. § 16-66-405; Smith v. Spradlin, 136 Ark. 204, 206 S.W. 327 (1918). The purpose of the indemnity bond is two-fold. First, it protects the purchaser at the execution sale against defects in title. Id. If the judgment creditor refuses to give the bond, the sheriff may refuse to levy or, if levy has already occurred, may return the property to the person from whom it was taken. Id.

5. Stay of Execution

Before or after a writ of execution has been issued but before the execution sale takes place, the judgment debtor may obtain a six-month stay of execution by posting, with the clerk of the court entering the judgment, a bond for the amount of judgment plus costs, interest, and half of the commissions up to that time. § 16-66-303. A waiver of the right to secure a stay of execution entered on the record is enforceable. § 16-66-305. There are certain types of judgments or decrees upon which a stay is not permitted at all. These include a judgment or decree for specific property, or for the property or its value, or a judgment decree enforcing a lien in favor of a vendor or mortgagee, or a judgment for personal injury or injuries resulting in death caused by neglect or default of another. § 16-66-302. Any person, other than the judgment debtor, who claims ownership of personal property levied upon may have the execution sale stayed by posting a bond for double the value of the property. § 16-66-304. A writ of execution may be stayed, quashed, or set aside by the judgment debtor for good cause. The judgment debtor must apply to the judge of the court out of which the execution was issued, by petition verified by affidavit setting forth the good cause why the execution should be stayed, quashed or set aside. Reasonable notice must be given to the adverse party, his agent, or attorney of record. § 16-66-301.

6. Conducting the Sale

Specific procedures have been established with respect to notice of the execution sale and the conduct of the sale. Neither the sheriff, nor his deputies nor anyone on their behalf may purchase any property at an execution sale. § 16-66-415.

Real Property

The time and place of the sale of real property must be advertised for at least twenty (20) days before the day of sale. This is accomplished by posting printed advertisements at the courthouse door and five (5) other places in the county in which the sale is to be made. One (1) of these notices is to be upon the premises to be sold. If there is a newspaper published at least weekly in the county, at least two (2) insertions of the notice of sale must be published prior to the sale. § 16-66-408. Real property shall be sold at the courthouse door unless the judgment debtor requires that the sale be held on the property to be sold. § 16-66- 409.

Personal Property

The time and place of a sale of personal property must be advertised by posting written or printed notices at three of the most public places in the vicinity of the place of sale. § 16-66-408. Further, at least 10 days' prior notice of the time and place of the sale must be given. Id. The sale must take place on the day for which it was advertised between 9:00 a.m. and 3:00 p.m. at public auction for ready money to the highest bidder. § 16-66-409.

7. Executing on Encumbered Property

Encumbered property may be levied upon and sold at an execution sale. All prior lienholders must be notified of the sale and the title to the property sold at an execution sale passes to the purchaser subject to all prior liens. § 16-66-203. A sale of real property under a junior judgment passes the title of the judgment debtor subject to the lien of all prior judgments and decrees. § 16-66-411. Section 16-66-420 provides that the purchaser at an execution sale acquires "all the right, title and interest" which the debtor had in the property on the day the execution was delivered to the sheriff. In view of §§ 16-66-203 and 16-66-411, this should probably be interpreted as passing title subject only to all interests prior to that of the executing

creditor. In addition to taking subject to prior encumbrances, the purchaser of real property at an execution sale also takes subject to the rights of the judgment debtor or any judgment creditor to redeem the property at any time within 12 months of the sale. §§ 16-66-502

8. Cost of Execution

A.C.A. § 21-6-505 provides that "[t]he sheriff, constable or other officer shall safely keep all property taken or seized under legal process and shall be allowed by the court the necessary expenses of doing so, to be paid by the plaintiff, and taxed in the cost."

It is clear that the costs arising out of an execution, such as towing and storage, are to be paid initially by the plaintiff and are to be taxed in the costs of the case. If the debtor cannot prevent the execution, these costs ultimately will be assessed against the debtor. If execution has issued and personal property has been seized but the debtor prevails on a claim that the property is exempt, the costs should arguably be paid by the plaintiff. Rule 54(d) of the Arkansas Rules of Civil Procedure provides that unless there is an express provision in a statute or the rules, costs shall be allowed as of course to the prevailing party unless the court directs otherwise. If the claim of exempt property is upheld, the debtor is the prevailing party.

III

Exempt Property

A. State Exemptions

1. Homestead

The Constitution of Arkansas provides that the homestead of the resident of the state who is married, or the head of a family is not subject to a judgment lien or an execution sale. Ark. Const. Art. 9, § 3; A.C.A. § 16-66-210; Arkansas Savings and Loan v. Hayes, 276 Ark. 582, 637 S.W.2d 592 (1982). There are some exceptions to the application of this exemption based on the type of underlying debt. The homestead exemption does not apply to judgment or decrees for purchase money mortgages, specific liens, and laborers' and mechanics' liens; nor against executors, administrators, guardians, receivers, attorneys for money collected by them, nor trustees of an express trust for money held in their fiduciary capacity. Ark. Const. Art. 9, § 3; A.C.A. § 16-66-210. The proceeds from the sale of a homestead become personal property and are not exempt except to the extent of exemptions allowed in personal property to a debtor. Tucker v. Stell, 169 Ark. 1, 272 S.W. 864 (1925). When the owner of a homestead voluntarily sells the property the proceeds of the sale are not exempt as homestead. However, when the homestead is subjected to a forced sale, the debtor's share of the proceeds is exempt if he/she intends to use the money to acquire another homestead. Obenshain v. Obenshain, 252 Ark. 701, 480 S.W.2d 567 (1972). The proceeds from a fire insurance policy are exempt from execution for a reasonable period of time to allow the debtor to reinvest in another homestead. The Exchange Bank & Trust Co. v. Mathews, 267 Ark. 415, 591 S.W.2d 354 (1980).

Rural Homestead

The rural homestead, owned and occupied as a residence, consists of not more than 160 acres, with the improvements thereon, not to exceed $2,500 in value, but in no event is the homestead to be reduced to less than 80 acres without regard to value. Ark. Const. Art. 9, § 4; A.C.A. § 16-66-210.

Urban Homestead

The urban homestead, owned and occupied as a residence, consists of one acre of land, with the improvements thereon, not to exceed $2,500 in value. In no event is the urban homestead to be reduced to less than 1/4 acre without regard to value. Ark. Const. Art. 9, § 5; A.C.A. § 16-66-210.

2. Personal Property

The Arkansas Constitution provides that certain property is exempt from seizure on attachment or sale on execution or other process. This exemption applies only to process issued for a debt due by reason of contract. Ark. Const. Art. 9, §§ 1,2. A resident of Arkansas who is not married or the head of a household may claim as exempt specific articles of personal property, to be selected by him/her, not exceeding in value the sum of $200 in addition to his/her wearing apparel. Ark. Const. Art. 9, § 1. A resident of Arkansas who is married or the head of a family may claim as exempt specific articles of personal property, to be selected by him/her, not exceeding in value the sum of $500 in addition to his/her wearing apparel and that of the family. Ark. Const. Art. 9, § 2.

3. Claiming Exemptions

To claim an exemption, the judgment debtor must file with the court a schedule, verified by affidavit, listing all of his or her property. The party in whose favor the process was issued must be notified in writing and has five days within which to request a hearing. If no hearing is requested, or if the claim of exemption is determined to be valid, a supersedeas will issue. If the judgment debtor has more property in value than is exempt by law, he may choose which property shall be exempt and the remainder is subject to execution. A.C.A. §16-66-211. Sanford v. Otasco, Inc., 286 Ark. 100, 590 S.W.2d 285 (1980). See also A.C.A. § 16-66-104(g) and (h) and A.C.A. § 16-110-402(5). A.C.A. § 16-66-104(g) provides that if the judgment debtor files a claim of exempt property then a prompt hearing shall be held to determine the validity of the claim. A hearing is not held if the judgment creditor files a statement that the claim of exemption is not contested. A.C.A. § 16-66-104(h) provides that the exemptions must be claimed within twenty (20) days from receipt of the writ of execution. If the judgment debtor fails to file a schedule he has waived his right to the personal property exemptions. Andrews v. Briggs, 203

Ark. 714, 158 S.W.2d 269 (1942). However, the right to the homestead exemption is not lost by the failure to schedule. The judgment debtor may select and claim his or her homestead exemption before or after the execution sale and may claim the right of homestead when suit is brought for possession. If the spouse neglects or refuses to make the claim his or her spouse may do so. If the judgment debtor does not reside on his homestead and owns more land than he or she is entitled to hold as a homestead, he or she must select the homestead before the sale. A.C.A. § 16-66-212.

Although Arkansas law provides that the home of a resident of the state who is married or the head of a family is not subject to a judgment lien or an execution sale, Ark. Const. Art. 9, § 3; A.C.A. § 16-66-210; Arkansas Savings and Loan Ass'n v. Hayes, 276 Ark. 582, 637 S.W.2d 592 (1982), the judgment debtor, or their spouse, must claim, by filing a claim of homestead exemption, the right to the exemption.

4. Wage Exemptions

Arkansas law provides wages with some protection from garnishment or other legal process. (See III.B. for federal garnishment restrictions.) The first $25 per week of net wages of all laborers and mechanics is absolutely exempt from garnishment or other legal process without the necessity of filing a schedule of exemptions. § 16-66-208. The wages of all laborers and mechanics, not exceeding their wages for 60 days, may, under some circumstances, be claimed as exempt from garnishment or other legal process. § 16-66-208(a)(1). (The Arkansas Constitution's exemption provision, Art. 9, § 2, says nothing about accruing wages for 60 days to qualify for exemptions.) In order to claim this exemption, the judgment debtor must file with the court a sworn statement containing a schedule of his personal property and the property which he/she claims to be exempt. Although § 16-66-208 provides that the judgment debtor must file a sworn statement that the 60 days' wages would not exceed the limits of the constitutional exemption, this does not mean that a judgment debtor may not claim wages as exempt if the total value of his/her personal property exceeds the limits of the constitutional exemption. A judgment debtor may claim both wages and property in his/her schedule of exemptions as provided by § 16-66-211 and Ark. Const. Art. 9, § 2. Whatever the judgment debtor possesses above the exempt amount remains subject to levy, execution, garnishment, or other process. Sanford v. Otasco, Inc., Supra. See Section III. A.3., above.

5. Claiming Wage Exemptions

Notice that the judgment debtor is claiming exempt wages must be served on the judgment creditor who then has five days to give written notice that it asserts the claim of exemption is invalid in whole or in part and requests a hearing. § 16-66-208(2). If the judgment creditor does not object within five days or if the claim of exemption is sustained, a supersedeas shall issue. § 16-66-208(2) and § 16-110-402(5). After a claim of exemption has been sustained, the judgment debtor's wages shall not again be seized by garnishment or other legal process for a period of 60 days. § 16-66-208(3)(B).

6. Other Exempt Property

Certain other property is usually exempt from execution under Arkansas law, including state-owned property, § 16-66-205; improvements on public land, § 16-66-206; graveyards, § 16-66-207; state police and teachers' retirement benefits, §§ 24-6-202; 24-7-715; health, life, accident and disability insurance proceeds; and annuity contracts, §§ 16-66-209; 23-79-131 - 134.

Certain benefits paid by the state or under state law are exempt from execution. Benefits paid under the Arkansas Worker's Compensation Act are not subject to garnishment, attachment, levy, execution, or any other legal process. § 11-9-110. Unemployment Compensation benefits are also exempt. However, these benefits are not exempt where the underlying debt was incurred for necessaries furnished to the unemployed individual or his/her spouse or dependents during the time he/she was unemployed. Any waiver of this exemption is void. § 11-10-109. In addition, public assistance grants are not subject to execution, levy, attachment, garnishment, or other legal process, or the operation of bankruptcy or insolvency law. § 20-76-430. Act 428 of 1989 provides that a person's wedding ring is exempt from attachment, execution, and seizure for satisfaction of debts. In addition, qualifying pension plans are exempt. § 16-66-220.

B. Federal Exemptions

1. Wage Garnishment

The federal restrictions on the garnishment of wages are contained in 15 U.S.C.A. §§ 1672-77. The maximum amount of the aggregate disposable earnings of an individual for any workweek subject to garnishment may not exceed 25% of the disposable earnings for that week or the amount by which disposable earnings for that week exceeds 30 times the federal minimum hourly wage, whichever is less. The Secretary of Labor is charged with promulgating regulations prescribing a multiple of the federal minimum hourly wage equivalent in effect to the above formula. § 1673. These regulations are found in 29 C.F.R. §§ 870.1-870.11.

The term "earnings" applies to compensation paid or payable for personal services, whether it is called wages, salary, commission, bonus, or otherwise. The term includes periodic payments pursuant to a pension or retirement program. 15 U.S.C.A. § 1672(a). The term "disposable earnings" means that part of the earnings remaining after the deductions of those amounts required by law to be withheld. § 1672(b). This would mean the amount remaining after state and federal income taxes and Social Security taxes have been withheld, but before any deductions have been made for items such as insurance, uniforms and credit union payments.

a. Garnishment for Support of a Person

The above restrictions do not apply in the case of an order for support of any person, an order in a Chapter 13 bankruptcy case, or to any debt due for any state or federal tax. 15 U.S.C.A. § 1673(b)(1). In cases where an individual's disposable earnings are subject to garnishment to enforce any order for the support of any person, the maximum amount which may be withheld is determined by § 1673(b)(2). If the individual is supporting a spouse or dependent child (other than the spouse or child with respect to whose support the order is used), the maximum amount of the disposable earnings which is subject to garnishment is 50%. If the individual is not supporting a spouse or dependent child, then the maximum amount of the disposable earnings which is subject to garnishment is 60%. If the garnishment is to enforce a support order with respect to a period which is prior to the 12-week period that ends with the beginning of the workweek to which the garnishment applies, the 50% and 60% specified above are increased to 55% and 65%, respectively. § 1673(b)(2). Also, support orders can affect the amount which other creditors can garnish from an individual's earnings.

b. Calculating Exempt Wages

Since July 9, 2004, the federal minimum hourly wage has been $7.25. In order to determine the amount of an individual's disposable earnings not subject to garnishment, the following formula is applied: the number of work weeks or fractions thereof X 30 X the federal minimum wage. Based on the current $7.25 minimum wage, the disposable earnings of a person paid weekly would not be subject to garnishment unless the amount exceeds $217.50. (1 week X 30 X $7.25 = $217.50). If an individual's disposable earnings for one week are more than $217.50, but less than $290.00, then only the amount over $217.50 is subject to garnishment. If an individual's disposable earnings for a week are $290 or more, 25% of the amount over $217.50 is subject to garnishment. The following chart may be used to determine the amount of disposable earnings subject to the garnishment. (The calculations for bi-monthly and monthly wages are based on a calendar month being considered to consist of 4 1/3 work weeks. See 29 C.F.R. § 870.10(c)(2).)

Weekly	Bi-Weekly	Semi-Monthly	Monthly
$217.50 or less: none	$435 or less: none	$471.25 or less none	$942.50 or less none
more than $217.50, less than $290: amount above $217.50	more than $435, less than $580: amount above $435	more than $471.25, less than $628.33: amount above $471.25	more than $942.50, less than $1,256.66: amount above $942.50
$290 or more: maximum 25%	$580 or more: maximum 25%	$628.33 or more: maximum 25%	$1,256.66 or more: maximum 25%

source: dol.gov/whd/regs/compliance/whdfs30.pdf

c. Application to Support Payments

In 15 U.S.C.A. § 1672(c), "garnishment" is defined as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt". Therefore, court-ordered wage assignments for support are considered to be garnishments, and, in states where there is a priority for the payment of such orders, an ordinary judgment creditor will only be able to garnish that amount, if any, which is not being withheld pursuant to the court- ordered wage assignment for support. Therefore, if the support assignment (which could affect as much as 65% of the earnings; see § (a) above), results in 25% or more of the affected earnings being withheld, the ordinary judgment creditor would not be entitled to anything. If, on the other hand, the support order requires less than the maximum amount to be withheld, the judgment creditor will be entitled to a withholding - - but, only for an amount equal to the maximum as calculated pursuant to the chart in (b) above, less the amount of the support. (e.g., weekly disposable earnings of $400, subject to a judicial wage assignment for support in the amount of $100 per week, will not be subject to any further garnishment by an ordinary judgment creditor, whereas, the same earnings, subject to a support order in the amount of $70 per week would be subject to an additional garnishment of as much as $30 per week.

In Arkansas, the basic authority for the priority of income withholding pursuant to orders of support is codified at Ark. Code Ann. § 9-14-219. In addition, Ark. Code Ann. § 9-14-507 gives a priority to income withholding orders for health care coverage, subordinate only to an order of income withholding for child support.

d. Protection of Debtor's Employment

An employer may not discharge an employee whose earnings have been subject to garnishment for any one indebtedness, 15 U.S.C.A. § 1674(a), regardless of the number of garnishments. An employer who willfully violates that provision is subject to $1,000 fine or to imprisonment for not more than one year, or both. § 1674(b). Discharge of an employee whose wages have been garnished on more than one indebtedness is not prohibited unless the discharge results in discrimination based on race, color, sex, religion or national origin. Johnson v. Pike Corp. of America, 332 F. Supp. 490 (D.C. Calif. 1971).

2. Exempt Government Benefits

Federal law also provides that certain types of government benefits are exempt. These include Social Security payments, 42 U.S.C.A. § 407, Supplemental Security Income benefits, 42 U.S.C.A. § 1383(d), Veterans Administration benefits, 38 U.S.C.A. § 301, Railroad Retirement, 45 U.S.C.A. § 321m, War Hazard Compensation, 33 U.S.C.A. §916, savings deposits of members of the armed forces on a permanent duty assignment outside the United States or its possessions, 10 U.S.C.A. §1035, and foreign service retirement and disability benefits, actions or proceedings against a person in military service may be stayed. 50 App. U.S.C.A. § 523. The above statues should be carefully checked for exceptions before they are relied upon.

(2001 Repl.)

IV

Bankruptcy

A. Generally

Bankruptcy is often the best solution for a debtor, especially when the value of his/her property exceeds the amount exempt from execution under state law or when Arkansas exemption statutes cannot be applied to the underlying debt. For example, the personal property exemptions provided in Ark. Const. Art. 9, §§ 1 and 2 apply only when the underlying debt was due by reason of contract and thus would not protect a debtor if the judgment was for damages in a personal injury action.

The Bankruptcy Reform Act of 1978, at 11 U.S.C.A. § 101 et seq., is divided into seven chapters. Chapters 1, 3, and 5 contain provisions which are generally applicable in all bankruptcy cases. Chapters 7, 9, 11, 12, and 13 each cover specific types of bankruptcy actions. Of particular concern to legal services attorneys are Chapter 7, covering liquidation cases ("straight" bankruptcies), and Chapter 13, providing for adjustment of debts of an individual with regular income (the successor to the old Chapter XIII "wage earner plan").

The "Bankruptcy Amendments and Federal Judgeship Act of 1984," 11 U.S.C. § 101 et seq. (Supp. 1987), created a new bankruptcy system in which the Federal District Court has original and exclusive jurisdiction in all "cases under Title II," with the discretionary power to delegate some of the proceedings to the bankruptcy judges. Bankruptcy judges may now hear all "cases under Title II" and all "core proceedings" as defined by 11 U.S.C. § 198 (Supp. 1987).

The Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, 11 U.S.C. § 101 et seq. (Supp. 1987), adds a new Chapter 12 to the Bankruptcy Code for bankruptcies of family farmers. However, Chapter 12 will not be covered here.

B. State Exemptions in Bankruptcy

Federal law provides debtors with a choice between state law exemptions and the federal bankruptcy exemptions contained in that section unless the state has passed legislation specifically eliminating the federal exemptions. 11 U.S.C.A. § 522. Arkansas enacted such legislation in 1981. A.C.A. § 16-66-217. This was repealed by Act 345 of 1991, and Arkansas residents once again have a choice between state law exemptions and the federal bankruptcy exemptions. A.C.A. § 16-66-217 (Supp. 1991). The state exemptions provided in A.C.A. § 16-66-218 remain in effect, although there is considerable doubt as to the constitutionality of this statute. The petitioner in FSLIC v. Holt (In re Holt), 894 F.2d 1005 (8th Cir. 1990), claimed as exempt the proceeds of the insurance policy on the life of her deceased husband. A.C.A. § 16-66-209 provides that proceeds of life, health, accident, and disability insurance are exempt from liability or seizure under judicial process. A.C.A. § 16-66-281(b)(7) provides that this exemption is available to the debtor in a bankruptcy proceeding. In effect, this provision gives debtors only temporary protection in that such proceeds are not subject to garnishment while in the hands of the insurance company. The court in Holt held that this provision is unconstitutional in that it allows the exemption to become permanent by the U.S. Bankruptcy Code. Holt would seemingly also apply to similar provisions which convert temporary exemptions to permanent ones in the bankruptcy context, although they would probably not be unconstitutional outside of the bankruptcy situation. See, W.B. Worthen Co. v. Thomas, 488 Ark. 249, 65 S.W.2d 917 (1933), rev'd on other grounds, 292 U.S. 426 (1934). See, generally, Laurence, In re Holtand the Re-making of Arkansas Exemption Law: Commentary after the Rout, 43 Ark. L. Rev. 235 (1989).

With the state bankruptcy exemptions provided in A.C.A. § 16-66-218 thus unavailable, the legislature repealed § 16-66-217 and enacted the new provision, also codified as § 16-66-217, which provides that residents of Arkansas may once again in bankruptcy proceedings elect either the state exemptions or the exemptions provided by 11 U.S.C.A. § 522(d). The Arkansas constitutional exemptions are thus still available to the bankruptcy debtor.

The following exemptions are currently available under federal law at 11 U.S.C. § 522(d). However, Congress has provided for an automatic adjustment to all of the dollar amounts, which is tied to the Consumer Price Index for Urban Consumers. The next adjustment is scheduled to take effect on April 1, 1998, with further adjustments to occur every three years thereafter. It is the responsibility of the Judicial Conference of the United States to publish the new dollar amounts in the Federal Register, no later than March 1 of each year in which an adjustment is to occur. 11 U.S.C.A. § 104.

- the debtor's aggregate interest, not to exceed $15,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor; 11 U.S.C.A. § 522(d)(1)
- the debtor's interest, not to exceed $2,400 in value, in one motor vehicle; 11 U.S.C.A. § 522(d)(2)
- the debtor's interest, not to exceed $400 in value in any particular item or $8,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor; 11 U.S.C.A. § 522(d)(3)
- the debtor's aggregate interest, not to exceed $1,000 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor; 11 U.S.C.A. § 522(d)(4)
- the debtor's aggregate interest, not to exceed in value $800 plus one half of any unused amount of the exemption provided under paragraph one of this subsection, in any property; 11 U.S.C.A. § 522(d)(5)
- the debtor's aggregate interest, not to exceed $1,500 in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor; 11 U.S.C.A. § 522(d)(6)
- any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract; 11 U.S.C.A. § 522(d)(7)
- the debtor's aggregate interest, not to exceed in value $8,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent; 11 U.S.C.A. § 522(d)(8)
- professionally prescribed health aids for the debtor or a dependent of the debtor; 11 U.S.C.A. § 522(d)(9)
- the debtor's right to receive a Social Security benefit, unemployment compensation, or a local public assistance benefit; a veterans' benefit; a disability, illness, or unemployment benefit; alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; a payment under a stock bonus, pension, profit sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, with some exceptions enumerated in the statute; 11 U.S.C.A. § 522(d)(10)
- the debtor's right to receive, or property that is traceable to, an award under a crime victim's reparation law; a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor; a payment, not to exceed $15,000, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonable necessary for the support of the debtor and any dependent of the debtor; 11 U.S.C.A. § 522(d)(11)
- in joint cases filed by a husband and wife, and whose estates are ordered to be jointly administered, one debtor may not choose the state exemptions and the other debtor choose the federal exemptions; 11 U.S.C.A. § 522(b)

C. Dischargeable Debts

The discharge in bankruptcy will extinguish all personal liability for most types of debts. Several types of debts are non-dischargeable in Chapter 7 bankruptcies. 11 U.S.C.A. § 523. These include taxes that do not qualify for discharge due to the passage of time, debts obtained by fraud or false pretenses, debts not listed or scheduled on the petition, debts arising from fraud while acting in a fiduciary capacity, embezzlement or larceny, debts arising from willful and malicious injury by the debtor, and fines and penalties. Also, non-dischargeable is a debt owed to a spouse, a former spouse, or child of the debtor for alimony, maintenance, or support of such spouse or child in connection with a separation agreement, divorce decree, or property settlement agreement. A debt owed to a governmental unit or non-profit institution of higher education for an educational loan is not dischargeable unless it first became due at least seven years before the date of the filing of the petition or if excepting the debt from discharge would impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C.A. § 523(a)(9) renders non-dischargeable any debt for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance. A debt owed to a spouse, a former spouse, or a child of a debtor for alimony, maintenance, or support is now non-dischargeable even if it has been assigned to the federal government, a state, or any political subdivision of a state. 11 U.S.C.A. § 523(a)(5)(A).

11 U.S.C.A. § 523(d) provides for costs and attorney fees to be awarded to the debtor in some cases in which the creditor requests a determination of the dischargeability of a consumer debt. This subsection applies when a creditor challenges the dischargeability of a debt by alleging that the debt was incurred by fraud or false pretenses.

D. Advantages of Chapter 13

There are a number of advantages of Chapter 13 over Chapter 7. The discharge provisions of Chapter 13 are somewhat broader. If the debtor completes the plan, many debts which would be non-dischargeable in a Chapter 7 may be discharged. 11 U.S.C.A. § 1328(a). The exceptions are support for child or spouse, long term secured or unsecured claims on which the last payment is due after the final payment on the plan is made, student loans, debts owed for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug or other substance, and debts for restitution included in a sentence on the debtor's conviction of a crime. Further, the plan must provide for payment in full of all claims entitled to priority under 11 U.S.C.A. § 507 so that these debts would not be discharged in a Chapter 13. 11 U.S.C.A. § 1322(a)(2). For consumer debtors this would often include only certain taxes (see 11 U.S.C.A. § 507(7)) and administrative expenses. Other types of non-dischargeable debts under a Chapter 7 are apparently dischargeable under a Chapter 13, including debts involving false financial statements, debts arising from willful and malicious injury by the debtor, and fines and penalties.

Another important advantage of Chapter 13 is the stay of action against a co-debtor provided by 11 U.S.C.A. § 1301. Frequently, creditors require a co-signer of low-income consumers with a poor or nonexistent credit history. With a few exceptions, § 1301 provides for a stay of collection actions against co-obligors. The stay does not apply to co-debtors who became liable in the ordinary course of their business or if the Chapter 13 case is closed, dismissed, or converted to a Chapter 7 or 11 case. If the bankrupt was really the co-signer, if the plan filed by the debtor does not propose to pay the debt, or if the creditor's interest would be irreparably harmed by the stay, the creditor may request a hearing to obtain relief from the stay.

One of the greatest advantages of Chapter 13 is that the plan may modify the rights of secured creditors other than those whose claim is secured by a security interest in real property that is the debtor's principle residence. 11 U.S.C.A. § 1322(b)(2). This may be done by extending and lowering payments or allowing the curing or waiving of any default. Furthermore, the plan may be confirmed even if a secured creditor objects so long as the secured creditor retains its lien and receives, over the course of the plan, the present value of its allowed secured claim. 11 U.S.C.A. § 1325(a)(5).

E. Chapter 7 or Chapter 13

An often-difficult determination is whether a debtor should file a Chapter 7 or a Chapter 13 petition. While the debtor may not at the outset know enough about the distinctions, the debtor may at least have a vague idea of what he/she wants. They may want "out from under" their debts or they may want to pay all of their creditors eventually. It may be that the emotional burden of overwhelming debts is truly endangering the client's health and a bankruptcy is needed for psychological reasons.

In helping the client decide whether to file under Chapter 7 or Chapter 13, the client's current financial situation should be examined in detail. Obviously, it will be necessary for the client to list all debts. The types of debts involved will often help determine which petition to file. If the debts are non-dischargeable, or if there is a co-signer on a loan, the client will often be well advised to file under a Chapter 13 if the client has regular income.

In addition, the client should list all of his or her monthly living expenses. This list should include rent or house payment, utilities, food, transportation, clothing, child care if necessary for work, etc. When the figures on this list are added up and compared to the client's net income, the comparison should give an indication of whether a Chapter 13 bankruptcy is even feasible. § 109(e).

F. The Chapter 13 Plan

Under previous law the debtor who filed a Chapter 13 was required to pay his/her debts in full. This is not the case with the present Chapter 13 provisions. The only debts which must be paid in full are those granted priority under 11 U.S.C.A. § 507. These include administrative expenses; certain claims of a spouse, former spouse, or child of a debtor for alimony to,

maintenance for, or support of such person; and certain taxes. 11 U.S.C.A. § 1322(a)(2). The plan may not provide for payments over a period longer than three years unless the court, for cause, extends the time to a period not to exceed five years. 11 U.S.C.A. § 1322(c). In order to be approved, the plan must be proposed in good faith and must distribute to the creditors of allowed unsecured claims at least as much as would be paid on such a claim in a Chapter 7 liquidation case. §§ 1325(a)(3) and (4). In a typical case where there are no assets that are not exempt, the unsecured claims would not be paid anything in a Chapter 7 liquidation case, so the Chapter 13 plan might propose zero payment to the unsecured creditors. This is, of course, subject to the good faith requirement. The unsecured claims may be classified for purposes of payment as long as the plan provides the same treatment for such claim within a particular class. § 1322(a)(3).

G. Who May File Chapter 13

Chapter 13 relief is open to almost any individual with a regular income. An "individual with an income" is defined as an individual with an income "sufficiently stable and regular to enable such individual to make payments under a plan under Chapter 13 of this title, other than a stock broker or a commodity broker." 11 U.S.C.A. § 101(24). The use of a Chapter 13 is currently limited to those with unsecured debts of less than $250,000 and secured debts of less than $750,000. 11 U.S.C.A. § 109(e). However, as with the federal exemption amounts (See § B., Supra), these figures are scheduled to be adjusted on April 11, 1998, and every three years thereafter. The changes should be published in the Federal Register by March 1 of each year in which an adjustment is to occur. 11 U.S.C.A. § 104.

A Social Security or welfare recipient may seek relief under Chapter 13. The United States Courts of Appeal for the Sixth and Eleventh Circuits have both considered whether the Social Security Administration is subject to an income deduction order issued by the bankruptcy court requiring a portion of the debtor's benefits to be sent to the Chapter 13 trustee. In both cases the Social Security Administration objected and argued that the income deduction order violated the provisions of 42 U.S.C.A. §§ 407, 1383(d)(1), the anti-assignment provisions of the Social Security Act.

In United States v. Devall, 704 F.2d 1513 (11th Cir. 1983), the court noted that 11 U.S.C.A. Sec. 1325(b) states that upon confirmation of a plan the bankruptcy court may order any entity from whom the debtor receives income to pay part or all of that income to the trustee. The Act defines entity to include government agencies. 11 U.S.C.A. §§ 101(14), (21). Thus, the court reasoned, the Social Security Administration is subject to an income deduction order issued by the bankruptcy court.

In 1983, however, Congress amended the Social Security Act to bar repeal of the anti-assignment provision by implication. 42 U.S.C.A. § 407(b). In light of that amendment, the Sixth Circuit, in Hilderbrand v. Social Security Administration (In re Buren), 725 F.2d 1080 (6th Cir. 1984), rejected Devall and barred a deduction order against the Social Security Administration.

In Bibb County Department of Family & Children Services v. Hope (In re Hammonds), 729 F.2d 1391 (11th Cir. 1984), an AFDC recipient sought to use her welfare check to fund a Chapter 13 plan. The Eleventh Circuit held the AFDC payment to be part of the debtor's estate. Therefore, the court allowed an income deduction order directing the welfare department to mail the debtor's AFDC check to the Chapter 13 trustee.

V

Usury

Overview

Article 19 § 13 as amended by Amendment 60 of the Arkansas Constitution sets the maximum lawful rates of interest in Arkansas. Ark. Const. Art. 19, § 13(a)(I) provides that the maximum lawful rate of interest for any contract entered into after this effective date shall not exceed five percent per annum above the Federal Discount Rate at the time of the contract. Contracts having a rate of interest in excess of this shall be void as to the unpaid interest and if interest in excess of the maximum lawful rate has been paid, the person who has paid that interest may recover twice the amount paid. Ark. Const. Art. 19, § 13(a)(ii). Ark. Const. Art. 19, § 13(b) contains separate provisions which apply to consumer loans and credit sales. All contracts for consumer loans and credit sales having a rate of interest greater than 17% per annum shall be void as to the principal and interest. Ark. Const. Art. 19, § 13(c)(I) defines consumer loans and credit sales "as credit extended to a natural person in which their money, property, or service which is the subject of the transaction is primary for a personal family or household purposes." Art. 19, § 13(d)(ii) specifically provides that these provisions are not intended and shall not be deemed to supersede or invalidate provisions of federal law applicable to loans or interest rates, including loans secured by residential real property.

The Arkansas Supreme Court, in Bishop v. Linkway Stores, Inc., 280 Ark. 106, 655 S.W.2d 426 (Ark. 1983) held that a consumer contract which provided for interest at the rate of 15% at a time when the Federal Reserve Discount rate was 8.5% exceeded the lawful rate provided for under the Arkansas Constitution and was thus void as to unpaid interest. The court held that § 13(b) when read in conjunction with § 13(a), provides a further limitation on interest rates which is applicable only to consumer loans and credit sales. The court found that these subsections do not conflict, and that Amendment 60 provides for a two-fold limitation on the maximum amount of interest a lender can charge on a consumer loan or credit sale—the lesser of 17% or five percent over the Federal Reserve Discount rate.

The Arkansas Supreme Court in Henslee v. Madison Guaranty Savings & Loan Association, 297 Ark. 183, 760 S.W.2d 842 (1988), held that Amendment 60 by implication repealed Ark. Code Ann. §§ 4-57-101 -108, the provisions on interest and usury.