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Guy Barco Zewadski v. Ford Motor Credit Company, Rick Warner Lincoln-Mercury : Unknown

Utah Court of Appeals

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Guy B. Zewadski; Appearing pro-se; Appellant.

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IN THE UTAH COURT OF APPEALS

GUY BARCO ZEWADESKI,
Plaintiff, Appellant,

vs.

FORD MOTOR CREDIT COMPANY,
Defendant, Appellee,
and,

RICK WARNER LINCOLN-MERCURY,
Defendant, Appellee.

APPEAL No. 920226
(890901423CN)

Category 16

**PAMPHLET OF APPELLANT OF STATUTES, RULES, ETC;
PURSUANT TO U.R.A.P. 24 (F)**

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE PAT B. BRIAN PRESIDING

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UTAH COURT OF APPEALS
BRIEF

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FILED
Utah Court of Appeals

FEB 11 1993


Mary T. Noonan
Clark of the Court

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§ 2301. Definitions

For the purposes of this chapter:

(1) The term "consumer product" means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

(2) The term "Commission" means the Federal Trade Commission.

(3) The term "consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

(4) The term "supplier" means any person engaged in the business of making a consumer product directly or indirectly available to consumers

(5) The term "warrantor" means any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty

(6) The term "written warranty" means—

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,

which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product

(7) The term "implied warranty" means an implied warranty arising under State law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product

(8) The term "service contract" means a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product.

(9) The term "reasonable and necessary maintenance" consists of those operations (A) which the consumer reasonably can be expected to perform or have performed and (B) which are necessary to keep any consumer product performing its intended function and operating at a reasonable level of performance

(10) The term "remedy" means whichever of the following actions the warrantor elects

(A) repair,

(B) replacement, or

(C) refund,

except that the warrantor may not elect refund unless (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or (ii) the consumer is willing to accept such refund

(11) The term "replacement" means furnishing a new consumer product which is identical or reasonably equivalent to the warranted consumer product

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Note 2

(12) The term "refund" means refunding the actual purchase price (less reasonable depreciation based on actual use where permitted by rules of the Commission)

(13) The term "distributed in commerce" means sold in commerce, introduced or delivered for introduction into commerce, or held for sale or distribution after introduction into commerce.

(14) The term "commerce" means trade, traffic, commerce, or transportation—

(A) between a place in a State and any place outside thereof, or

(B) which affects trade, traffic, commerce, or transportation described in subparagraph (A)

(15) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Canal Zone, or American Samoa. The term "State law" includes a law of the United States applicable only to the District of Columbia or only to a territory or possession of the United States, and the term "Federal law" excludes any State law

(Pub L 93-637, Title I, § 101, Jan 4, 1975, 88 Stat 2183)

Historical Note

References in Text. For definition of Canal Zone, referred to in par (15), see section 3602(b) of Title 22, Foreign Relations and Intercourse

Effective Date. Section effective six months after Jan 4, 1975, but inapplicable to consumer products manufactured prior to such date, see section 2312 of this title

Short Title. Section 1 of Pub L 93-637 provided "That this Act [which enacted this

chapter and sections 57a to 57c of this title, amended sections 45, 46, 49, 50, 52, 56 and 58 of this title, and enacted provisions set out as notes under sections 45, 56, 57a and 57b of this title] may be cited as the 'Magnuson-Moss Warranty—Federal Trade Commission Improvement Act' "

Legislative History. For legislative history and purpose of Pub L 93-637, see 1974 U S Code Cong and Adm News, p 7702

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Consumer products 2 Law governing 1

1. Law governing

Fact that this section defines term "implied warranty" as an implied warranty arising under state law means that this chapter, insofar as it permits recovery for breach of implied warranty relies upon state law and thus state vertical privity rules control and applicable measure of damages is that provided by state law *Mendelson v General Motors Corp*, Sup 1980, 432 N Y S 2d 132

2. Consumer products

Determination of whether airplane was a consumer product covered by this chapter could not be made as a matter of law but required a factual resolution as to whether the aircraft was normally used for personal, family, or household purposes *Balser v Cessna Aircraft Co*, D C Ga 1981, 512 F Supp 1217

The provisions of this chapter apply only to consumer products, that is, tangible personal property distributed in commerce which is normally used for personal, family or household purposes, and thus such provisions did not apply to airplane engine made by Alabama motor manufacturing corporation *Patron Aviation, Inc v Teledyne Industries Inc*, 1980, 267 S E 2d 274, 154 Ga App 13

§ 2302. Rules governing contents of warranties

Full and conspicuous disclosure of terms and conditions; additional requirements for contents

(a) In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Such rules may require inclusion in the written warranty of any of the following items among others:

(1) The clear identification of the names and addresses of the warrantors.

(2) The identity of the party or parties to whom the warranty is extended.

(3) The products or parts covered.

(4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty—at whose expense—and for what period of time.

(5) A statement of what the consumer must do and expenses he must bear.

(6) Exceptions and exclusions from the terms of the warranty.

(7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty.

(8) Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.

(9) A brief, general description of the legal remedies available to the consumer.

(10) The time at which the warrantor will perform any obligations under the warranty.

(11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.

(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.

(13) 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.

Availability of terms to consumer; manner and form for presentation and display of information; duration; extension of period for written warranty or service contract

(b)(1)(A) The Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him.

(B) The Commission may prescribe rules for determining the manner and form in which information with respect to any written warranty of a consumer product shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing.

(2) Nothing in this chapter (other than paragraph (3) of this subsection) shall be deemed to authorize the Commission to prescribe the duration of written warranties given or to require that a consumer product or any of its components be warranted.

(3) The Commission may prescribe rules for extending the period of time a written warranty or service contract is in effect to correspond with any period of time in excess of a reasonable period (not less than 10 days) during which the consumer is deprived of the use of such consumer product by reason of failure of the product to conform with the written warranty or by reason of the failure of the warrantor (or service contractor) to carry out such warranty (or service contract) within the period specified in the warranty (or service contract).

Prohibition on conditions for written or implied warranty; waiver by Commission

(c) No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name; except that the prohibition of this subsection may be waived by the Commission if—

(1) the warrantor satisfies the Commission that the warranted product will function properly only if the article or service so identified is used in connection with the warranted product, and

(2) the Commission finds that such a waiver is in the public interest. The Commission shall identify in the Federal Register, and permit public comment on, all applications for waiver of the prohibition of this subsection, and shall publish in the Federal Register its disposition of any such application, including the reasons therefor.

Incorporation by reference of detailed substantive warranty provisions

(d) The Commission may by rule devise detailed substantive warranty provisions which warrantors may incorporate by reference in their warranties.

Applicability to consumer products costing more than \$5.00

(e) The provisions of this section apply only to warranties which pertain to consumer products actually costing the consumer more than \$5.

(Pub.L. 93-637, Title I, § 102, Jan. 4, 1975, 88 Stat. 2185.)

Historical Note

Effective Date. Subsec. (a) of this section effective six months after the final publication of rules respecting such subsection, except that Commission, for good cause shown, may postpone applicability until one year after final publication, see section 2312(b) of this title.

Subsecs. (b) to (e) of this section effective six months after Jan. 4, 1975, but inapplicable to consumer products manufactured prior to such date, see section 2312(a) of this title.

Legislative History. For legislative history and purpose of Pub.L. 93-637, see 1974 U.S. Code Cong. and Adm. News, p. 7702.

Code of Federal Regulations

Additional requirements, see 16 CFR 701.1 et seq., 702.1 et seq.

Library References

Consumer Protection § 36.
C.J.S. Trade-Marks, Trade-Names, and Unfair Competition §§ 237, 238.

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sylvania to the dealership in Ohio for repairs was not impermissible under this chapter where the buyers bought the motor home in Ohio with knowledge that they would have to return the motor home to Ohio for repairs and regular maintenance. *Pratt v. Winnebago Industries, Inc.*, D.C.Pa.1979, 463 F.Supp. 709.

§ 2303. Designation of written warranties**Full (statement of duration) or limited warranty**

(a) Any warrantor warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty in the following manner, unless exempted from doing so by the Commission pursuant to subsection (c) of this section:

(1) If the written warranty meets the Federal minimum standards for warranty set forth in section 2304 of this title, then it shall be conspicuously designated a "full (statement of duration) warranty".

(2) If the written warranty does not meet the Federal minimum standards for warranty set forth in section 2304 of this title, then it shall be conspicuously designated a "limited warranty".

Applicability of requirements, standards, etc., to representations or statements of customer satisfaction

(b) This section and sections 2302 and 2304 of this title shall not apply to statements or representations which are similar to expressions of general

policy concerning customer satisfaction and which are not subject to any specific limitations.

Exemptions by Commission

(c) In addition to exercising the authority pertaining to disclosure granted in section 2302 of this title, the Commission may by rule determine when a written warranty does not have to be designated either "full (statement of duration)" or "limited" in accordance with this section.

Applicability to consumer products costing more than \$10.00 and not designated as full warranties

(d) The provisions of subsections (a) and (c) of this section apply only to warranties which pertain to consumer products actually costing the consumer more than \$10 and which are not designated "full (statement of duration) warranties".

(Pub.L. 93-637, Title I, § 103, Jan. 4, 1975, 88 Stat. 2187.)

Historical Note

Effective Date. Section effective six months after Jan. 4, 1975, but inapplicable to consumer products manufactured prior to such date, see section 2312 of this title.

Legislative History. For legislative history and purpose of Pub.L. 93-637, see 1974 U.S. Code Cong. and Adm. News, p. 7702.

Library References

Consumer Protection § 30.
C.J.S. Trade-Marks, Trade-Names, and Unfair Competition §§ 237, 238.

§ 2304. Federal minimum standards for warranties

Remedies under written warranty; duration of implied warranty; exclusion or limitation on consequential damages for breach of written or implied warranty; election of refund or replacement

(a) In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty—

(1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 2308(b) of this title, such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to elect either a refund for, or replacement with-

out charge of, such product or part (as the case may be). The Commission may by rule specify for purposes of this paragraph, what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances. If the warrantor replaces a component part of a consumer product, such replacement shall include installing the part in the product without charge.

Duties and conditions imposed on consumer by warrantor

(b)(1) In fulfilling the duties under subsection (a) of this section respecting a written warranty, the warrantor shall not impose any duty other than notification upon any consumer as a condition of securing remedy of any consumer product which malfunctions, is defective, or does not conform to the written warranty, unless the warrantor has demonstrated in a rulemaking proceeding, or can demonstrate in an administrative or judicial enforcement proceeding (including private enforcement), or in an informal dispute settlement proceeding, that such a duty is reasonable.

(2) Notwithstanding paragraph (1), a warrantor may require, as a condition to replacement of, or refund for, any consumer product under subsection (a) of this section, that such consumer product shall be made available to the warrantor free and clear of liens and other encumbrances, except as otherwise provided by rule or order of the Commission in cases in which such a requirement would not be practicable.

(3) The Commission may, by rule define in detail the duties set forth in subsection (a) of this section and the applicability of such duties to warrantors of different categories of consumer products with "full (statement of duration)" warranties.

(4) The duties under subsection (a) of this section extend from the warrantor to each person who is a consumer with respect to the consumer product.

Waiver of standards

(c) The performance of the duties under subsection (a) of this section shall not be required of the warrantor if he can show that the defect, malfunction, or failure of any warranted consumer product to conform with a written warranty, was caused by damage (not resulting from defect or malfunction) while in the possession of the consumer, or unreasonable use (including failure to provide reasonable and necessary maintenance).

Remedy without charge

(d) For purposes of this section and of section 2302(c) of this title, the term "without charge" means that the warrantor may not assess the consumer for any costs the warrantor or his representatives incur in connection with the required remedy of a warranted consumer product. An obligation under subsection (a)(1)(A) of this section to remedy without charge does not necessarily require the warrantor to compensate the consumer for incidental expenses; however, if any incidental expenses are incurred because the remedy is not made within a reasonable time or because the warrantor imposed an unreasonable duty upon the consumer as a condition of securing remedy,

then the consumer shall be entitled to recover reasonable incidental expenses which are so incurred in any action against the warrantor.

Incorporation of standards to products designated with full warranty for purposes of judicial actions

(e) If a supplier designates a warranty applicable to a consumer product as a "full (statement of duration)" warranty, then the warranty on such product shall, for purposes of any action under section 2310(d) of this title or under any State law, be deemed to incorporate at least the minimum requirements of this section and rules prescribed under this section.

(Pub.L. 93-637, Title I, § 104, Jan. 4, 1975, 88 Stat. 2187.)

Historical Note

Effective Date. Section effective six months after Jan. 4, 1975, but inapplicable to consumer products manufactured prior to such date, see section 2312 of this title.

Legislative History. For legislative history and purpose of Pub.L. 93-637, see 1974 U.S. Code Cong. and Adm. News, p. 7702.

Library References

Consumer Protection § 30.
C.J.S. Trade-Marks, Trade-Names, and Un-
fair Competition §§ 237, 238.

Notes of Decisions

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1. Elements of action

Cause of action exists under this chapter where there has been breach of warranty which has not been remedied although warrantor has been given reasonable opportunity to cure breach. *Gates v. Chrysler Corp.*, Fla. App.1981, 397 So.2d 1187.

2. Refund of purchase price

Pursuant to section 2311(b)(1) of this title which provides that nothing in this chapter restrict any right or remedy of any consumer under State or other Federal law, granting of remedy of refund of purchase price under N.J.S.A. 12A:2-608 and 711 for breach of limited warranty is not barred by or inconsistent with this section. *Ventura v. Ford Motor Corp.*, 1981, 433 A.2d 801, 180 N.J.Super. 45.

3. Rescission of contract

Refusal of purchasers of recreational vehicle to return the vehicle to the dealer for repairs was not reasonable in view of the manufacturers' willingness to make the needed repairs, in view of the fact that the repairs could be remedied in only a few days, and in view of the fact that the dealer had offered to transport the vehicle to its place of business for repairs; the refusal also could not be justified by the buyers' unwillingness to pay Pennsylvania sales tax for license plate for the motor home, which they purchased in Cleveland, so that purchasers were not entitled to rescission of the contract under this section. *Pratt v. Winnebago Industries, Inc.*, D.C.Pa.1979, 463 F.Supp. 709.

4. Questions for jury

In buyer's action under this chapter against automobile manufacturer, there was more than slight evidence of breach of warranty, and thus, sufficient evidence to go to jury on question of whether there had been breach of warranty which had not been remedied although warrantor had been given reasonable opportunity to cure breach. *Gates v. Chrysler Corp.*, Fla.App.1981, 397 So.2d 1187.

§ 2305. Full and limited warranting of a consumer product

Nothing in this chapter shall prohibit the selling of a consumer product which has both full and limited warranties if such warranties are clearly and conspicuously differentiated.

(Pub.L. 93-637, Title I, § 105, Jan. 4, 1975, 88 Stat. 2188.)

Historical Note

<p>Effective Date. Section effective six months after Jan. 4, 1975, but inapplicable to consumer products manufactured prior to such date, see section 2312 of this title.</p>	<p>Legislative History. For legislative history and purpose of Pub.L. 93-637, see 1974 U.S. Code Cong. and Adm. News, p. 7702.</p>
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Library References

Sales Ⓒ260.

C.J.S. Sales § 307 et seq.

§ 2306. Service contracts; rules for full, clear and conspicuous disclosure of terms and conditions; addition to or in lieu of written warranty

(a) The Commission may prescribe by rule the manner and form in which the terms and conditions of service contracts shall be fully, clearly, and conspicuously disclosed.

(b) Nothing in this chapter shall be construed to prevent a supplier or warrantor from entering into a service contract with the consumer in addition to or in lieu of a written warranty if such contract fully, clearly, and conspicuously discloses its terms and conditions in simple and readily understood language.

(Pub.L. 93-637, Title I, § 106, Jan. 4, 1975, 88 Stat. 2188.)

Historical Note

<p>Effective Date. Section effective six months after Jan. 4, 1975, but inapplicable to consumer products manufactured prior to such date, see section 2312 of this title.</p>	<p>Legislative History. For legislative history and purpose of Pub.L. 93-637, see 1974 U.S. Code Cong. and Adm. News, p. 7702.</p>
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Library References

Sales Ⓒ252.

C.J.S. Sales § 303.

§ 2307. Designation of representatives by warrantor to perform duties under written or implied warranty

Nothing in this chapter shall be construed to prevent any warrantor from designating representatives to perform duties under the written or implied warranty: *Provided*, That such warrantor shall make reasonable arrangements for compensation of such designated representatives, but no such designation shall relieve the warrantor of his direct responsibilities to the consumer or make the representative a cowarrantor.

(Pub.L. 93-637, Title I, § 107, Jan. 4, 1975, 88 Stat. 2189.)

Historical Note

Effective Date. Section effective six months after Jan. 4, 1975, but inapplicable to consumer products manufactured prior to such date, see section 2312 of this title.

Legislative History. For legislative history and purpose of Pub.L. 93-637, see 1974 U.S. Code Cong. and Adm. News, p. 7702.

§ 2308. Implied warranties**Restrictions on disclaimers or modifications**

(a) No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

Limitation on duration

(b) For purposes of this chapter (other than section 2304(a)(2) of this title), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

Effectiveness of disclaimers, modifications, or limitations

(c) A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law.

(Pub.L. 93-637, Title I, § 108, Jan. 4, 1975, 88 Stat. 2189.)

Historical Note

Effective Date. Section effective six months after Jan. 4, 1975, but inapplicable to consumer products manufactured prior to such date, see section 2312 of this title.

Legislative History. For legislative history and purpose of Pub.L. 93-637, see 1974 U.S. Code Cong. and Adm. News, p. 7702.

Library References

Consumer Protection § 36.
C.J.S. Trade-Marks, Trade-Names, and Unfair Competition §§ 237, 238.

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1. Notice

Absent indication that automobile manufacturer attempted at any time to restrict, modify, or disclaim any implied warranties, there was no requirement of written notice and no violation of this chapter. *Gates v.*

Chrysler Corp., Fla.App.1981, 397 So.2d 1187.

2. Limitation on duration

Since paragraph of automobile purchase order-contract providing that selling dealer agreed to promptly perform and fulfill all terms and conditions of owner service policy constituted written warranty within meaning of this chapter, dealer as supplier could not disclaim or modify except to limit in duration any implied warranty to buyer of automobile.

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and attempted disclaimer by dealer of implied warranties of merchantability and fitness were invalid. *Ventura v. Ford Motor Corp.*, 1981, 433 A.2d 801, 180 N.J.Super. 45.

§ 2309. Procedures applicable to promulgation of rules by Commission; rulemaking proceeding for warranty and warranty practices involved in sale of used motor vehicles

(a) Any rule prescribed under this chapter shall be prescribed in accordance with section 553 of Title 5; except that the Commission shall give interested persons an opportunity for oral presentations of data, views, and arguments, in addition to written submissions. A transcript shall be kept of any oral presentation. Any such rule shall be subject to judicial review under section 57a(e) of this title in the same manner as rules prescribed under section 57a(a)(1)(B) of this title, except that section 57a(e)(3)(B) of this title shall not apply.

(b) The Commission shall initiate within one year after January 4, 1975, a rulemaking proceeding dealing with warranties and warranty practices in connection with the sale of used motor vehicles; and, to the extent necessary to supplement the protections offered the consumer by this chapter, shall prescribe rules dealing with such warranties and practices. In prescribing rules under this subsection, the Commission may exercise any authority it may have under this chapter, or other law, and in addition it may require disclosure that a used motor vehicle is sold without any warranty and specify the form and content of such disclosure.

(Pub.L. 93-637, Title I, § 109, Jan. 4, 1975, 88 Stat. 2189.)

Historical Note

Effective Date. Section effective six months after Jan. 4, 1975, but inapplicable to consumer products manufactured prior to such date, see section 2312 of this title.

Legislative History. For legislative history and purpose of Pub.L. 93-637, see 1974 U.S. Code Cong. and Adm. News, p. 7702.

Library References

Administrative Law and Procedure § 392.
C.J.S. Public Administrative Bodies and Procedure § 97.

§ 2310. Remedies in consumer disputes

Informal dispute settlement procedures; establishment; rules setting forth minimum requirements; effect of compliance by warrantor; review of informal procedures or implementation by Commission; application to existing informal procedures

(a)(1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

(2) The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter

applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

(3) One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules under paragraph (2). If—

(A) a warrantor establishes such a procedure,

(B) such procedure, and its implementation, meets the requirements of such rules, and

(C) he incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty,

then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure; and (ii) a class of consumers may not proceed in a class action under subsection (d) of this section except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the named plaintiffs (upon notifying the defendant that they are named plaintiffs in a class action with respect to a warranty obligation) initially resort to such procedure. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure. In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence.

(4) The Commission on its own initiative may, or upon written complaint filed by any interested person shall, review the bona fide operation of any dispute settlement procedure resort to which is stated in a written warranty to be a prerequisite to pursuing a legal remedy under this section. If the Commission finds that such procedure or its implementation fails to comply with the requirements of the rules under paragraph (2), the Commission may take appropriate remedial action under any authority it may have under this chapter or any other provision of law.

(5) Until rules under paragraph (2) take effect, this subsection shall not affect the validity of any informal dispute settlement procedure respecting consumer warranties, but in any action under subsection (d) of this section, the court may invalidate any such procedure if it finds that such procedure is unfair.

Prohibited acts

(b) It shall be a violation of section 45(a)(1) of this title for any person to fail to comply with any requirement imposed on such person by this chapter (or a rule thereunder) or to violate any prohibition contained in this chapter (or a rule thereunder).

Injunction proceedings by Attorney General or Commission for deceptive warranty, noncompliance with requirements, or violating prohibitions; procedures; definitions

(c)(1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purpose, to restrain (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this chapter or from violating any prohibition contained in this chapter. Upon proper showing that, weighing the equities and considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 45 of this title is not filed within such period (not exceeding 10 days) as may be specified by the court after the issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect. Any suit shall be brought in the district in which such person resides or transacts business. Whenever it appears to the court that the ends of justice require that other persons should be parties in the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district.

(2) For the purposes of this subsection, the term "deceptive warranty" means (A) a written warranty which (i) contains an affirmation, promise, description, or representation which is either false or fraudulent, or which, in light of all of the circumstances, would mislead a reasonable individual exercising due care; or (ii) fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or (B) a written warranty created by the use of such terms as "guaranty" or "warranty", if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

Civil action by consumer for damages, etc.; jurisdiction; recovery of costs and expenses; cognizable claims

(d)(1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of

the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection—

(A) if the amount in controversy of any individual claim is less than the sum or value of \$25;

(B) if the amount in controversy is less than the sum or value of \$50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

Class actions; conditions; procedures applicable

(e) No action (other than a class action or an action respecting a warranty to which subsection (a)(3) of this section applies) may be brought under subsection (d) of this section for failure to comply with any obligation under any written or implied warranty or service contract, and a class of consumers may not proceed in a class action under such subsection with respect to such a failure except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action (other than a class action respecting a warranty to which subsection (a)(3) of this section applies) brought under subsection (d) of this section for breach of any written or implied warranty or service contract, such reasonable opportunity will be afforded by the named plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure.

Warrantors subject to enforcement of remedies

(f) For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person.

(Pub.L. 93-637, Title I, § 110, Jan. 4, 1975, 88 Stat. 2189.)

Historical Note

References in Text. Rule 23 of the Federal Rules of Civil Procedure, referred to in subsecs. (a)(3) and (e), is rule 23, Federal Rules of Civil Procedure, Title 28.

Effective Date. Section effective six months after Jan. 4, 1975, but inapplicable to consumer products manufactured prior to such date see section 2312 of this title.

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Legislative History. For legislative history and purpose of Pub.L. 93-637, see 1974 U.S. Code Cong. and Adm. News, p. 7702.

West's Federal Forms

Actions by United States or officers thereof, see §§ 1069 to 1072.
Class actions, see § 3061 et seq.
Jurisdiction and venue in district courts, matters pertaining to, see § 1001 et seq.
Preliminary injunctions and temporary restraining orders, matters pertaining to, see § 5271 et seq.
Service of process, see § 1301 et seq.
Taxation of costs, see §§ 4612 to 4632.

Code of Federal Regulations

Additional requirements, see 16 CFR 703.1 et seq.

Library References

Consumer Protection  30, 31.
C.J.S. Trade-Marks, Trade-Names, and Unfair Competition §§ 237, 238.

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1. Purpose

Purpose of jurisdictional provisions in this section is two-fold, i.e., to avoid trivial or minor actions being brought as class actions in federal district courts, and to overcome absence of an amount in controversy requirement, since this chapter is an Act regulating commerce. *Novosel v. Northway Motor Car Corp.*, D.C.N.Y.1978, 460 F.Supp. 541.

2. Law governing

Resort to state law is proper to determine applicable measure of damages under this chapter. *MacKenzie v. Chrysler Corp.*, C.A. Miss.1979, 607 F.2d 1162.

Applicable law for purposes of proper measure of damages under this section could be found by reference to law of New York, whose applicable statutes, McKinney's N.Y. Uniform Commercial Code, §§ 2-714, 2-715, contained no indication that punitive damages were an element of recovery in breach of warranty cases. *Novosel v. Northway Motor Car Corp.*, D.C.N.Y.1978, 460 F.Supp. 541.

3. Opportunity to cure default

Opportunity given by buyer to automobile dealer to repair automobile as manufacturer's designated representative to whom buyer was required to bring automobile for repair, satisfied subsec. (c) of this section. *Ventura v. Ford Motor Corp.*, 1981, 433 A.2d 801, 180 N.J.Super. 45.

4. Persons subject to enforcement of remedies

Absence of privity of contract between sailboat buyer and corporation, which was both

manufacturer of the boat and the seller of component parts, was not fatal to buyer's claim against manufacturer assembler for breach of express warranty. *Richard W. Cooper Agency, Inc. v. Irwin Yacht and Marine Corp.*, N.C.App.1980, 264 S.E.2d 768.

5. Jurisdiction—Generally

In that provisions of this section setting forth jurisdictional prerequisites for an action under this chapter are written in the disjunctive, all three paragraphs of subsec. (d) of this section must be satisfied. *Barr v. General Motors Corp.*, D.C.Ohio 1978, 80 F.R.D. 136.

6. — Amount in controversy

This section limits federal court jurisdiction over class actions prosecuted under this chapter to those actions in which the amount of each individual claim is at least \$25, the total amount in controversy is at least \$50,000, and the number of named plaintiffs is at least 100. In *re General Motors Corp. Engine Interchange Litigation*, C.A.Ill.1979, 594 F.2d 1106, certiorari denied 100 S.Ct. 146, 444 U.S. 870, 62 L.Ed.2d 95.

No claim was stated under this section where amount in controversy was less than \$50,000. *Reiff v. Don Rosen Cadillac-BMW, Inc.*, D.C.Pa.1980, 501 F.Supp. 77.

To vest United States district court with jurisdiction under this chapter, amount in controversy of any individual claim must exceed \$25, the total amount in controversy must exceed \$50,000, and the number of named plaintiffs must be 100 or more. *Watts v. Volkswagen Artiengesellschaft*, D.C.Ark. 1980, 488 F.Supp. 1233.

Trial court was not compelled to accept plaintiff's claim of punitive damages, however unwarranted, made for purpose of conferring federal jurisdiction under this chapter; indeed, in computing federal jurisdictional amount, a claim for punitive damages is to be given closer scrutiny, and trial judge accorded greater discretion, than a claim for actual damages. *Novosel v. Northway Motor Car Corp.*, D.C.N.Y.1978, 460 F.Supp. 541.

Subject to limitations that certain damages may not be recoverable under applicable law and that amount claimed is merely colorable for purposes of obtaining federal jurisdiction, determination of amount in controversy in actions maintained under this chapter must include consideration of both actual and punitive damages to extent claimed. *Id.*

Individual's action under this section to recover approximate \$7,000 cost of defective

automobile did not meet minimum jurisdictional amount of \$50,000 under this section, and could not be considered by federal court. *Barnette v. Chrysler Corp.*, D.C.Neb.1977, 434 F.Supp. 1167.

Provisions of subsec. (d)(3)(A), (B) of this section that no claim shall be cognizable in a suit brought under this chapter if amount in controversy of any individual claim is less than sum or value of \$25 or if amount in controversy is less than sum or value of \$50,000 computed on basis of all claims apply in individual actions as well as class actions under this chapter. *Barr v. General Motors Corp.*, D.C.Ohio 1978, 80 F.R.D. 136.

7. — Class actions

Jurisdictional prerequisites for a class action under this chapter must be met at time court certifies class action. *Barr v. General Motors Corp.*, D.C.Ohio 1978, 80 F.R.D. 136.

Where there were not 100 named plaintiffs at time federal jurisdiction was invoked, there was no subject-matter jurisdiction over class action under this chapter and no jurisdiction under section 1337 of Title 28 providing jurisdiction over civil controversy arising out of an Act of Congress regulating commerce regardless of amount in controversy. *Watts v. Volkswagen Artiengesellschaft*, D.C.Ark. 1980, 488 F.Supp. 1233.

8. — Personal jurisdiction

Where motor home purchasers brought suit against seller, manufacturer, assembler, and bank which was Maryland corporation and which was holder of security interest as assignee of seller, and purchasers claimed violation of this chapter and breach of warranty under Maryland law, district court sitting in North Carolina lacked personal jurisdiction over bank. *Fleming v. Apollo Motor Homes, Inc.*, D.C.N.C.1980, 87 F.R.D. 408.

9. — Subject-matter jurisdiction

This section grants jurisdiction to district court to hear cases in which consumer claimed damages for failure of service contractor to comply with obligations of service contract. *People of State of Ill. ex rel. Scott v. Hunt Intern. Resources Corp.*, D.C.Ill. 1979, 481 F.Supp. 71.

Where motor home purchaser brought action against seller, manufacturer, assembler, and bank which held security agreement as assignee of seller under this chapter, and purchasers sought rescission or \$33,000 in damages, court lacked subject-matter jurisdiction over purchasers claim against bank. *Fleming*

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v. Apollo Motor Homes, Inc., D.C.N.C.1980, 87 F.R.D. 408.

10. Persons entitled to maintain action

Since this chapter provides that the United States Attorney General and the Federal Trade Commission may go to federal court to enjoin violations of this chapter it provides its own mechanism for protecting the general public's interest in enforcement of its provisions; it does not leave protection of the public interest up to the attorneys general of the 50 states. In re General Motors Corp. Engine Interchange Litigation, C.A.Ill.1979, 594 F.2d 1106, certiorari denied 100 S.Ct. 146, 444 U.S. 876, 62 L.Ed.2d 95.

11. Class actions—Generally

Subsec. (d)(3)(C) of this section requiring that a class action brought in federal court pursuant to this chapter have at least one hundred named plaintiffs requires that there be at least one hundred individuals named in the complaint and does not merely refer to potential size of class. Barr v. General Motors Corp., D.C.Ohio 1978, 80 F.R.D. 136.

Plaintiff's assertion that number of members in class was greater than one hundred persons together with her statements that on information and belief class exceeded several thousand persons and that it was an estimated class of greater than one thousand did not meet requirement that class action brought in federal court pursuant to this chapter have at least one hundred named plaintiffs. Id.

For purposes of numerosity requirement of rule 23 of the Federal Rules of Civil Procedure, Title 28, and subsec. (d)(3)(C) of this section requiring that class action brought pursuant to this chapter have at least one hundred named plaintiffs, it is insufficient to state that discovery will "certainly" demonstrate that class exists. Id.

12. — Settlements

This chapter does not alter the general rule that the trial court may approve a class action settlement without the consent of every member of the class. In re General Motors Corp. Engine Interchange Litigation, C.A.Ill.1979, 594 F.2d 1106, certiorari denied 100 S.Ct. 146, 444 U.S. 870, 62 L.Ed.2d 95.

In engine interchange litigation brought against automobile manufacturer, the district court did not have the power under rule 23, Federal Rules of Civil Procedure, Title 28, to dismiss with prejudice the Magnuson-Moss claims of those sub-class members who refused to accept settlement package; as to them, the "settlement" was not a settlement, but was merely an offer to settle with a penal-

ty, the dismissal of their federal claims, if they did not accept. Id.

13. Private right of action

Congress, in enacting this chapter, intended to create a federal private cause of action for consumers injured by violation of any obligation under this chapter, any warranty subject to extensive regulatory requirements of this chapter, or any implied warranty, the deceptive and unconscionable limitation of which was a major focus of this chapter's regulatory provisions. Skelton v. General Motors Corporation, Ill.1981, 660 F.2d 311.

14. Complaint—Generally

Complaint, which was filed by purchasers of automobiles because of substitution of certain transmissions, because it failed to distinguish between descriptions of transmissions in general advertising and time-bound promises presented in connection with sale of specific automobiles, pleaded more than breach of a written warranty under this chapter. Skelton v. General Motors Corp., D.C.Ill.1980, 500 F.Supp. 1181, reversed on other grounds 660 F.2d 311.

15. — Dismissal

Where motor home purchaser sued seller seeking rescission or \$33,000 damages under this chapter, claim would be dismissed for lack of federal jurisdiction. Fleming v. Apollo Motor Homes, Inc., D.C.N.C.1980, 87 F.R.D. 408.

In that issue of compliance with statutory jurisdictional prerequisites for an action under this chapter implicates jurisdiction of court, question of dismissal of action can be raised by court sua sponte. Barr v. General Motors Corp., D.C.Ohio 1978, 80 F.R.D. 136.

16. Burden of proof

Burden of demonstrating compliance with jurisdictional prerequisites for a class action under this chapter is on party seeking class certification. Barr v. General Motors Corp., D.C.Ohio 1978, 80 F.R.D. 136.

17. Remedies—Generally

This section provides remedy for the breach of all written promises presented in connection with sale of formally warranted product. Skelton v. General Motors Corp., D.C.Ill.1980, 500 F.Supp. 1181, reversed on other grounds 660 F.2d 311.

18. — Attorney fees

This section permits recovery of attorney fees by consumer who prevails in action against seller for breach of implied warranty under state law, provided seller is afforded

opportunity to cure. *Champion Ford Sales, Inc. v. Levine*, Md.App.1981, 433 A.2d 1218.

Award of counsel fees to buyer in action against manufacturer for damages due to defects in automobile fulfilled intent of this chapter, notwithstanding failure of trial judge to enter judgment for nominal damages to which award of attorney fees could be attached. *Ventura v. Ford Motor Corp.*, 1981, 433 A.2d 801, 180 N.J.Super. 45.

Manufacturer of automobile was not exempt from liability for attorney fees under this chapter upon rescission for breach of manufacturer's express warranty against manufacturer's authorized but independent dealer which sold automobile, even though judgment of rescission was against dealer only. *Ventura v. Ford Motor Corp.*, 1980, 414 A.2d 611, 173 N.J.Super. 501.

Buyer who was allowed rescission of his purchase of automobile in his action under this chapter was entitled to attorney fees of \$5,165 based on actual hours expended and reasonable rate of \$75 an hour for office time and \$100 an hour for court time. *Id.*

Attorney's fees provision of this section was inapplicable to claim of breach of implied warranty of merchantability brought by roofing contractor against supplier of roof coating material. *Jameson Chemical Co. Ltd. v. Love*, Ind.App.1980, 403 N.E.2d 928.

Purchaser of defective motor home was entitled to recover attorney fees in his successful suit against retailer, builder of home on chassis and manufacturer of the chassis, and retailer was entitled to recover its attorney fees from builder and manufacturer, but since builder and manufacturer were joint tortfeasors, builder was not entitled to allowance of attorney fees from manufacturer. *Massingale v. Northwest Cortez, Inc.*, Wash.App.1980, 620 P.2d 1009.

In suit against retailer and manufacturer for breach of warranty in connection with sale of mobile home, although trial court technically erred in first making award of attorney's fees and costs to buyers and against retailer and then passing on award to retailer against manufacturer on retailer's third-party complaint, error was harmless where effect was to award fees and costs to buyer against manufacturer, and trial court could just as easily have made the award directly to buyers on their complaint against manufacturer. *Nobility Homes, Inc. v. Ballentine*, Ala.1980, 386 So.2d 727.

19. — Damages

Although in respect to this section the broad language of this chapter falls short of

express authorization for an award of punitive damages, it cannot be said that punitive damages are never recoverable under federal law unless expressly authorized. In *re General Motors Corp. Engine Interchange Litigation*, C.A.Ill.1979, 594 F.2d 1106, certiorari denied 100 S.Ct. 146, 444 U.S. 870, 62 L.Ed. 2d 95.

From a consumer protection point of view, this chapter is clearly preferable to the Uniform Commercial Code, which is difficult to apply to consumer sales transactions and is full of pitfalls for consumers seeking recovery for defective products; in addition, this chapter provides the consumer with a more adequate remedy by providing that the successful plaintiff may also recover the costs of litigation. *Id.*

Although the legislative history of this chapter is silent on the matter of punitive damages, it is not unlikely that Congress intended to provide at least the same relief available under state law for breach of warranty. *Id.*

Attorney General and Federal Trade Commission are authorized to bring only actions to restrain deceptive warranties and not suits for money damages. *Skelton v. General Motors Corp.*, D.C.Ill.1980, 500 F.Supp. 1181, reversed on other grounds 660 F.2d 311.

Tort theory does not extend to permit recovery against manufacturer for solely "economic losses" absent property damage or personal injury from use of product; buyer of air conditioners therefore was not entitled to recover from manufacturer, on theory of negligent manufacture, purely "economic" losses incurred in repairing and replacing allegedly defective units. *Alfred N. Koplin & Co., Inc. v. Chrysler Corp.*, 1977, 364 N.E.2d 100, 7 Ill.Dec. 113, 49 Ill.App.3d 194.

Any failure by automobile manufacturer to comply with requirements of this chapter did not constitute an illegal act invoking certain state statutory remedies, including treble damages and attorney fees, since "illegal act" as used in West's F.S.A. § 320.64(4), was one subject to criminal penalties, and violation of this chapter did not result in criminal penalties. *Gates v. Chrysler Corp.*, Fla.App.1981, 397 So.2d 1187.

Manufacturer's failure to make required disclosure on face of its warranty that "This warranty gives you special legal rights, and you may also have other rights which vary from state to state" was at most a technical violation of this chapter and did not contribute to buyer's damages, since relief which she sought and received was afforded by state law. *Id.*

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20. — Rescission

Although automobile manufacturer intended by limited warranty to limit warranty of ultimate buyer to repair and replacement of defective parts, failure of such remedy to fulfill its essential purpose, and consequent breach of implied warranty of merchantability which accompanied limited warranty made rescission type remedy appropriate when revocation of acceptance was justified. *Ventura v. Ford Motor Corp.*, 1981, 433 A.2d 801, 180 N.J.Super. 45.

21. Harmless or prejudicial error

In Mississippi diversity action by buyer of automobile against manufacturer to recover for breach of warranties, any error in refusal to instruct jury regarding provisions of this chapter was harmless since buyer would not have been entitled to recover more under this chapter than he recovered under court's instructions regarding express and implied warranties set out by Mississippi law. *MacKenzie v. Chrysler Corp.*, C.A.Miss.1979, 607 F.2d 1162.

§ 2311. Applicability to other laws

Federal Trade Commission Act and Federal Seed Act

(a)(1) Nothing contained in this chapter shall be construed to repeal, invalidate, or supersede the Federal Trade Commission Act or any statute defined therein as an Antitrust Act.

(2) Nothing in this chapter shall be construed to repeal, invalidate, or supersede the Federal Seed Act and nothing in this chapter shall apply to seed for planting.

Rights, remedies, and liabilities

(b)(1) Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.

(2) Nothing in this chapter (other than sections 2308 and 2304(a)(2) and (4) of this title) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

State warranty laws

(c)(1) Except as provided in subsection (b) of this section and in paragraph (2) of this subsection, a State requirement—

(A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 2302, 2303, and 2304 of this title (and rules implementing such sections), and

(C) which is not identical to a requirement of section 2302, 2303, or 2304 of this title (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder).

(2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 2309 of this title) that any requirement of such State covering any transaction to which this chapter applies (A) affords protection to consumers greater than the requirements of this chapter and (B) does not unduly burden interstate com-

merce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement.

Other Federal warranty laws

(d) This chapter (other than section 2302(c) of this title) shall be inapplicable to any written warranty the making or content of which is otherwise governed by Federal law. If only a portion of a written warranty is so governed by Federal law, the remaining portion shall be subject to this chapter.

(Pub.L. 93-637, Title I, § 111, Jan. 4, 1975, 88 Stat. 2192.)

Historical Note

References in Text. The Federal Trade Commission Act, referred to in subsec. (a)(1), is Act Sept. 26, 1914, ch. 311, 38 Stat. 717, which is classified generally to subchapter I (section 41 et seq.) of chapter 2 of this title. For complete classification of this Act to the Code, see section 58 of this title and Tables volume.

The Antitrust Acts, referred to in subsec. (a)(1), are defined in section 44 of this title.

The Federal Seed Act, referred to in subsec. (a)(2), is Act Aug. 9, 1939, ch. 615, 53

Stat. 1275, which is classified generally to chapter 37 (section 1551 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 1551 of Title 7 and Tables volume.

Effective Date. Section effective six months after Jan. 4, 1975, but inapplicable to consumer products manufactured prior to such date, see section 2312 of this title.

Legislative History. For legislative history and purpose of Pub.L. 93-637, see 1974 U.S. Code Cong. and Adm. News, p. 7702.

Library References

Consumer Protection § 36
C.J.S. Trade-Marks, Trade-Names, and Un-
fair Competition §§ 237, 238.

Notes of Decisions

1. State warranty laws

This chapter was not designed completely to supplant state law of warranties and sales, but, rather, was intended primarily to regulate transactions involving written, usually formal, warranties, and in such transactions, this chapter not only regulates contents and effect of warranty document itself, but is also designed to provide basic level of honesty and reliability to the entire transaction and therefore requires certain written representations which trigger this chapter's protections. *Skelton v. General Motors Corp.*, D.C.Ill. 1980, 500 F.Supp. 1181, reversed 660 F.2d 311.

Pursuant to subsec. (b)(1) of this section, granting of remedy of refund of purchase price under N.J.S.A. 12A:2-608 and 711 for breach of limited warranty is not barred by or inconsistent with section 2304 of this title. *Ventura v. Ford Motor Corp.*, 1981, 433 A.2d 801, 180 N.J.Super. 455.

Since this section preserves consumer's rights and remedies under state law, notification under UCC § 2-607 should be given as soon as possible in order to safeguard consumer's right to damages under UCC § 2-714, but prelitigation notice required by former UCC § 2-607 is not required by this chapter. *Mendelson v. General Motors Corp.*, Sup.1980, 432 N.Y.S.2d 132.

§ 2312. Effective dates

Effective date of chapter

(a) Except as provided in subsection (b) of this section, this chapter shall take effect 6 months after January 4, 1975, but shall not apply to consumer products manufactured prior to such date.

Effective date of section 2302(a)

(b) Section 2302(a) of this title shall take effect 6 months after the final publication of rules respecting such section; except that the Commission, for good cause shown, may postpone the applicability of such sections until one year after such final publication in order to permit any designated classes of suppliers to bring their written warranties into compliance with rules promulgated pursuant to this chapter.

Promulgation of rules


(c) The Commission shall promulgate rules for initial implementation of this chapter as soon as possible after January 4, 1975, but in no event later than one year after such date.

(Pub.L. 93-637, Title I, § 112, Jan. 4, 1975, 88 Stat. 2192.)

Historical Note

Legislative History. For legislative history and purpose of Pub.L. 93-637, see 1974 U.S. Code Cong. and Adm. News, p. 7702.

Library References

Consumer Protection  31.
C.J.S. Trade-Marks, Trade Names, and Un-
fair Competition §§ 237, 238.

History: L. 1973, ch. 17, § 4.

13-10-5. Persons excepted from act.

- (1) This act does not apply to:
- (a) any person engaged in radio or television broadcasting or cable television who transfers, or causes to be transferred, any of the sounds referred to in §§ 13-10-3 and 13-10-4 (other than from the sound track of a motion picture) intended for, or in connection with, broadcast transmission or for archival purposes; or
 - (b) any person transferring any such sounds without any compensation being derived by this person or any other person from the transfer.
- (2) This act shall neither enlarge nor diminish the rights of parties in civil litigation.

History: L. 1973, ch. 17, § 5.

Meaning of "this act". — See the note under this catchline under § 13-10-1.

13-10-6. Violation a misdemeanor.

Each violation of this act is a misdemeanor and shall be punished as a misdemeanor.

History: L. 1973, ch. 17, § 6.

Meaning of "this act". — See the note under this catchline under § 13-10-1.

Cross-References. — Penalty for misdemeanors, §§ 76-3-204, 76-3-301.

CHAPTER 11

CONSUMER SALES PRACTICES

Section		Section	
13-11-1.	Citation of act.	13-11-13.	Petition for adoption, amendment or repeal of rule.
13-11-2.	Construction and purposes of act.	13-11-14.	Action for declaratory judgment on validity or applicability of rule.
13-11-3.	Definitions.	13-11-15.	Invalidation of rule — Grounds.
13-11-4.	Deceptive act or practice by supplier.	13-11-16.	Investigatory powers of enforcing authority.
13-11-5.	Unconscionable act or practice by supplier.	13-11-17.	Actions by enforcing authority.
13-11-6.	Jurisdiction of district courts — Service of process.	13-11-18.	Noncompliance by supplier subject to other state supervision — Cooperation of enforcing authority and other official or agency.
13-11-7.	Duties of enforcing authority — Confidentiality of identity of persons investigated — Civil penalty for violation of restraining or injunctive orders.	13-11-19.	Actions by consumer.
13-11-8.	Powers of enforcing authority.	13-11-20.	Class actions.
13-11-9.	Rule-making requirements.	13-11-21.	Settlement of class action — Complaint in class action delivered to enforcing authority.
13-11-10.	Rule-making procedure — Limitation on action to contest rule.	13-11-22.	Exemptions from application of act.
13-11-11.	Filing of rules — Effective date.	13-11-23.	Other remedies available — Class action only as prescribed by act.
13-11-12.	Repealed.		

13-11-1. Citation of act.

This act shall be known and may be cited as the "Utah Consumer Sales Practices Act."

History: L. 1973, ch. 188, § 1.

Meaning of "this act". — The term "this act," referred to in this section, refers to Laws

1973, ch. 188, which enacted this section and §§ 13-11-2 to 13-11-11 and 13-11-13 to 13-11-23.

COLLATERAL REFERENCES

A.L.R. — Price fixed in contract violating statute of frauds as evidence of value in action on quantum meruit, 21 A.L.R.3d 9.

Validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices, 50 A.L.R.3d 1008.

Validity and construction of state statutes forbidding area price discrimination, 67 A.L.R.3d 26.

Trade dress simulation of cosmetic products as unfair competition, 86 A.L.R.3d 505.

Scope and exemptions of state deceptive trade practice and consumer protection acts, 89 A.L.R.3d 399.

Practices forbidden by state deceptive trade

practice and consumer protection acts, 89 A.L.R.3d 449.

Validity, construction, and effect of laws or regulations requiring merchants to affix sale price to each item of consumer goods, 7 A.L.R.4th 792.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, 41 A.L.R.4th 675.

Who is a "purchaser" within the meaning of § 2(a) of the Robinson-Patman Act (15 USCS § 13(a)), making it unlawful to discriminate in price between different purchasers of commodities, 60 A.L.R. Fed 875.

13-11-2. Construction and purposes of act.

This act shall be construed liberally to promote the following policies:

- (1) to simplify, clarify, and modernize the law governing consumer sales practices;
- (2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices;
- (3) to encourage the development of fair consumer sales practices;
- (4) to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection;
- (5) to make uniform the law, including the administrative rules, with respect to the subject of this act among those states which enact similar laws; and
- (6) to recognize and protect suppliers who in good faith comply with the provisions of this act.

History: L. 1973, ch. 188, § 2.

Meaning of "this act". — See the note under this catchline under § 13-11-1.

13-11-3. Definitions.

As used in this chapter:

(1) "Enforcing authority" means the division of consumer protection. The enforcing authority shall be supplied with legal assistance and advice concerning administration and enforcement of this chapter by the attorney general of the state of Utah or any county attorney.

(2) "Consumer transaction" means a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property both tangible and intangible (except securities and insurance) to a person for primarily personal, family, or household purposes, or for purposes that relate to a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged, or a solicitation or offer by a supplier with respect to any of these transfers or dispositions. It includes any offer or solicitation, any agreement, and any performance of an agreement with respect to any of these transfers or dispositions.

(3) "Final judgment" means a judgment, including any supporting opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired.

(4) "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, co-operative, or any other legal entity.

(5) "Supplier" means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer.

History: L. 1973, ch. 188, § 3; 1983, ch. 58, § 4.

Amendment Notes. — The 1983 amendment substituted "chapter" for "act" in two places; substituted "division of consumer protection" for "Trade Commission of Utah" in Subsection (1); added "or any county attorney"

to Subsection (1); inserted "written or oral transfer or," "other property both tangible and," "or offer," and "transfers or" in the first sentence of Subsection (2); added the second sentence in Subsection (2); inserted "offeror, broker" in Subsection (5); and made minor changes in phraseology.

13-11-4. Deceptive act or practice by supplier.

(1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction.

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier, with intent to deceive:

(a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not;

(b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;

(c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;

- (d) indicates that the subject of a consumer transaction is available to the consumer for a reason that does not exist;
- (e) indicates that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not;
- (f) indicates that the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;
- (g) indicates that replacement or repair is needed, if it is not;
- (h) indicates that a specific price advantage exists, if it does not;
- (i) indicates that the supplier has a sponsorship, approval, or affiliation he does not have;
- (j) indicates that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations if the indication is false;
- (k) indicates that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if receipt of the benefit is contingent on an event occurring after the consumer enters into the transaction;
- (l) after receipt of payment for goods or services, fails to ship the goods or furnish the services within the time advertised or otherwise represented or, if no specific time is advertised or represented, fails to ship the goods or furnish the services within 30 days, unless within the applicable time period the supplier provides the buyer with the option to either cancel the sales agreement and receive a refund of all previous payments to the supplier or to extend the shipping date to a specific date proposed by the supplier, but any refund shall be mailed or delivered to the buyer within 10 business days after the seller receives written notification from the buyer of the buyer's right to cancel the sales agreement and receive the refund;
- (m) fails to furnish a notice of the purchaser's right to cancel a direct solicitation sale within three business days at the time of purchase if the sale is made pursuant to the supplier's mail, telephone, or personal contact and if the sale price exceeds \$25; or
- (n) promotes, offers, or grants participation in a pyramid scheme as defined under Chapter 6a, Title 76.

History: L. 1973, ch. 188, § 4; 1983, ch. 55, § 1; 1983, ch. 58, § 5; 1985, ch. 250, § 1.

Amendment Notes. — The 1983 amendment by Chapter 55 substituted "following acts or practices of a supplier or the following indications by a supplier are deceptive" in Subsection (2) for "act or practice of a supplier in indicating any of the following is deceptive"; and added Subsection (2)(l).

The 1983 amendment by Chapter 58 substituted "chapter" for "act" in Subsection (1); and added the provisions of Subsections (2)(m) and (2)(n).

The 1985 amendment substituted "a supplier

commits a deceptive act or practice if the supplier, with intent to deceive" in Subsection (2) for "the following acts or practices of a supplier or the following indications by a supplier are deceptive"; substituted "indicates that" in Subsections (2)(a) through (2)(k) for "that"; substituted "fails" in two places in Subsection (2)(l) for "failing"; substituted "right to cancel" in Subsection (2)(l) for "option to cancel"; substituted "under Chapter 6a, Title 76" in Subsection (2)(n) for "by law"; and made minor changes in phraseology and punctuation in Subsections (2)(j), (2)(k) and (2)(l).

13-11-5. Unconscionable act or practice by supplier.

(1) An unconscionable act or practice by a supplier in connection with a consumer transaction violates this act whether it occurs before, during, or after the transaction.

(2) The unconscionability of an act or practice is a question of law for the court. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.

(3) In determining whether an act or practice is unconscionable, the court shall consider circumstances which the supplier knew or had reason to know.

History: L. 1973, ch. 188, § 5.

Meaning of "this act". — See the note under this catchline under § 13-11-1.

13-11-6. Jurisdiction of district courts — Service of process.

(1) The district courts of this state have jurisdiction over any supplier as to any act or practice in this state governed by this act or as to any claim arising from a consumer transaction subject to this act.

(2) In addition to any other method provided by rule or statute, personal jurisdiction over a supplier may be acquired in a civil action or proceeding instituted in the district court by the service of process in the following manner. If a supplier engages in any act or practice in this state governed by this act, or engages in a consumer transaction subject to this act, he may designate an agent upon whom service of process may be made in this state. The agent must be a resident of or a corporation authorized to do business in this state. The designation must be in writing and filed with the Division of Corporations and Commercial Code. If no designation is made and filed, or if process cannot be served in this state upon the designated agent, whether or not the supplier is a resident of this state or is authorized to do business in this state, process may be served upon the director of the Division of Corporations and Commercial Code, but service upon him is not effective unless the plaintiff promptly mails a copy of the process and pleadings by registered or certified mail to the defendant at his last reasonably ascertainable address. An affidavit of compliance with this section must be filed with the clerk of the court on or before the return day of the process, if any, or within any future time the court allows.

History: L. 1973, ch. 188, § 6; 1984, ch. 66, § 30.

Amendment Notes. — The 1984 amendment substituted "Division of Corporations and Commercial Code" for "secretary of state" in the fourth sentence of Subsection (2); and sub-

stituted "director of the Division of Corporations and Commercial Code" for "secretary of state" in the fifth sentence of Subsection (2).

Meaning of "this act". — See the note under this catchline under § 13-11-1.

13-11-7. Duties of enforcing authority — Confidentiality of identity of persons investigated — Civil penalty for violation of restraining or injunctive orders.

- (1) The enforcing authority shall:
 - (a) enforce this act throughout the state;
 - (b) co-operate with state and local officials, officials of other states, and officials of the federal government in the administration of comparable statutes;
 - (c) inform consumers and suppliers on a continuing basis of the provisions of this act and of acts or practices that violate this act including mailing information concerning final judgments to persons who request it, for which he may charge a reasonable fee to cover the expense;
 - (d) receive and act on complaints; [and][.]
 - (e) maintain a public file of final judgments rendered under this act that have been either reported officially or made available for public dissemination under Subsection (1)(c) of this section, final consent judgments, and to the extent the enforcing authority considers appropriate, assurances of voluntary compliance; [and][.]
- (2) In carrying out his duties, the enforcing authority may not publicly disclose the identity of a person investigated unless his identity has become a matter of public record in an enforcement proceeding or he has consented to public disclosure.
- (3) On motion of the enforcing authority, or on its own motion, the court may impose a civil penalty of not more than \$5,000 for each day a temporary restraining order, preliminary injunction, or permanent injunction issued under this chapter is violated, if the supplier received notice of the restraining or injunctive order. Civil penalties imposed under this section shall be paid to the General Fund.

History: L. 1973, ch. 188, § 7; 1983, ch. 58, § 6.

Amendment Notes. — The 1983 amendment deleted a Subsection (1)(f) which read: "Report annually on or before January first to the governor and legislature on the operations of his office and on the acts or practices occurring in this state that violate this act"; deleted a former Subsection (2) which read: "The enforcing authority's report shall include a statement of the investigatory and enforcement procedures and policies of his office, of the number

of investigations and enforcement proceedings instituted and of their disposition, and of the other activities of his office and of other persons to carry out the purposes of this act"; redesignated former Subsection (3) as (2); and added Subsection (3).

Compiler's Notes. — The word "and" at the end of subsection (e) is bracketed as surplusage, and the bracketed period has been added to correct the punctuation.

Meaning of "this act". — See the note under this catchline under § 13-11-1.

13-11-8. Powers of enforcing authority.

- (1) The enforcing authority may conduct research, hold public hearings, make inquiries, and publish studies relating to consumer sales acts or practices.
- (2) The enforcing authority shall adopt substantive rules that prohibit with specificity acts or practices that violate § 13-11-4 and appropriate procedural rules.

History: L. 1973, ch. 188, § 8.

13-11-9. Rule-making requirements.

(1) In addition to complying with other rule-making requirements imposed by this act, the enforcing authority shall:

(a) adopt as a rule a description of the organization of his office, stating the general course and method of operation of his office and method whereby the public may obtain information or make submissions or requests;

(b) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of the forms and instructions used by the enforcing authority of his office; and

(c) make available for public inspection all rules, written statements of policy, and interpretations formulated, adopted, or used by the enforcing authority in discharging his functions.

(2) A rule of the enforcing authority is invalid, and may not be invoked by the enforcing authority for any purpose, until it has been made available for public inspection under Subsection (1). This provision does not apply to a person who has knowledge of a rule before engaging in an act or practice that violates this act.

History: L. 1973, ch. 188, § 9.

Meaning of "this act". — See the note under this catchline under § 13-11-1.

13-11-10. Rule-making procedure — Limitation on action to contest rule.

(1) Before adopting, amending, or repealing a rule, the enforcing authority shall give at least thirty days' notice of his intended action. The notice shall include a statement of the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may present their views. The notice, for which the enforcing authority may charge a reasonable fee to cover the expense, shall be mailed to all persons who request it. It shall be published in the appropriate medium of publication.

(2) The enforcing authority shall also offer all interested persons reasonable opportunity to submit data or recommendations orally or in writing. In the case of substantive rules, opportunity for oral hearings shall be granted if requested by 25 persons, a governmental subdivision or agency, or an association having at least 25 members. The enforcing authority shall consider all written and oral submissions respecting the proposed rule-making proceedings. Upon adoption of a rule, the enforcing authority if requested to do so by an interested person not later than thirty days after adoption, shall issue a concise statement of the principal reasons for its adoption including the reasons for overruling any considerations urged against its adoption.

(3) A rule is invalid unless it is adopted in substantial compliance with this section. A proceeding to contest a rule on the ground of noncompliance with

the procedural requirements of this section must be begun within two years after the effective date of the rule.

History: L. 1973, ch. 188, § 10.

13-11-11. Filing of rules — Effective date.

(1) The enforcing authority shall file with the Division of Archives a certified copy of each rule adopted by it. The division of archives shall keep open to public inspection a permanent register of the rules.

(2) Each rule is effective twenty days after it is filed, unless a later date is specified in the rule.

History: L. 1973, ch. 188, § 11; 1983, ch. 58, § 7. ment substituted "division of archives" for "secretary of state" in two places in Subsection

Amendment Notes. — The 1983 amendment substituted "secretary of state" in two places in Subsection (1); and made minor changes in phraseology.

13-11-12. Repealed.

Repeals. — Section 13-11-12 (L. 1973, ch. 188, § 12), relating to publication of rules of the enforcing authority, was repealed by Laws 1983, ch. 58, § 17.

13-11-13. Petition for adoption, amendment or repeal of rule.

An interested person may petition the enforcing authority to adopt, amend, or repeal a rule. The enforcing authority shall prescribe by rule the form for such a petition and the procedure of its submission, consideration, and disposition. Within thirty days after submission, the enforcing authority shall either deny the petition in writing stating his reasons for the denial or initiate rule-making proceedings.

History: L. 1973, ch. 188, § 13.

13-11-14. Action for declaratory judgment on validity or applicability of rule.

The validity or applicability of a rule may be determined in an action for a declaratory judgment in the appropriate court, if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the rights or privileges of the plaintiff. The enforcing authority shall be made a party to the action. The court may render a declaratory judgment whether or not the plaintiff has previously requested the enforcing authority to determine the validity or applicability of the rule.

History: L. 1973, ch. 188, § 14.

13-11-15. Invalidation of rule — Grounds.

A rule of the enforcing authority may be invalidated only if it:

- (1) violates a constitutional or statutory provision;
- (2) exceeds the statutory authority of the enforcing authority; or
- (3) is arbitrary, capricious, or otherwise clearly unreasonable in view of the whole record of the review proceeding.

History: L. 1973, ch. 188, § 15.

13-11-16. Investigatory powers of enforcing authority.

(1) If, by his own inquiries or as a result of complaints, the enforcing authority has reason to believe that a person has engaged in, is engaging in, or is about to engage in an act or practice that violates this act, he may administer oaths and affirmations, subpoena witnesses or matter, and collect evidence.

(2) If matter that the enforcing authority subpoenas is located outside this state, the person subpoenaed may either make it available to the enforcing authority at a convenient location within the state or pay the reasonable and necessary expenses for the enforcing authority or his representative to examine the matter at the place where it is located. The enforcing authority may designate representatives, including officials of the state in which the matter is located, to inspect the matter on his behalf, and he may respond to similar requests from officials of other states.

(3) Upon failure of a person without lawful excuse to obey a subpoena and upon reasonable notice to all persons affected, the enforcing authority may apply to the court for an order compelling compliance.

(4) The enforcing authority may request that an individual who refuses to comply with a subpoena on the ground that testimony or matter may incriminate him be ordered by the court to provide the testimony or matter. Except in a prosecution for perjury, an individual who complies with a court order to provide testimony or matter after asserting a privilege against self-incrimination to which he is entitled by law, may not be subjected to a criminal proceeding or to a civil penalty to the transaction concerning which he is required to testify or produce relevant matter. This subsection does not apply to damages recoverable under § 13-11-19(2) or to civil sanctions imposed under § 13-11-17(1)(b).

History: L. 1973, ch. 188, § 16.

Meaning of "this act". — See the note under this catchline under § 13-11-1.

13-11-17. Actions by enforcing authority.

(1) The enforcing authority may bring an action:

- (a) to obtain a declaratory judgment that an act or practice violates this chapter;
 - (b) to enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is otherwise likely to violate this chapter;
- and

(c) to recover, for each violation, actual damages, or obtain relief under Subsection (2)(b), on behalf of consumers who complained to the enforcing authority within a reasonable time after it instituted proceedings under this chapter.

(2) (a) The enforcing authority may bring a class action on behalf of consumers for the actual damages caused by an act or practice specified as violating this chapter in a rule adopted by the enforcing authority under Section [Subsection] 13-11-8(2) before the consumer transactions on which the action is based, or declared to violate § 13-11-4 or 13-11-5 by final judgment of courts of general jurisdiction and appellate courts of this state that was either reported officially or made available for public dissemination under Section [Subsection] 13-11-7(1)(c) by the enforcing authority ten days before the consumer transactions on which the action is based, or, with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment that became final before the consumer transactions on which the action is based.

(b) On motion of the enforcing authority and without bond in an action under this subsection, the court may make appropriate orders, including appointment of a master or receiver or sequestration of assets, but only if it appears that the defendant is threatening or is about to remove, conceal or dispose of his property to the damage of persons for whom relief is requested, to reimburse consumers found to have been damaged, or to carry out a transaction in accordance with consumers' reasonable expectations, or to strike or limit the application of unconscionable clauses of contracts to avoid an unconscionable result, or to grant other appropriate relief. The court may assess the expenses of a master or receiver against a supplier.

(c) If an act or practice that violates this chapter unjustly enriches a supplier and damages can be computed with reasonable certainty, damages recoverable on behalf of consumers who cannot be located with due diligence shall be transferred to the state treasurer pursuant to the Uniform Disposition of Unclaimed Property Act.

(d) If a supplier shows by a preponderance of the evidence that a violation of this chapter resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this subsection is limited to the amount, if any, by which the supplier was unjustly enriched by the violation.

(e) No action may be brought by the enforcing authority under this subsection more than two years after the occurrence of a violation of this chapter.

(3) The enforcing authority may terminate an investigation or an action other than a class action upon acceptance of the supplier's written assurance of voluntary compliance with this chapter. Acceptance of an assurance may be conditioned on a commitment to reimburse consumers or take other appropriate corrective action. An assurance is not evidence of a prior violation of this chapter. Unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation.

History: L. 1973, ch. 188, § 17; 1983, ch. 58, § 8.

Amendment Notes. — The 1983 amendment substituted "chapter" for "act" throughout the section; deleted "or" at the end of Subsection (1)(a); substituted "and" for "or" at the end of Subsection (1)(b); inserted "for each violation" and substituted "within a reasonable

time after it" for "before he" in Subsection (1)(c); and made a minor change in phraseology.

Uniform Disposition of Unclaimed Property Act. — The Uniform Disposition of Unclaimed Property Act, referred to at the end of Subsection (1)(c), is found at ch. 44, Title 78.

13-11-18. Noncompliance by supplier subject to other state supervision — Co-operation of enforcing authority and other official or agency.

(1) If the enforcing authority received a complaint or other information relating to noncompliance with this act by a supplier who is subject to other supervision in this state, the enforcing authority shall inform the official or agency having that supervision. The enforcing authority may request information about suppliers from the official or agency.

(2) The enforcing authority and any other official or agency in this state having supervisory authority over a supplier shall consult and assist each other in maintaining compliance with this act. Within the scope of their authority, they may jointly or separately make investigations, prosecute suits, and take other official action they consider appropriate.

History: L. 1973, ch. 188, § 18.

Meaning of "this act". — See the note under this catchline under § 13-11-1.

13-11-19. Actions by consumer.

(1) Whether he seeks or is entitled to damages or otherwise has an adequate remedy at law, a consumer may bring an action to:

(a) obtain a declaratory judgment that an act or practice violates this chapter; and

(b) enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is likely to violate this chapter.

(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or \$2,000, whichever is greater, plus court costs.

(3) Whether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, he may bring a class action for declaratory judgment, an injunction, and appropriate ancillary relief against an act or practice that violates this chapter.

(4) (a) A consumer who suffers loss as a result of a violation of this chapter may bring a class action for the actual damages caused by an act or practice specified as violating this chapter by a rule adopted by the enforcing authority under Section [Subsection] 13-11-8(2) before the consumer transactions on which the action is based, or declared to violate § 13-11-4 or 13-11-5 by a final judgment of the appropriate court or courts of general jurisdiction and appellate courts of this state that was either officially reported or made available for public dissemination under Section [Subsection] 13-11-7(1)(c) by the enforcing authority ten days before

the consumer transactions on which the action is based, or with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment which became final before the consumer transactions on which the action is based.

(b) If an act or practice that violates this chapter unjustly enriches a supplier and the damages can be computed with reasonable certainty, damages recoverable on behalf of consumers who cannot be located with due diligence shall be transferred to the state treasurer pursuant to the Uniform Disposition of Unclaimed Property Act.

(c) If a supplier shows by a preponderance of the evidence that a violation of this chapter resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this section is limited to the amount, if any, in which the supplier was unjustly enriched by the violation.

(5) Except for services performed by the enforcing authority, the court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed if:

(a) the consumer complaining of the act or practice that violates this chapter has brought or maintained an action he knew to be groundless; or a supplier has committed an act or practice that violates this chapter; and

(b) an action under this section has been terminated by a judgment or required by the court to be settled under Section [Subsection] 13-11-21(1)(a).

(6) Except for consent judgment entered before testimony is taken, a final judgment in favor of the enforcing authority under § 13-11-17 is admissible as prima facie evidence of the facts on which it is based in later proceedings under this section against the same person or a person in privity with him.

(7) When a judgment under this section becomes final, the prevailing party shall mail a copy to the enforcing authority for inclusion in the public file maintained under Section [Subsection] 13-11-7(1)(e).

(8) An action under this section must be brought within two years after occurrence of a violation of this chapter, or within one year after the termination of proceedings by the enforcing authority with respect to a violation of this chapter, whichever is later. When a supplier sues a consumer, he may assert as a counterclaim any claim under this chapter arising out of the transaction on which suit is brought.

History: L. 1973, ch. 188, § 19; 1983, ch. 58, § 9.

Amendment Notes. — The 1983 amendment substituted "chapter" for "act" throughout the section; substituted "and" for "or" at the end of subsection (1)(a); increased the amount in Subsection (2) from \$100 to \$2,000;

added "plus court costs" to Subsection (2); and made a minor change in phraseology.

Uniform Disposition of Unclaimed Property Act. — The Uniform Disposition of Unclaimed Property Act, referred to in subsection (4)(b), is found at ch. 44, Title 78.

13-11-20. Class actions.

- (1) An action may be maintained as a class action under this act only if:
 - (a) the class is so numerous that joinder of all members is impracticable;
 - (b) there are questions of law or fact common to the class;
 - (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
 - (d) the representative parties will fairly and adequately protect the interests of the class; and
 - (e) either:
 - (i) the prosecution of separate actions by or against individual members of the class would create a risk of:
 - (aa) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
 - (bb) adjudications with respect to individual members of the class that would as a practical matter dispose of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
 - (ii) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
 - (iii) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
- (2) The matters pertinent to the findings under Subsection (1)(e)(iii) include:
 - (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
 - (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
 - (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
 - (d) the difficulties likely to be encountered in the management of a class action.
- (3) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and it may be amended before decision on the merits.
- (4) In a class action maintained under Subsection (1)(e) the court may direct to the members of the class the best notice practicable under the circumstances, including individual notice to each member who can be identified through reasonable effort. The notice shall advise each member that:
 - (a) the court will exclude him from the class, unless he requests inclusion, by a specified date;
 - (b) the judgment, whether favorable or not, will include all members who request inclusion; and

- (c) a member who requests inclusion may, if he desires, enter an appearance through his counsel.
- (5) When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class.
- (6) In the conduct of a class action the court may make appropriate orders:
- (a) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;
 - (b) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in the manner the court directs to some or all of the members or to the enforcing authority of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;
 - (c) imposing conditions on the representative parties or on intervenors;
 - (d) requiring that the pleadings be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly; or
 - (e) dealing with similar procedural matters.
- (7) A class action shall not be dismissed or compromised without approval of the court. Notice of the proposed dismissal or compromise shall be given to all members of the class as the court directs.
- (8) The judgment in an action maintained as a class action under Subsection (1)(e)(i) or (ii), whether or not favorable to the class, shall describe those whom the court finds to be members of the class. The judgment in a class action under Subsection (1)(e)(iii), whether or not favorable to the class, shall specify or describe those to whom the notice provided in Subsection (d) was directed, and who have requested inclusion, and whom the court finds to be members of the class.

History: L. 1973, ch. 188, § 2; 1974, ch. 5, § 1.

Meaning of "this act". — See the note under this catchline under § 13-11-1.

13-11-21. Settlement of class action — Complaint in class action delivered to enforcing authority.

- (1) (a) A defendant in a class action may file a written offer of settlement. If it is not accepted within a reasonable time by a plaintiff class representative, the defendant may file an affidavit reciting the rejection. The court may determine that the offer has enough merit to present to the members of the class. If it so determines, it shall order a hearing to determine whether the offer should be approved. It shall give the best notice of the hearing that is practicable under the circumstances, including notice to each member who can be identified through reasonable effort. The notice shall specify the terms of the offer and a reasonable period within which members of the class who request it are entitled to be included in the class. The statute of limitations for those who are excluded pursuant to this subsection is tolled for the period the class action has been pending, plus an additional year.

(b) If a member who has previously lost an opportunity to be excluded from the class is excluded at his request in response to notice of the offer of settlement during the period specified under Paragraph (a), he may not thereafter participate in a class action for damages respecting the same consumer transaction, unless the court later disapproves the offer of settlement or approves a settlement materially different from that proposed in the original offer of settlement. After the expiration of the period of limitations, a member of the class is not entitled to be excluded from it.

(c) If the court later approves the offer of settlement, including changes, if any, required by the court in the interest of a just settlement of the action, it shall enter judgment, which is binding on all persons who are then members of the class. If the court disapproves the offer or approves a settlement materially different from that proposed in the original offer, notice shall be given to a person who was excluded from the action at his request in response to notice of the offer under paragraph (a), and he is entitled to rejoin the class and, in the case of the approval, participate in the settlement.

(2) On the commencement of a class action under § 13-11-19, the class representative shall mail by certified mail with return receipt requested or personally serve a copy of the complaint on the enforcing authority. Within thirty days after the receipt of a copy of the complaint, but not thereafter, the enforcing authority may intervene in the class action.

History: L. 1973, ch. 188, § 21.

13-11-22. Exemptions from application of act.

(1) This act does not apply to:

(a) an act or practice required or specifically permitted by or under federal law, or by or under state law;

(b) a publisher, broadcaster, printer, or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter so far as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated this act;

(c) claim for personal injury or death or claim for damage to property other than the property that is the subject of the consumer transaction;

(d) credit terms of a transaction otherwise subject to this act; or

(e) any public utility subject to the regulating jurisdiction of the Public Service Commission of the state of Utah.

(2) A person alleged to have violated this act has the burden of showing the applicability of this section.

History: L. 1973, ch. 188, § 22.

13-11-23. Other remedies available — Class action only as prescribed by act.

The remedies of this act are in addition to remedies otherwise available for the same conduct under state or local law, except that a class action relating to a transaction governed by this act may be brought only as prescribed by this act.

History: L. 1973, ch. 188, § 23.

Meaning of "this act". — See the note under this catchline under § 13-11-1.

CHAPTER 12

GASOLINE PRODUCTS MARKETING ACT

Section		Section	
13-12-1.	Citation.	13-12-6.	Distributor electing not to continue doing business in state — Marketing agreements — Repurchase merchandise.
13-12-2.	Definitions.	13-12-7.	District court's jurisdiction over violations — Equitable relief — Attorney's fees and costs — Action for failure to renew — Damages limited.
13-12-3.	Refiners or distributors — Unlawful practices — Marketing agreements with dealers.	13-12-8.	Marketing agreements applicable after effective date.
13-12-4.	Cancellation provisions — Dealer or distributor — Time limit to exercise.		
13-12-5.	Death of dealer or lessee — Distributor to co-operate with heirs — Offer to purchase — Reasonable access to premises.		

13-12-1. Citation.

This act shall be known and may be cited as the "Gasoline Products Marketing Act."

History: L. 1975 (1st S.S.), ch. 6, § 1.

Meaning of "this act". — The term "this act," referred to in this section, refers to Laws

1975 (1st S.S.), ch. 6, which enacted this section and §§ 13-12-2 to 13-12-8.

COLLATERAL REFERENCES

Am. Jur. 2d. — 38 Am. Jur. 2d Gas and Oil §§ 153, 230; 62 Am. Jur. 2d Private Franchise §§ 1 to 17.

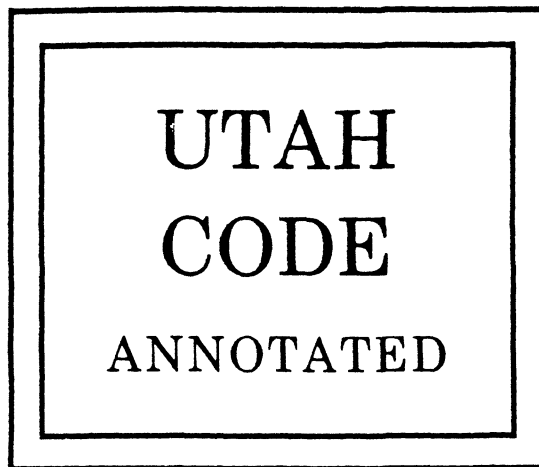
C.J.S. — 3 C.J.S. Agency § 318.

A.L.R. — Meaning of "paying quantities" in oil and gas lease, 43 A.L.R.3d 8.

Validity, construction, and application of entirety clause in oil and gas lease, 48 A.L.R.3d 706.

Meaning of, and proper method for determining, market value or market price in oil and gas lease requiring royalty to be paid on standard measured by such terms, 10 A.L.R.4th 732.

Termination or nonrenewal of franchise to sell motor fuel in commerce under Petroleum Marketing Practices Act (15 USCS §§ 2801 et seq.), 53 A.L.R. Fed 348.



1992 Cumulative Supplement

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arising from services performed by the design professional in connection with the development of land. This subsection does not apply if the owner and the contractor are the same person or entity or are controlled by the same person or entity.

(3) An agreement between a contractor and a subcontractor may not limit the owner's or a design professional's liability to the subcontractor for any claim arising from services performed by the design professional in connection with the development of land.

(4) This section does not apply if the design professional is retained under a single contract to perform both the design and the construction of the project, such as in a design-build or turn-key project.

(5) This section may not be construed to affect any limitation of a design professional's liability to an owner or other design professional that may exist in an agreement between the owner and the design professional or between design professionals.

(6) This section does not affect or impair the obligations of agreements in existence as of May 1, 1988.

History: C. 1953, 13-8-2, enacted by L. 1988, ch. 129, § 1.

Effective Dates. — Laws 1988, ch. 129, § 2 makes the act effective on May 1, 1988.

CHAPTER 11

CONSUMER SALES PRACTICES

Section		Section	
13-11-3.	Definitions.		penalty for violation of re-
13-11-4.	Deceptive act or practice by supplier.		straining or injunctive or-
			ders.
13-11-6.	Service of process.	13-11-10, 13-11-11.	Repealed.
13-11-7.	Duties of enforcing authority — Confidentiality of identity of persons investigated — Civil	13-11-13 to 13-11-15.	Repealed.
		13-11-17.5.	Costs and attorney's fees.
		13-11-20.	Class actions.

13-11-1. Citation of act.

COLLATERAL REFERENCES

Brigham Young Law Review. — Necessity or Overkill? Regulating Residential Landlord-Tenant Relations through the Utah Consumer Sales Practices Act, 1990 B.Y.U.L. Rev. 1063.

A.L.R. — Implied warranty coverage for service transactions under state consumer protec-

tion and deceptive trade statutes, 72 A.L.R.4th 282.

Coverage of insurance transactions under state consumer protection statutes, 77 A.L.R.4th 991.

13-11-2. Construction and purposes of act.

NOTES TO DECISIONS

Cited in *Wade v. Jobe*, 818 P.2d 1006 (Utah 1991)

13-11-3. Definitions.

As used in this chapter:

(1) "Charitable solicitation" means any request directly or indirectly for money, credit, property, financial assistance, or any other thing of value on the plea or representation that it will be used for a charitable purpose. A charitable solicitation may be made in any manner, including:

- (a) any oral or written request, including a telephone request;
- (b) the distribution, circulation, or posting of any handbill, written advertisement, or publication;

(c) the sale of, offer or attempt to sell, or request of donations for any book, card, chance, coupon, device, magazine, membership, merchandise, subscription, ticket, flower, flag, button, sticker, ribbon, token, trinket, tag, souvenir, candy, or any other article in connection with which any appeal is made for any charitable purpose, or where the name of any charitable organization or movement is used or referred to as an inducement or reason for making any purchase donation, or where, in connection with any sale or donation, any statement is made that the whole or any part of the proceeds of any sale or donation will go to or be donated to any charitable purpose. A charitable solicitation is considered complete when made, whether or not the organization or person making the solicitation receives any contribution or makes any sale.

(2) "Consumer transaction" means a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities and insurance), to a person for primarily personal, family, or household purposes, or for purposes that relate to a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged, or a solicitation or offer by a supplier with respect to any of these transfers or dispositions. It includes any offer or solicitation, any agreement, any performance of an agreement with respect to any of these transfers or dispositions, and any charitable solicitation as defined in this section.

(3) "Enforcing authority" means the Division of Consumer Protection.

(4) "Final judgment" means a judgment, including any supporting opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired.

(5) "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or any other legal entity.

(6) "Supplier" means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer.

History: L. 1973, ch. 188, § 3; 1983, ch. 58, § 4; 1987, ch. 105, § 2.

Amendment Notes. — The 1987 amendment in Subsection (1) substituted the present definition for the former definition of "enforcing authority"; in Subsection (2) added at the

end of the last sentence "and any charitable solicitation as defined in this section"; added Subsection (3); and redesignated former Subsections (3) through (5) as present Subsections (4) through (6).

NOTES TO DECISIONS

ANALYSIS

Consumer transaction.
Supplier.

Consumer transaction.

In view of (1) the legislature's mandate to construe the Utah Consumer Sales Practices Act (UCSPA) liberally, (2) the stated purpose of keeping Utah law consistent with the Federal Trade Commission Act (15 U.S.C. §§ 41 to 77) and the consumer protection laws of other states, and (3) the absence of any language or other expression of legislative intent to the contrary, the renting of residential housing is a consumer transaction within the meaning of

the UCSPA. *Wade v. Jobe*, 818 P.2d 1006 (Utah 1991).

Supplier.

This chapter is broad enough to impose liability upon suppliers of consumer goods who deceptively transact with other suppliers. *Utah ex rel. Wilkinson v. B & H Auto*, 701 F. Supp. 201 (D. Utah 1988).

Defendants, who were alleged to have tampered with vehicle odometers with the intent to defraud purchasers, were not insulated from liability for deceptive acts merely because they sold the vehicles involved to independent dealers for resale, rather than directly to consumers. *Utah ex rel. Wilkinson v. B & H Auto*, 701 F. Supp. 201 (D. Utah 1988).

13-11-4. Deceptive act or practice by supplier.

(1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction.

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier, with intent to deceive:

(a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not;

(b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;

(c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;

(d) indicates that the subject of a consumer transaction is available to the consumer for a reason that does not exist;

(e) indicates that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not;

(f) indicates that the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(g) indicates that replacement or repair is needed, if it is not;

(h) indicates that a specific price advantage exists, if it does not;

(i) indicates that the supplier has a sponsorship, approval, or affiliation he does not have;

(j) indicates that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations, if the representation is false;

(k) indicates that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if receipt of the benefit is contingent on an event occurring after the consumer enters into the transaction;

(l) after receipt of payment for goods or services, fails to ship the goods or furnish the services within the time advertised or otherwise represented or, if no specific time is advertised or represented, fails to ship the goods or furnish the services within 30 days, unless within the applicable time period the supplier provides the buyer with the option to either cancel the sales agreement and receive a refund of all previous payments to the supplier or to extend the shipping date to a specific date proposed by the supplier, but any refund shall be mailed or delivered to the buyer within ten business days after the seller receives written notification from the buyer of the buyer's right to cancel the sales agreement and receive the refund;

(m) fails to furnish a notice of the purchaser's right to cancel a direct solicitation sale within three business days at the time of purchase if the sale is made other than at the supplier's established place of business pursuant to the supplier's mail, telephone, or personal contact and if the sale price exceeds \$25, which notice shall be a conspicuous statement written in bold type, in immediate proximity to the space reserved for the signature of the buyer, as follows: "YOU, THE BUYER, MAY CANCEL THIS CONTRACT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THE TRANSACTION.";

(n) promotes, offers, or grants participation in a pyramid scheme as defined under Title 76, Chapter 6a; or

(o) represents that the funds or property conveyed in response to a charitable solicitation will be donated or used for a particular purpose or will be donated to or used by a particular organization, if the representation is false.

History: L. 1973, ch. 188, § 4; 1983, ch. 55, § 1; 1983, ch. 58, § 5; 1985, ch. 250, § 1; 1987, ch. 105, § 3.

Amendment Notes. — The 1987 amendment in Subsection (2)(j) substituted "represent-

tation" for "indication"; in Subsection (2)(m) inserted "other than at the supplier's established place of business" and added the language beginning with "which notice shall be"; and added Subsection (2)(o).

NOTES TO DECISIONS

ANALYSIS

Cause of action.

— Misrepresentation of warranty.
Transactions with other suppliers.
Cited.

Cause of action.

— Misrepresentation of warranty.

Claim that roof shingle manufacturer, through its literature or agent, made an express warranty to homeowner and later tried to

disclaim or ignore that warranty and supplant it with a limited written warranty stated a cause for relief under Subsection (2)(j). *State ex rel. Division of Consumer Protection v. GAF Corp.*, 760 P.2d 310 (Utah 1988).

Transactions with other suppliers.

This chapter is broad enough to impose liability upon suppliers of consumer goods who deceptively transact with other suppliers. *Utah ex rel. Wilkinson v. B & H Auto*, 701 F. Supp. 201 (D. Utah 1988).

Defendants, who were alleged to have tam-

pered with vehicle odometers with the intent to defraud purchasers, were not insulated from liability for deceptive acts merely because they sold the vehicles involved to independent dealers for resale, rather than directly to con-

sumers. *Utah ex rel. Wilkinson v. B & H Auto*, 701 F. Supp. 201 (D. Utah 1988).

Cited in *Wade v. Jobe*, 818 P.2d 1006 (Utah 1991).

COLLATERAL REFERENCES

A.L.R. — Liability for delay in making repair of motor vehicle, 44 A.L.R.4th 1174.

Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold, 46 A.L.R.4th 546.

Liability of telephone company for mistakes

in or omissions from its directory, 47 A.L.R.4th 882.

What goods or property are "used," "second-hand," or the like, for purposes of state consumer laws prohibiting claims that such items are new, 59 A.L.R.4th 1192.

13-11-5. Unconscionable act or practice by supplier.

NOTES TO DECISIONS

Eviction of tenant.

A landlord's actions in having a house effectively condemned for the purpose of evicting a tenant rather than repairing a leaking sewer system violated state policy disfavoring self-

help evictions and abused the building inspection process and were unconscionable under the Utah Consumer Sales Practices Act. *Wade v. Jobe*, 818 P.2d 1006 (Utah 1991).

13-11-6. Service of process.

In addition to any other method provided by rule or statute, personal jurisdiction over a supplier may be acquired in a civil action or proceeding instituted in the district court by the service of process in the following manner. If a supplier engages in any act or practice in this state governed by this act, or engages in a consumer transaction subject to this act, he may designate an agent upon whom service of process may be made in this state. The agent must be a resident of or a corporation authorized to do business in this state. The designation must be in writing and filed with the Division of Corporations and Commercial Code. If no designation is made and filed, or if process cannot be served in this state upon the designated agent, whether or not the supplier is a resident of this state or is authorized to do business in this state, process may be served upon the director of the Division of Corporations and Commercial Code, but service upon him is not effective unless the plaintiff promptly mails a copy of the process and pleadings by registered or certified mail to the defendant at his last reasonably ascertainable address. An affidavit of compliance with this section must be filed with the clerk of the court on or before the return day of the process, if any, or within any future time the court allows.

History: L. 1973, ch. 188, § 6; 1984, ch. 66, § 30; 1991, ch. 268, § 3.

Amendment Notes. — The 1991 amendment, effective January 1, 1992, deleted former Subsection (1), which read "The district courts

of this state have jurisdiction over any supplier as to any act or practice in this state governed by this act or as to any claim arising from a consumer transaction subject to this act," and deleted the Subsection (2) designation.

13-11-7. Duties of enforcing authority — Confidentiality of identity of persons investigated — Civil penalty for violation of restraining or injunctive orders.

- (1) The enforcing authority shall:
 - (a) enforce this chapter throughout the state;
 - (b) cooperate with state and local officials, officials of other states, and officials of the federal government in the administration of comparable statutes;
 - (c) inform consumers and suppliers on a continuing basis of the provisions of this chapter and of acts or practices that violate this chapter including mailing information concerning final judgments to persons who request it, for which he may charge a reasonable fee to cover the expense;
 - (d) receive and act on complaints; and
 - (e) maintain a public file of final judgments rendered under this chapter that have been either reported officially or made available for public dissemination under Subsection (1)(c), final consent judgments, and to the extent the enforcing authority considers appropriate, assurances of voluntary compliance.
- (2) In carrying out his duties, the enforcing authority may not publicly disclose the identity of a person investigated unless his identity has become a matter of public record in an enforcement proceeding or he has consented to public disclosure.
- (3) On motion of the enforcing authority, or on its own motion, the court may impose a civil penalty of not more than \$5,000 for each day a temporary restraining order, preliminary injunction, or permanent injunction issued under this chapter is violated, if the supplier received notice of the restraining or injunctive order. Civil penalties imposed under this section shall be paid to the General Fund.

History: L. 1973, ch. 188, § 7; 1983, ch. 58, § 6; 1987, ch. 92, § 24.

Amendment Notes. — The 1987 amend-

ment substituted "this chapter" for "this act" and made minor stylistic changes in Subsection (1).

13-11-10, 13-11-11. Repealed.

Repeals. — Laws 1988, ch. 135, § 1 repeals §§ 13-11-10, as enacted by Laws 1973, ch. 188, § 10 and § 13-11-11, as amended by Laws

1983, ch. 58, § 7, relating to rule-making procedure and filing of rules, respectively, effective April 25, 1988.

13-11-13 to 13-11-15. Repealed.

Repeals. — Laws 1988, ch. 135, § 1 repeals §§ 13-11-13 to 13-11-15, as enacted by Laws 1973, ch. 188, §§ 13 to 15, relating to petition for adoption, amendment or repeal of rules; ac-

tion for declaratory judgment on validity or applicability of rule; and invalidation of rules, effective April 25, 1988.

13-11-17. Actions by enforcing authority.

NOTES TO DECISIONS

ANALYSIS

Class actions
Cited

Class actions.

In an action brought by the Division of Consumer Protection, alleging misconduct in the sale of condominiums, a summary judgment in favor of the division, which was later assigned to an individual as representative of the al-

leged class of condominium owners, was void, because the record did not reflect that members of the would-be class of condominium owners had been notified that the action had been brought. *Workman v Nagle Construction*, 802 P 2d 749 (Utah Ct App 1990)

Cited in *State ex rel Division of Consumer Protection v GAF Corp*, 760 P 2d 310 (Utah 1988)

13-11-17.5. Costs and attorney's fees.

Any judgment granted in favor of the enforcing authority in connection with the enforcement of this chapter shall include, in addition to any other monetary award or injunctive relief, an award of reasonable attorney's fees, court costs, and costs of investigation.

History: C. 1953, 13-11-17.5, enacted by L. 1987, ch. 105, § 4.

13-11-19. Actions by consumer.

NOTES TO DECISIONS

Cited in *Wade v Jobe*, 818 P 2d 1006 (Utah 1991)

COLLATERAL REFERENCES

A.L.R. — Attorneys' fees as recoverable in fraud action, 44 A L R 4th 776

Liability for delay in making repair of motor vehicle, 44 A L R 4th 1174

13-11-20. Class actions.

- (1) An action may be maintained as a class action under this act only if:
 - (a) the class is so numerous that joinder of all members is impracticable,
 - (b) there are questions of law or fact common to the class;
 - (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
 - (d) the representative parties will fairly and adequately protect the interests of the class; and
 - (e) either:
 - (i) the prosecution of separate actions by or against individual members of the class would create a risk of:
 - (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

- (B) adjudications with respect to individual members of the class that would as a practical matter dispose of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
- (ii) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
- (iii) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
- (2) The matters pertinent to the findings under Subsection (1)(e)(iii) include:
- (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
 - (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
 - (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
 - (d) the difficulties likely to be encountered in the management of a class action.
- (3) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and it may be amended before decision on the merits.
- (4) In a class action maintained under Subsection (1)(e) the court may direct to the members of the class the best notice practicable under the circumstances, including individual notice to each member who can be identified through reasonable effort. The notice shall advise each member that:
- (a) the court will exclude him from the class, unless he requests inclusion, by a specified date;
 - (b) the judgment, whether favorable or not, will include all members who request inclusion; and
 - (c) a member who requests inclusion may, if he desires, enter an appearance through his counsel.
- (5) When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class.
- (6) In the conduct of a class action the court may make appropriate orders:
- (a) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;
 - (b) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in the manner the court directs to some or all of the members or to the enforcing authority of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;
 - (c) imposing conditions on the representative parties or on intervenors;

(d) requiring that the pleadings be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly; or

(e) dealing with similar procedural matters.

(7) A class action shall not be dismissed or compromised without approval of the court. Notice of the proposed dismissal or compromise shall be given to all members of the class as the court directs.

(8) The judgment in an action maintained as a class action under Subsection (1)(e)(i) or (ii), whether or not favorable to the class, shall describe those whom the court finds to be members of the class. The judgment in a class action under Subsection (1)(e)(iii), whether or not favorable to the class, shall specify or describe those to whom the notice provided in Subsection (4) was directed, and who have requested inclusion, and whom the court finds to be members of the class.

History: L. 1973, ch. 188, § 2; 1974, ch. 5, § 1; 1992, ch. 30, § 26.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, made stylistic

changes in Subsection (1) and substituted "Subsection (4)" for "Subsection (d)" in the second sentence of Subsection (8).

NOTES TO DECISIONS

Notice.

In an action brought by the Division of Consumer Protection, alleging misconduct in the sale of condominiums, a summary judgment in favor of the division, which was later assigned to an individual as representative of the al-

leged class of condominium owners, was void, because the record did not reflect that members of the would-be class of condominium owners had been notified that the action had been brought. *Workman v. Nagle Construction*, 802 P.2d 749 (Utah Ct. App. 1990).

13-11-22. Exemptions from application of act.

NOTES TO DECISIONS

Cited in *Wade v. Jobe*, 818 P.2d 1006 (Utah 1991).

CHAPTER 11a

TRUTH IN ADVERTISING

Section		Section	
13-11a-1.	Purpose.		Injunctive relief — Damages —
13-11a-2.	Definitions.		Attorneys' fees — Corrective
13-11a-3.	Deceptive trade practices enumerated — Records to be kept — Defenses.		advertising — Notification required.
13-11a-4.	Jurisdiction of district courts —	13-11a-5.	Exemptions.

were performed outside the state, 16 A.L.R.4th 1318.

Forum state's jurisdiction over nonresident defendant in action based on obscene or threatening telephone call from out of state, 37 A.L.R.4th 852.

Necessity and permissibility of raising claim for abuse of process by reply or counterclaim in

same proceeding in which abuse occurred — state cases, 82 A.L.R.4th 1115.

Key Numbers. — Corporations ⇨ 507; Counties ⇨ 219; Municipal Corporations ⇨ 1029; Process ⇨ 21, 23, 24, 50 to 58, 63, 64, 82, 84 to 111, 127 to 153; 161 to 165; Schools and School Districts ⇨ 119; States ⇨ 204.

Rule 5. Service and filing of pleadings and other papers.

(a) **Service: When required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, notice of signing or entry of judgment under Rule 58A(d), and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except as provided in Rule 55(a)(2) (default proceedings) or pleadings asserting new or additional claims for relief against them which shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) **Service: How made.**

(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(2) A resident attorney, on whom pleadings and other papers may be served, shall be associated as attorney of record with any foreign attorney practicing in any of the courts of this state.

(c) **Service: Numerous defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the

plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) **Filing.** All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may upon motion of a party or on its own initiative order that depositions, interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

(e) **Filing with the court defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk, if any.

(Amended effective Sept. 4, 1985; Jan. 1, 1987.)

Advisory Committee Note. — Rule 5(d) is amended to give the trial court the option, either on an ad hoc basis or by local rule, of ordering that discovery papers, depositions, written interrogatories, document requests, requests for admission, and answers and responses need not be filed unless required for specific use in the case. The committee is of the view that a local rule of the district courts on the subject should be encouraged.

Compiler's Notes. — This rule is substantially similar to Rule 5, F.R.C.P.

Cross-References. — How civil action commenced, Rule 3(a).

Service by mail, additional time after, Rule 6(e).

Third-party defendant, service upon, Rule 14.

NOTES TO DECISIONS

ANALYSIS

Filed depositions.

Service upon attorney.

—Presumption of authorization.

When service required.

—Default judgment.

—Appeal.

Cited.

Filed depositions.

Sealed pretrial depositions filed with a court are presumptively public under the Utah Public and Private Writings Act (§ 78-26-1 et seq.) and can be kept secret only on a showing of good cause. *Carter v. Utah Power & Light Co.*, 800 P.2d 1095 (Utah 1990).

Service upon attorney.

—Presumption of authorization.

Where defendant engaged attorney only to file motion but never so notified court or attorney, appearance of attorney to file motion raised presumption that he represented defendant in full action. Where defendant presented no clear and convincing evidence to refute presumption, notice given to attorney of date set for trial was good notice to defendant. *Blake v. Blake*, 17 Utah 2d 369, 412 P.2d 454 (1966).

When service required.

—Default judgment.

Plaintiff was under no duty to notify defendants of default judgment entered against them. *Central Bank & Trust Co. v. Jensen*, 656 P.2d 1009 (Utah 1982) (decided before 1985 addition of reference to Rule 55).

—Appeal.

Under former Rule 73(h), time for appeal from default judgment in city court runs from date of notice of entry of such judgment, rather than from the date of judgment. *Buckner v. Main Realty & Ins. Co.*, 4 Utah 2d 124, 288 P.2d 786 (1955) (but see Rule 58A(d)).

Cited in *Remington-Rand, Inc. v. O'Neil*, 4 Utah 2d 270, 293 P.2d 416 (1956); *Pillsbury Mills, Inc. v. Nephi Processing Plant, Inc.*, 7 Utah 2d 286, 323 P.2d 266 (1958); *Dehm v. Dehm*, 545 P.2d 525 (Utah 1976); *Triple I Supply, Inc. v. Sunset Rail, Inc.*, 652 P.2d 1298 (Utah 1982); *Sperry v. Smith*, 694 P.2d 581 (Utah 1984); *Williams v. State*, 716 P.2d 806 (Utah 1986); *Walker v. Carlson*, 740 P.2d 1372 (Utah Ct. App. 1987).

Rule 15. Amended and supplemental pleadings.

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **Amendments to conform to the evidence.** When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) **Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Compiler's Notes. — This rule is substantially similar to Rule 15, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Amendments.

- After pretrial order.
- Alternative to dismissal.
- Payment of attorney fees.
- Prolix complaint.
- Amendment of response.
- Answer.
- To include counterclaim.
- Complaint.

- To defeat motion for summary judgment.
- To include damages.
- Considerations.
- Prejudice.
- Court's discretion.
- Abused.
- Not abused.
- Dismissal without opportunity to amend.
- Following dismissal.
- Late amendment.
- Day of trial.

names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) **Perpetuation by action.** This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Compiler's Notes. — In light of the 1972 amendments to these rules, the reference in Subdivision (a)(4) to Rule 26(d) is incorrect. It should refer to Rule 32(a).

This rule is similar to Rule 27, F R C P

Cross-References. — Appeals from district court Utah Const., Art. VIII, Sec. 5

Cross-examination in deposition proceedings Rule 30(c)

District court, jurisdiction of, § 78-3-4

Motions and orders, Rule 7

Oral examination depositions upon, Rule 30

Pretrial procedure, formulating issues, Rule 16

Prior testimony, admissibility of, Rule 804

(b)(1), U R E

Service of motions and papers, Rule 5

Time, Rule 6

Written questions depositions upon, Rule 31

NOTES TO DECISIONS

ANALYSIS

Before action

—Appeal from order

—Fishing expedition

Perpetuation of testimony

—Notice

Before action.

—**Appeal from order.**

Order permitting depositions to be taken before commencement of action was appealable *Bainum v. Mackay*, 15 Utah 2d 295, 391 P 2d 436 (1964)

—**"Fishing expedition."**

A party may not use the deposition process described in Subdivision (a) as a "fishing expedition" for the purpose of preparing a complaint. *Bainum v. Mackay*, 15 Utah 2d 295, 391 P 2d 436 (1964)

Perpetuation of testimony.

—**Notice.**

Where complaint had been filed but not yet served on respondent in divorce action, court's taking of complainant's testimony without notice to respondent and ordering it to be perpetuated was invalid. *Treutle v. District Court*, 7 Utah 2d 155, 320 P 2d 666 (1958)

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d Depositions and Discovery §§ 118 to 129

C.J.S. — 26A C.J.S. Depositions §§ 5, 33
Key Numbers. — Depositions ¶¶ 11, 33

Rule 28. Persons before whom depositions may be taken.

(a) **Within the United States.** Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term "officer" as used in Rules 30, 31, and 32 includes a person appointed by the court or designated by the parties under Rule 29.

(b) **In foreign countries.** In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the *United States*, or (2) *before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony*, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name of country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) **Disqualification for interest.** No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule is substantially similar to Rule 28, F.R.C.P.

Subpoena of person in foreign country, Rule 45(d)(3).

Cross-References. — Oaths, who may administer, § 78-24-16.

NOTES TO DECISIONS

Foreign countries.

—Depositions as evidence.

In action for workmen's compensation brought by mother of deceased employee as his alleged dependent, depositions of testimony of nonparties, taken in foreign country without notice, stipulation, or order authorizing them,

there being no appearance by employer at taking of depositions, and no opportunity for cross-examination, amounted to no more than ex parte affidavits, and were not competent evidence. *Robles v. Industrial Comm'n*, 77 Utah 408, 296 P. 600 (1931).

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d Depositions and Discovery §§ 15 to 20.

C.J.S. — 26A C.J.S. Depositions §§ 17 to 19.

A.L.R. — Disqualification of attorney, other-

wise qualified, to take oath or acknowledgment from client, 21 A.L.R.3d 483.

Key Numbers. — Depositions ⇨ 49, 50, 53.

Rule 29. Stipulations regarding discovery procedure.

Unless the court orders otherwise, the parties may by written stipulation

(1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and

(2) modify the procedures provided by these rules for other methods of discovery.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. — This rule corresponds to Rule 29, F.R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d Depositions and Discovery § 11.

C.J.S. — 26A C.J.S. Depositions § 105.

A.L.R. — Incompetency, taking deposition or serving interrogatories in civil case as waiver of, 23 A.L.R.3d 389.

Videotape, use to take deposition for presentation at civil trial in state court, 66 A.L.R.3d 637.

Key Numbers. — Depositions ⇐ 111.

Rule 30. Depositions upon oral examination.

(a) **When depositions may be taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in Subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) **Notice of examination; general requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization; deposition by telephone.**

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this Subdivision (b)(2) he was unable through the exercise of diligence to obtain

counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken and the manner of recording, preserving, and filing the deposition and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under Subdivision (c), any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in Subdivision (e), and the certification of the officer required by Subdivision (f) shall be set forth in a writing to accompany a deposition recorded by nonstenographic means.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This Subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(b)(1), and 45(d), a deposition taken by telephone is taken at the place where the deponent is to answer questions propounded to him.

(c) **Examination and cross-examination; record of examination; oath; objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Utah Rules of Evidence. The officer before whom the deposition is to be taken shall put the witnesses on oath and shall personally or by someone acting under his direction and in his presence record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with Subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, or to the conduct of any party and any other objection to the proceedings shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral

examination, parties may serve written questions in a sealed envelope on the party taking the deposition, and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) **Motion to terminate or limit examination.** At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) **Submission to witness; changes; signing.** When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefore; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) [Rule 32(c)(4)] the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) **Certification and filing by officer; exhibits; copies; notice of filing.**

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the court, he shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness shall, upon the request of the party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them he may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may be used in the same manner as if annexed to the deposition. Any party may move for an order that the

original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefore, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) Failure to attend or to serve subpoena; expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. — Following the amendment of Rule 32, effective January 1, 1987, the reference to Rule 32(d)(4) near the end of Subdivision (e) of this rule should be to Rule 32(c)(4).

This rule corresponds to Rule 30, F.R.C.P.

Cross-References. — Commencement of action, Rule 3.

Corporation defined, Utah Const., Art. XII, Sec. 4; § 16-10-2.

Court reporters and stenographers, § 78-56-1.1 et seq.

Depositions before action or pending appeal, Rule 27.

Filing with the court defined, Rule 5(e).

Motions, orders and other papers, Rule 7(b).

Partnership defined, § 48-1-3.

Protective orders, Rule 26(c).

Scope of cross-examination, Rule 611(b), U.R.E.

Stipulations regarding discovery procedure, Rule 29.

Transcript of testimony at trial or hearing as evidence, Rule 80(c).

NOTES TO DECISIONS

ANALYSIS

Authentication.

—Objection.

Changes to deposition.

Compelling appearance.

Privilege against self-incrimination.

Sealed depositions.

When taken.

—Action to remove city officer.

—Criminal actions.

Authentication.

—Objection.

Objection to deposition based on insufficiency of authentication by officer taking it must be made by motion to suppress before trial of cause. *Groot v. Oregon Short Line R.R.*, 34 Utah 152, 96 P. 1019 (1908).

Changes to deposition.

Although changes in depositions may be lib-

erally allowed, the technical requirements of Subdivision (e) that the deponent provide reasons for the changes must be strictly applied. However, striking the changes is an extreme remedy and should be used sparingly. A court may instead permit the deponent opportunity to comply. *Gaw v. State*, 798 P.2d 1130 (Utah Ct. App. 1990).

Compelling appearance.

To obtain presence of witness for purpose of taking his deposition, notice and affidavit prescribed by former rule had to be served on adverse party's attorney; if witness did not voluntarily appear, officer before whom deposition was to be taken had to issue subpoena. Command to witness to appear contained in notice or affidavit was ineffective. *Olson v. District Court*, 93 Utah 145, 71 P.2d 529, 112 A.L.R. 438 (1937).

Rule 32. Use of depositions in court proceedings.

(a) **Use of depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of [a] deponent as a witness or for any other purpose permitted by the Utah Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and when an action has been brought in any court of the United States or of any state and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Utah Rules of Evidence.

(b) **Objections to admissibility.** Subject to the provisions of Rule 28(b) and Subdivision (d)(3) [(c)(3)] of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) **Effect of errors and irregularities.**

(1) **As to notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) **As to disqualification of officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) **As to taking of deposition.**

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) **As to completion and return of deposition.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

(d) **Publication of deposition.** Use of a deposition under Subsection (a) of this rule shall have the effect of publishing the deposition unless the court orders otherwise in response to objections.

(Amended effective Jan. 1, 1987.)

Compiler's Notes. — Following the amendment of this rule, effective January 1, 1987, the reference to Subdivision (d)(3) in Subdivision (b) should be to Subdivision (c)(3).

This rule corresponds to Rule 32, F R C P
Cross-References. — Admissible evidence, Rules 401 to 411, U R.E.

Depositions and prior testimony, admissibility of, Rule 804(b)(1), U R.E.

Depositions upon written questions, Rule 31.

Extension of time, Rule 6(b).

Oaths, who may administer, § 78-24-16.

Protective orders, Rule 26(c).

Rulings on evidence, Rule 103, U R.E.

Service of notice, Rule 5.

Subpoena for taking deposition, issuance and service of, Rule 45(d).

Witnesses, Rules 601 to 615, U R.E.

NOTES TO DECISIONS

ANALYSIS

Admissibility

—Standard of review

—Witness's absence

Errors and irregularities

—Answering stricken question.

—Exclusion of part of deposition.

—Nonspecific answers.

—Refusal to give information source.

—Exclusion of deposition.

—Waiver

—Absence of motion to suppress.

Objections.

—General

—Health of witness.

was an abuse of discretion. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

Cited in *Utah Sand & Gravel Prods. Corp. v. Tolbert*, 16 Utah 2d 407, 402 P.2d 703 (1965);

J.P.W. Enters., Inc. v. Naef, 604 P.2d 486 (Utah 1979); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986).

COLLATERAL REFERENCES

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: *Grham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments §§ 1152 to 1213.

C.J.S. — 49 C.J.S. Judgments §§ 187 to 218.

A.L.R. — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Key Numbers. — Judgment ⇐ 92 to 134.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the

action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Affidavit.
 —Contents.
 —Corporation.
 —Experts.
 —Inconsistency with deposition.
 —Necessity of opposing affidavits.
 —Resting on pleadings.
 —Objection.
 —Sufficiency.
 —Hearsay and opinion testimony.
 —Superseding pleadings.
 —Unpleaded defenses.
 —Verified pleading.
 —Waiver of right to contest.
 —When unavailable.
 —Exclusive control of facts.
 —Who may make.
 Affirmative defense.
 Answers to interrogatories.

Appeal.
 —Adversely affected party.
 —Standard of review.
 Attorney's fees.
 Availability of motion.
 Cross-motions.
 Damages.
 Discovery.
 Disputed facts.
 Evidence.
 —Facts considered.
 —Improper evidence.
 —Proof.
 —Weight of testimony.
 Improper party plaintiff.
 Issue of fact.
 —Corporate existence.
 —Deeds.
 —Lease as security.
 Judicial attitude.
 Motion for new trial.

Subdivisions (5) through (7) as Subdivisions (5)(C) and (D) and (6); substituted "circuit" for "court" in Subdivision (5)(C); substituted "presiding judge" for "court" in two places in Subdivision (5)(D); substituted "March 1st" for "February 28th" in Subdivision (6); added Subdivision (7); and made stylistic changes throughout.

The 1990 amendment, in Subdivision (1) added "or if the statement is made on behalf of a business or corporation, a statement that the business or corporation" to the introductory language of paragraph (C) and made stylistic changes; rewrote Subdivision (2) to delete language relating to appraisals and inserted "prepared by a certified public accountant"; redesignated former Subdivision (2)(C) as present Subdivision (3), added present Subdivision (4),

and renumbered the remaining subdivisions accordingly, making appropriate reference changes throughout; in present Subdivision (3), deleted "audited" before "financial statement" and substituted "surety" for "company" in the first sentence and substituted "the value" for "a ratio of bond dollars to letter of credit dollars" in the second sentence; in present Subdivision (5), substituted "current assets" for "real assets" in two places; and rewrote present Subdivision (6) to delete a table setting out the ratio of bond dollars outstanding to net worth value.

The 1992 amendment substituted "Commercial" for "qualifications of" in the rule heading, inserted "re-qualification and disqualification" and "commercial" in the Intent section, and substantially rewrote the rule.

Rule 4-408. Locations of trial courts of record.

Intent:

To designate locations of trial courts of record.

Applicability:

This rule shall apply to all trial courts of record.

Statement of the Rule:

(1) Each county seat and the following municipalities are hereby designated as locations of trial courts of record: American Fork; Bountiful; Cedar City; Clearfield; Kaysville; Layton; Murray; Orem; Park City; Roosevelt; Roy; Salem; Sandy; Spanish Fork; West Valley City.

(2) Subject to limitations imposed by law, a trial court of record of any subject matter jurisdiction may hold court in any location designated by this rule.

(Added effective January 1, 1992.)

ARTICLE 5.

CIVIL PRACTICE.

Rule 4-501. Motions.

Intent:

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions.

To establish a procedure for expedited dispositions.

Applicability:

This rule shall apply to motion practice in all district and circuit courts except proceedings before the court commissioners and the small claims de-

partment of the circuit court. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

Statement of the Rule:

(1) Filing and service of motions and memoranda.

(a) **Motion and supporting memoranda.** All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(b) **Memorandum in opposition to motion.** The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(d) of this rule.

(c) **Reply memorandum.** The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(d) **Notice to submit for decision.** Upon the expiration of the five-day period to file a reply memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

(2) Motions for summary judgment.

(a) **Memorandum in support of a motion.** The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) **Memorandum in opposition to a motion.** The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be

deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) Hearings.

(a) A decision on a motion shall be rendered without a hearing unless ordered by the Court, or requested by the parties as provided in paragraphs (3)(b) or (4) below.

(b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(c) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(d) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(e) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(f) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(g) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the Court.

(4) Expedited dispositions. Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) Telephone conference. The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

(Amended effective January 15, 1990; April 15, 1991.)

Amendment Notes. — The 1990 amendment rewrote this rule to such an extent that a detailed description is impracticable.

The 1991 amendment deleted "and a copy of

the proposed order" following "supporting documentation" in Subdivision (1)(b) and made related stylistic changes and inserted "principal" in Subdivision (3)(b).

NOTES TO DECISIONS

ANALYSIS

When rule applies.
Cited.

When rule applies.

Because the defendants' Rule 56(e) objection to the plaintiff's first affidavit was framed as a

separate, written motion to strike, the plaintiff should have been given ten days to respond, as prescribed by Subdivision (1)(b) of this rule. *Gillmor v. Cummings*, 806 P.2d 1205 (Utah Ct. App. 1991).

Cited in *Huston v. Lewis*, 169 Utah Adv. Rep. 24 (1991).

Rule 4-502. Discovery procedures in civil cases.**Intent:**

To establish a procedure for the filing of discovery documents.

To establish a limitation on discovery procedures within 30 days of trial.

Applicability:

This rule shall apply to the District, Juvenile and Circuit Courts.

Statement of the Rule:

(1) Parties conducting discovery under Rules 33, 34 and 36 of the Utah Rules of Civil Procedure shall not file discovery requests with the clerk of the court, but shall file only the original certificate of service stating that the discovery requests have been served on the other parties and the date of service. The responding party shall file a similar certificate with the clerk of the court.

(2) The party serving the discovery request shall retain the original with a copy of the proof of service affixed to it and serve a copy of the discovery request and proof of service upon the opposing party or counsel. The party responding to the discovery request shall retain the original with a copy of the proof of service affixed to it, and serve a copy of the responses and the proof of service upon the opposing party or counsel. The discovery requests and response shall not be filed with the clerk of the court unless the court on motion and notice and for good cause shown so orders.

(3) Any party filing a motion to compel compliance with a discovery request or a motion which relies upon the discovery response shall attach a copy of the discovery request or response which is at issue in the motion.

(4) Depositions taken pursuant to the Rules of Civil Procedure shall not be filed with the clerk of the court except as provided in this Code or upon order of the court for good cause shown.

(5) All parties shall be entitled to conduct discovery proceedings in accordance with this rule. All discovery proceedings shall be completed, including all responses thereto, and all depositions and other documents filed with the court no later than thirty (30) days before the date set for trial of the case. The right to conduct discovery proceedings within thirty (30) days before trial shall be within the discretion of the court. Motions to conduct discovery within thirty (30) days before trial shall be presented to the judge assigned to the case upon notice to the other parties in the action. In exercising its discretion, the court shall take into consideration the necessity and reasons for such discovery, the diligence or lack of diligence of the parties seeking such discovery, whether permitting such discovery will prevent the case from going to

trial on the scheduled date, or result in prejudice to any party. Nothing herein shall preclude or limit the voluntary exchange of information or discovery by stipulation of the parties at any time prior to the date set for trial, but in no event shall such exchanges or stipulations require a court to grant a continuance of the trial date.

(Amended effective January 15, 1990; April 15, 1991.)

Amendment Notes — The 1990 amendment, in Subdivision (4), substituted "except as provided in Rule 4-501 of this Code or upon order of the court for good cause shown" for "unless the court on motion and notice and for good cause shown so orders" and deleted further procedural provisions

The 1991 amendment substituted "the original" for "a" in the first sentence in Subdivision (1), substituted "a copy of the" for "the original" twice in Subdivision (2), and deleted a reference to Rule 4-501 in Subdivision (4)

Rule 4-503. Requests for jury instructions.

Intent:

To establish a uniform procedure for submitting and requesting jury instructions.

Applicability:

This rule shall apply to the District, Circuit and Justice Courts.

Statement of the Rule:

(1) All jury instruction requests shall be presented to the court five days prior to the scheduled trial date unless otherwise ordered by the court. The court, in its discretion, may allow the presentation of jury instructions at any time prior to the submission of the case to the jury. At the time of presentation to the court, a copy of the requested instructions shall be furnished to opposing counsel.

(2) Jury instruction requests must be in writing and state in full the instruction requested. Each request shall be upon a separate sheet of paper, the original and copies of which shall be free from red lines and firm names and shall be entitled:

"Instruction No. ____"

The number of the request shall be written in lead pencil.

(3) If case citations are used in support of a requested instruction, at least one copy of the requested instruction furnished to the court shall be submitted without the citations. Citations may be provided upon separate sheets attached to the particular instruction to which the citation applies.

(Amended effective January 15, 1990.)

Amendment Notes. — The 1990 amendment added Justice Courts to the scope of applicability of this rule and substituted "five"

for "10" in the first sentence and added the second sentence in Subdivision (1).

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

* * *

GUY BARCO ZEWADSKI,

Plaintiff,

-vs-

RICK WARNER LINCOLN-MERCURY

Defendant.

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* * *

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Salt Lake City, Utah

September 20, 1991

* * *

BRAD J. YOUNG
OFFICIAL COURT REPORTER

000689

MAR 9 1992

By W. J. Sack
Deputy Clerk

1 P R O C E E D I N G S

2 THE COURT: Guy Barco Zewadski vs. Rick Warner
3 Lincoln-Mercury, 890901423. Counsel and the pro se plaintiff
4 will state an appearance.

5 MR. TAYLOR: Tom Taylor for FMCC.

6 MR. ZEWADSKI: Guy Zewadski appearing pro se, your
7 Honor.

8 THE COURT: The matter is before the Court this
9 morning on Ford Motor Credit Company's motion for summary
10 judgment. You may proceed.

11 MR. ZEWADSKI: Yes, your Honor. The question --
12 could you rephrase the question, please.

13 THE COURT: You may proceed, as you deem
14 appropriate.

15 MR. ZEWADSKI: Your Honor, I believe the question
16 was phrased to me was to explain what importance the service
17 contract was in this issue. My amended response, and
18 attached -- my amended response in opposition to Ford Motor
19 Credit Company's motion for summary judgment, and its
20 attending affidavit, accompanying affidavit, set forth what I
21 believe to be the importance of the service contract in this
22 issue, and that it is just simply a contract issue, entirely,
23 that the lease contract that Ford Motor Company is attempting
24 to enforce was an integrated contract, consisting of two
25 documents: a lease and a service contract, which was listed

1 upon it, and incorporated by reference. And the two
2 documents, together, constitute the contract between Ford
3 Motor Credit Company and myself. And the significance of the
4 service contract is that when it finally arrived, 90 days
5 later, through the mail, it turned out to be invalid. It
6 didn't cover anything whatsoever. And I believe that causes
7 the contract between the parties to be an unenforceable or
8 unconscionable contract. And that's the significance of it,
9 your Honor.

10 THE COURT: One other question the Court will direct
11 to the pro se plaintiff. How many miles were put on the
12 leased vehicle from the time you drove it off the car lot
13 until it was returned?

14 MR. ZEWADSKI: I can't give an exact figure, your
15 Honor, but it was somewhere in the vicinity of 4,000 miles.

16 THE COURT: How many weeks did you have the vehicle
17 in your possession?

18 MR. ZEWADSKI: I returned the vehicle on March 9,
19 and I had picked it up on January 7, I believe.

20 THE COURT: How much money did you pay on the lease
21 contract from the time the vehicle was delivered until the
22 time it was returned?

23 MR. ZEWADSKI: I was never late with any of the
24 lease payments.

25 THE COURT: Did you understand the Court's question?

J00690

1 MR. ZEWADSKI: Your Honor, let me please refer to
2 the contract itself.

3 THE COURT: Do you understand the Court's question?
4 How much money did you pay on the lease agreement from the
5 date the vehicle was delivered to you until the date you
6 returned it?

7 MR. ZEWADSKI: I am doing a quick computation here,
8 your Honor. Approximately \$1,650, your Honor.

9 THE COURT: What did the lease provide for in terms
10 of down payment and monthly payments?

11 MR. ZEWADSKI: The down payment was \$866.50, your
12 Honor. And the monthly payments were \$391.50.

13 THE COURT: Anything further?

14 MR. ZEWADSKI: No, your Honor.

15 THE COURT: Anything further you would like to say
16 about anything that relates to the motion for summary
17 judgment?

18 MR. ZEWADSKI: No, your Honor.

19 THE COURT: You are sure?

20 MR. ZEWADSKI: Sure.

21 THE COURT: Response?

22 MR. TAYLOR: Your Honor, all I have to say is that
23 we disagree with Mr. Zewadski's assertions about the service
24 warranty. They are legal conclusions that the pleadings and
25 the evidence in this case do not support. He was never

1 denied -- as the Court has suggested, and is accurate, in the
2 Court's questioning Mr. Zewadski -- he was never denied
3 service under this service warranty for problems which the
4 service warranty covered. His assertions of legal matters and
5 factual matters in this case are neither ripe nor even
6 relevant under this case, because there is simply no damage in
7 what he is talking about. We just disagree.

8 THE COURT: Anything either party would like to say
9 before the Court rules? Do both sides submit?

10 MR. TAYLOR: Submit.

11 MR. ZEWADSKI: Submit.

12 THE COURT: The Court finds as follows: The
13 contractual agreement entered into between the plaintiff and
14 the lessor was, in fact, a legal lease. It was not a security
15 agreement.

16 The Court further finds that, consistent with the
17 plaintiff's own acknowledgement, there has never been, from
18 the date the vehicle was delivered to the plaintiff until the
19 date it was returned to the lessor, an assertion by the
20 plaintiff that mechanical problems, electrical problems,
21 suspension problems, or any other defective problem existed
22 with the vehicle which was the subject of the lease.

23 The Court further finds the sale of the vehicle by
24 the defendant was commercially reasonable, that it was
25 conducted appropriately to obtain the maximum money from the

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1 subject vehicle.

2 The Court further finds that the allegations by the
3 plaintiff relating to the service contract are neither
4 factually nor legally persuasive. Service has never been an
5 issue in the lawsuit before the Court.

6 The Court further finds that, for whatever reasons,
7 the lessee developed lessee remorse. The lease was valid on
8 its face, it was enforceable, and the returning of the leased
9 vehicle by the lessee, after 60 days and 4,000 miles had
10 intervened, did not exonerate the lessee of his
11 responsibilities, pursuant to the terms and conditions of the
12 lease.

13 The Court finds that there are no genuine issues of
14 material fact, relating to this dispute. Therefore, as a
15 matter of law, the defendant is entitled to summary judgment,
16 and the relief prayed for is granted. The defendant is
17 awarded \$5,692 as the amount due and owing by plaintiff. That
18 sum of money accrues interest at 10 percent per annum from
19 August 28, 1989, pursuant to the terms and conditions of the
20 lease.

21 Further, the lease provides for the awarding of
22 attorney's fees to the prevailing party. The Court finds the
23 defendant to be the prevailing party, and awards to the
24 defendant attorney's fees of \$9,267.50.

25 MR. TAYLOR: I would note \$160 of that was for a

J00693

1 particularly special award of attorney's fees for Rule 11
2 sanctions. If Mr. Zewadski has paid that, that amount should
3 be subtracted.

4 THE COURT: So ordered. In the event that the
5 reasonableness of the attorney's fees in this matter is
6 challenged by the pro se plaintiff, on proper motion the Court
7 will schedule a hearing, dealing solely with the question of
8 reasonableness of attorney's fees.

9 Counsel for the defendant will prepare specific
10 findings of fact, conclusions of law, and an order consistent
11 and compatible with the ruling of the Court from the bench on
12 the record.

13 MR. TAYLOR: Your Honor, I have taken copious notes.
14 However, I have prepared an order, and I believe that you did
15 not -- you did not deviate from anything that I said. I would
16 be delighted if you would look at it and see if it would be
17 sufficiently consistent with what you have mentioned, that you
18 would sign the order. I also included in this order some
19 things about the objection to the form of the last order,
20 which I presume we will deal with here, too.

21 THE COURT: Counsel for the defendant will provide
22 the order, the findings and the conclusions to the pro se
23 plaintiff, provide the plaintiff an opportunity to review
24 those documents. Absent objection, they are to be submitted
25 to the Court for signature on or before September 27, 1991,

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1 for filing with the clerk and signing by the Court.

2 Regarding the previous order, submitted by the
3 defendant, and objected to by the pro se plaintiff, the Court
4 will deal very briefly with the plaintiff's objections to the
5 order, which was prepared as a result of a hearing August 30,
6 1991, on this case. You may proceed.

7 MR. ZEWADSKI: Yes, your Honor. I prepared the
8 notice of objection to the order before I was able to get a
9 copy of the reporter's transcript of the proceedings. So it
10 is not quite complete. But the only primary objection that I
11 have is concerning argument on the merits of the amended
12 answer, and I believe that the court reporter's transcript of
13 the proceeding, right at the beginning, states -- the Court
14 stated that the matter that was before the Court for -- was
15 for clarification of a court order, and an apparent conflict
16 with a minute entry prepared by the Clerk of the Court, and
17 there wasn't any notice to reargue my motion for leave to
18 amend my answer, which is essentially what I believe counsel
19 is saying when he says that there was argument on the merits
20 of the amended answer. There wouldn't have been any reason to
21 argue the merits of the amended answer, because it was just
22 simply filed without leave of the Court. The Court had denied
23 my motion to amend my answer.

24 THE COURT: Response?

25 MR. TAYLOR: Your Honor, we were denying -- in that

1 order we were simply saying what the Court said was exactly
2 what it said. I, too, have a copy of this transcript. You
3 said on page 8, this is the Court speaking --

4 THE COURT: Cite the line so the pro se plaintiff
5 can follow.

6 MR. TAYLOR: Beginning on page 7, line 23, "The
7 Court has signed the order dated August 30, 1991, related to
8 the hearing of August 2, 1991. The minute entry, to the
9 extent that it granted the plaintiff's motion to supplement an
10 answer to the defendant's counterclaim, is ordered to be
11 corrected. That motion was denied. The Court -- I am sorry,
12 that motion is and was denied. The Court granted the
13 plaintiff leave to respond to defendant's motion for summary
14 judgment on the defendant's counterclaim."

15 Your Honor, simply because you stated at the
16 beginning that you were dealing with an order, clarification
17 of an order, is, to our mind, not an appropriate argument.
18 The subject of that clarification was the amended answer. We
19 handed a copy of it to the Court. We handed a copy to
20 Mr. Zewadski, we discussed the content of that. We have done
21 it now in two hearings.

22 If Mr. Zewadski is trying to get this thing left out
23 so it will somehow be viewed as a straight pleading on appeal,
24 there is absolutely no excuse for that. This thing has been
25 argued and argued. We talked not only about that motion but

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1 went a step further and allowed the content of that amended
2 answer to come in. You determined there was nothing in it
3 that had any relevance, legally or factually, in this case.

4 THE COURT: Brief response?

5 MR. ZEWADSKI: Yes, your Honor. At the conclusion
6 of the reporter's transcript of proceedings, on August 30, on
7 page 8 --

8 THE COURT: Cite the line.

9 MR. ZEWADSKI: Line 16. After we had given argument
10 concerning the order and the objection to the order,
11 Mr. Taylor addressed the Court, and he said, "Your Honor, do
12 we need in any way to dispose of these or simply go down the
13 litany of these things?" He was referring to the other
14 matters which had been noticed for hearing. And he stated on
15 line 18, "It would be my understanding, logically, under
16 these, that his objection to the form is denied, our motion to
17 strike his amended answer is granted, our rule 11 motion is
18 withdrawn, his request that the Court regard whatever our
19 response -- objection to form, again request would be denied,
20 and finally, presumably, this Court is going to deny him the
21 sanctions against us for bad faith, not pulling our rule 12.
22 Is that accurate your Honor?" I believe all of those issues,
23 with the exception of the objection to the form of order, were
24 dealt with at the conclusion of the -- of what was discussed
25 in the reporter's transcript.

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1 THE COURT: So the Court correctly understands your
2 position, the issue before the Court this morning is your
3 objection to an order submitted, embodying the ruling of the
4 Court on the August 30, 1991 hearing; is that correct?

5 MR. ZEWADSKI: Not entirely, your Honor. I prepared
6 that objection prior to getting a copy of the transcript. And
7 there is only one thing that I am objecting to. I will
8 withdraw the entire objection if it offends the Court.

9 THE COURT: Mr. Zewadski, the Court invites you to
10 argue aggressively. The Court invites you to argue as
11 assertively as you desire. The Court asked the question in
12 order to correctly understand your position. You have
13 objected to an order submitted by the defendant. That order
14 was submitted to the Court for signature as a result of a
15 hearing held August 30, 1991; is that correct?

16 MR. ZEWADSKI: Yes, your Honor.

17 THE COURT: Tell the Court what portion of that
18 order you specifically object to.

19 MR. ZEWADSKI: Your Honor, on the order prepared by
20 the counsel, concerning the hearing heard August 30, on
21 page 2, halfway down, item No. 1, there is a -- the counsel
22 for Ford Motor Credit Company states that the Court has
23 reviewed Mr. Zewadski's amended answer to Ford Motor Company's
24 counterclaim, and that the Court holds that the objection to
25 the form of order of the August 2 hearing and his amended

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1 answer to Ford Motor Company's counterclaim are based upon and
2 raise factual legal issues. But my objection is that counsel
3 for Ford Motor Credit Company is inferring, also on page 3,
4 No. 2 --

5 THE COURT: Let's deal with them one at a time.
6 What is your objection with the language --

7 MR. ZEWADSKI: Just --

8 THE COURT: Just a moment. What is your objection
9 to the language to which you have just referred on page 2,
10 paragraph 1?

11 MR. ZEWADSKI: Your Honor, it is not at all clear to
12 me that the Court reviewed the amended answer. That would be
13 inconsistent with the ruling that the motion to amend the
14 answer was denied in the first place.

15 THE COURT: The Court made a specific finding that
16 it had reviewed the proposed amended answer, and found that
17 the proposed amended answer would not be permitted, on several
18 grounds, one of which has been stated in the transcript of the
19 August 30 hearing.

20 MR. ZEWADSKI: I am somehow missing that.

21 THE COURT: Read the language again, would you,
22 please, Counsel.

23 MR. TAYLOR: On page 7, line 23, "The Court has
24 signed the order dated August 30, relating to the hearing of
25 August 2, 1991. The minute entry, to the extent that it

1 granted plaintiff's motion to supplement an answer to the
2 defendant's counterclaim, is ordered to be corrected. That
3 motion is and was denied."

4 MR. ZEWADSKI: May I respond?

5 THE COURT: Yes.

6 MR. ZEWADSKI: I realize the Court denied the motion
7 to amend the paper. I have no -- I am not arguing that. What
8 I am saying is that the very fact that the Court denied leave
9 to amend the answer is sufficient -- why would it consider the
10 amended answer on the merits, is what I am saying? It would
11 be inconsistent.

12 THE COURT: As a courtesy to the pro se plaintiff,
13 the Court has extended privileges in this lawsuit that would
14 not be extended if you were represented by counsel. And the
15 Court has stated repeatedly on the record that, in an effort
16 to be fair in every aspect of this litigation, the Court has
17 extended pleading privileges and argument privileges and other
18 privileges that relate to the rules of the Court, simply
19 because you are pro se. Those privileges would not have been
20 extended to you were you represented by counsel.

21 The Court has gone the extra mile repeatedly to
22 understand the basis of your lawsuit, to give you ample
23 opportunity to argue it, and to plead it, and to rule upon it.
24 The Court did consider your proposed amended answer. The
25 Court found that, legally and factually, it was inappropriate,

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1 denied your motion to amend your answer, and the Court so
2 ruled in our August hearing. And the Court so rules this
3 morning. What else do you take objection to?

4 MR. ZEWADSKI: That's it, your Honor.

5 THE COURT: For sure?

6 MR. ZEWADSKI: Honest.

7 THE COURT: Anything further?

8 MR. TAYLOR: There is, your Honor. There have been
9 an enormous variety of pleadings in this case. I have done
10 everything I can to try and keep track of them. Things have a
11 tendency to get lost in this case. If there is any other
12 pleading that is a stray pleading that either I or the Court
13 somehow missed, I would like the Court to ask Mr. Zewadski now
14 if there is such a pleading.

15 THE COURT: The Court has asked repeatedly in the
16 hearing this morning -- and it has taken nearly an hour -- are
17 there any other matters that relate to this lawsuit, whether
18 you have directly noticed them up for hearing, whether the
19 Court has directly made inquiry about them or ruled upon them,
20 is there anything whatever that relates to this lawsuit today,
21 September 20, 1991, that has not been addressed by the Court?

22 MR. ZEWADSKI: There is one, your Honor.

23 THE COURT: Let's hear it.

24 MR. ZEWADSKI: It has been a mystery to me. I have
25 to dig out the docket. When counsel for Ford Motor Credit

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1 Company filed a motion for summary judgment, and I responded
2 to that, I tried to get a supplemental paper, and I filed a
3 motion, and I submitted it for decision, and I have never
4 learned the disposition of that motion.

5 THE COURT: The Court asks that both counsel and pro
6 se plaintiff step into the hallway, determine whether or not
7 any light can be shed on that particular matter, and come back
8 to the Court, we will put it on the record and resolve it.
9 The Court is unaware of what you are alluding to, but is
10 anxious to give you full opportunity to be heard. Anything
11 else?

12 MR. TAYLOR: I have nothing.

13 MR. ZEWADSKI: No, your Honor.

14 THE COURT: The only other matter that this Court
15 will consider on this case is whether or not the pro se
16 plaintiff asserts that legal fees incurred by the defendant in
17 defending this lawsuit have been unreasonable. Otherwise, the
18 order for legal fees stands. Counsel will now prepare an
19 order consistent with the ruling of the Court, prepare
20 specific findings and conclusions, and submit them to the
21 Court for signature on or before 12 noon, September 27, 1991.
22 If they can be approved as to form by the pro se plaintiff
23 prior to that time, submit them, and the Court will sign them.

24 MR. TAYLOR: Your Honor, I have an order right now
25 that I believe with the exception of your ruling about the

1 attorney's fees and the separate hearing on that, I believe
2 that this order is sufficiently in line with what you have
3 ordered here today. If you would like to look at that,
4 perhaps we can deal with that.

5 THE COURT: The Court orders that the pro se
6 plaintiff and counsel go into the jury room, review the matter
7 page by page, line by line. If there is an objection, come
8 back, and we will put it on the record. The Court will sign
9 the order submitted as a result of the August 30, 1991
10 hearing, and finds that the order correctly embodies the
11 ruling of the Court on that hearing.

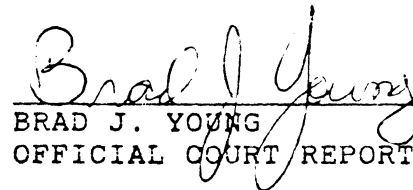
12 (This proceeding was concluded.)
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C E R T I F I C A T E

I, BRAD J. YOUNG, hereby certify that on September 30, 1991, I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Pat B. Brian and that the foregoing is a true and correct transcription of my stenographic notes thereof.

Dated at Salt Lake City, Utah, this 9th day of September, 1991.


BRAD J. YOUNG
OFFICIAL COURT REPORTER

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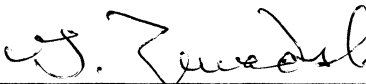
Mailing Certificate

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing PAMPHLET OF APPELLANT OF STATUTES, RULES, ETC; PURSUANT TO U.R.A. P. 24 (F) to the following, on this 11th day of February, 1993:

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