

## XII CONSUMER HOME REPAIR PROTECTIONS

While not exhaustive, the following outline provides an overview of many of the state and federal laws that will be of assistance to practitioners representing individuals who encounter legal problems associated with contracts for repair of their homes following a disaster.

### I. HOME SOLICITATION SALES:

A. Definitions. Florida law defines a home solicitation sale as a sale, lease or rental of consumer goods or services with a purchase price exceeding \$25.00, including all interest, service charges, finance charges, postage, freight, insurance and service or handling charges under single or multiple contracts made pursuant to an installment contract, a loan agreement, other evidence of indebtedness or a cash transaction in which:

1. "The seller or person acting for the seller engages in a personal solicitation of the sale, lease, or rental at a place other than the seller's fixed location business where goods or services are offered or exhibited for sale, lease or rental," F.S. 501.021(1)(a); and
2. "The buyer's agreement or offer to purchase is given to the seller and the sale, lease, or rental is consummated at a place other than at the seller's fixed location business establishment, including a transaction unsolicited by the consumer and consummated by telephone and without any other contact between the buyer and the seller or its representative

prior to delivery of the goods or performance of the services. It does not include a sale, lease, or rental made at any fair or similar commercial exhibit or a sale, lease, or rental that results from a request for specific goods or services by the purchaser or lessee or a sale made by a motor vehicle dealer licensed under F.S. 320.27 which occurs at a location or facility open to the general public or to a designated group.” F.S.

501.021(1)(b).

B. All violations of the Florida Home Solicitation Sales Act may also be unfair or deceptive trade practices under Florida’s Deceptive and Unfair Trade Practices Act, F. S. 501.201, et seq. (2005); the advocate should examine each case for possible dual violations.

C. Check List:

1. Did the seller have a permit? F.S. 501.022(1) (a) (2005). Permits are obtained from the Clerk of the Circuit Court. F.S. 501.022 (2) (2005).

2. Does notice of the buyer’s right to cancel appear on every note or other evidence of indebtedness given pursuant to the sale? F. S. 501.031 (2005).

3. Is the notice of the buyer’s right to cancel conspicuous? F.S. 501.031(2)(a) (2005).

4. Has the buyer signed and dated a ‘Buyer’s Right to Cancel’ disclosure statement that reads as follows:

"This is a home solicitation sale, and if you do not want the goods or services, you may cancel this agreement by providing written

notice to the seller in person, by telegram, or by mail. This notice must indicate that you do not want the goods or services and must be delivered or postmarked before midnight of the third business day after you sign this agreement. If you cancel this agreement, the seller may not keep all or part of any cash down payment." F.S. 501.031(2)(b) (2005).

5. Did the seller leave a business card, contract, or receipt with the buyer that has the name, address and telephone number of the person making the sale and of the parent company or sponsor? F. S. 501.046 (2005).

6. Did the seller misrepresent the terms and conditions of the sale, lease or rental? F.S. 501.047(1) (2005).

7. Did the seller misrepresent an affiliation with the parent company or sponsor? F.S. 501.047(2) (2005).

8. Did the seller represent as a reason for soliciting the sale, lease or rental of goods or services participation in a contest or an inability to perform any other job, or otherwise perform any act of misrepresentation? F. S. 501.047(3), (5) (2005).

9. Did the seller indicate that the agreement to purchase, lease or rent goods or services was non-cancelable? F. S. 501.047(4) (2005).

10. What work or goods were actually promised? Are the specifications contained in the contract are complete?

D. The Buyer's Right to Cancel. The buyer has a right to cancel until midnight of the third business day from the date the contract was signed. Cancellation

must be in writing and delivered in person, via telegram or by mail to the address stated in the agreement or offer to purchase. Business day means any calendar day except Sunday and the following federal holidays: New Years Day, Washington's Birthday, Martin Luther King's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, and Christmas Day. F.S. 501.021, 501.025 (2005). (Federal holidays are listed at 5 U.S.C. §6103.)

E. Getting the Down-payment Back. Florida law provides the following protections for a buyer who cancels:

"Within 10 days after a home solicitation sale has been canceled or an offer to purchase revoked, the seller must tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness. If the down payment includes goods traded in, the goods must be tendered in substantially as good condition as when received by the seller. If the seller fails to tender the goods, the buyer may elect to recover an amount equal to the trade-in allowance stated in the agreement. Until the seller has complied with the obligations imposed by this section, the buyer may retain possession of goods delivered to her or him by the seller and has a lien on the goods in her or his possession or control for any recovery to which she or he is entitled." F.S. 501.041 (2005).

F. If the Seller Does Not Come to Get the Goods. Upon demand, the buyer must return the goods to the seller within a reasonable time. The buyer is not obligated to tender the goods at any place other than the buyer's residence. If the seller fails to demand possession of the goods within a reasonable time (40 days is considered reasonable), the goods become the property of the buyer without further obligation to

pay for them. The buyer must care for the goods for a reasonable time. F.S. 501.045 (2005).

G. If the Seller Has Performed Any Services Prior To Cancellation. The seller is not entitled to compensation for any services performed before cancellation. FS. 501.045 (2005).

H. Penalties. Violations of the Florida Home Solicitation Act are generally first degree misdemeanors. A subsequent offense can be considered a third degree felony. F. S. 501.055 (2005).

## **II. THE FTC 'COOLING OFF' RULE FOR DOOR-TO-DOOR SALES**

A. The FTC rule is contained in 16 C. F.R. Part 429. It declares unfair and deceptive the failure of a seller in a home solicitation transaction to comply with the FTC rule's disclosure and notice requirements, 16 C.F.R. 429.1. The FTC rule requires the seller to give the following to the buyer at the time of the sale:

1. A fully completed receipt or dated copy of any sales contract in the language used in the sale with the name and address of the seller, 16 C.F.R. 429.1(a);
2. Oral notification of the right to cancel, 16 C.F.R. 429.1(e);
3. Written disclosure of the three day right to cancel in 10 point bold face type in the same language as the sale and on the front of the receipt or next to the signature line for the buyer on the contract, 16 C.F.R. 429.1(a);
4. An easily detachable Notice of Cancellation filled out in duplicate, 16 C.F.R. 429.1(a),(c).

B. The FTC rule also deems the following actions on the part of the seller to be unfair and deceptive:

1. Obtaining a confession of judgment or a waiver of any rights provided to the buyer under the Rule, 16 C.F.R. 429.1(d).
2. Failing to provide or misrepresenting the right to cancel, 16 C.F.R. 429.1(f).
3. Not honoring a Notice of Cancellation by failing or refusing to refund all payments, return all traded-in property, cancel and return any negotiable instrument (note & mortgage) and terminate any security interest within ten (10) days of receiving notice of cancellation, 16 C.F.R. 429.1(a).
4. Negotiating, transferring, selling, or assigning any note within five (5) business days of the contract, 16 C.F.R. 429.1(h).
5. Failing to notify the canceling buyer within ten (10) business days whether the seller will take possession of or abandon any goods, 16 C.F.R. 429.1(i)

C. Compliance with the FTC Rule does not exempt the transaction from the requirements of the Florida Home Solicitation Act, 16 C.F.R. 429.2.

D. The FTC Rule does not apply when a Truth-in-Lending rescission is required, 16 C.F.R. 429.0(a)(2).

E. The FTC Rule does not apply if the buyer asks the seller to visit the home for repairs, but does apply to any additional goods or services sold other than those needed for repairs, 16 C.F.R. 429.0(a)(5).

F. The seller is not required to allow the normal statutory three (3) day right

of rescission under 16 C.F.R 429 if the buyer initiated contact, the goods and services are needed to meet a bona fide personal emergency, and the buyer furnished the seller with a handwritten description of the emergency and expressly waived his right to cancel, 16 C.F.R. 429.0(a)(3).

G. There is no private cause of action under the FTC Rule.

### **III. OTHER FEDERAL RULES**

If the buyer paid by credit card, the debt can be disputed in a writing sent to the billing dispute address set out on the back of the credit card statement within 60 days pursuant to the Fair Credit Billing Act, 15 U.S.C. §1666.

### **IV. THE HOME IMPROVEMENT SALES AND FINANCE ACT, F.S. 520.60-520.98**

A. This act applies to home improvement contracts paid in installments over more than 90 days where a security interest in real property is retained. The act imposes licensing requirements and requires “home improvement finance sellers” and “sellers,” i.e., any person who enters into two or more contracts per year for more than \$500, F.S. 520.61(14), to give the owner a complete, signed copy of the contract which must be in the approved form and include:

1. Notice of the right to rescind within three (3) days following the execution of the contract, F.S. 520.72 (2005);
2. The names, addresses and license number of the contractor and salespeople who solicited or negotiated the contract. F.S. 520.73(1)(a)

(2005);

3. Approximate dates the work will begin and a description of the work and material to be used, F.S. 520.73(1)(c),(d) (2005);

4. Disclosure of amount financed, finance charge, total of payments, total sales price, amount of monthly payments, description of any security interest; F.S. 520.73 (2)(a),(b),(c),(d),(h),(i) (2005);

5. The following notice to the owner, in substantially the following form:

a. Do not sign this home improvement contract in blank.

b. You are entitled to a copy of the contract at the time you sign.

Keep it to protect your legal rights.

c. This home improvement contract may contain a mortgage or otherwise create a lien on your property that could be foreclosed on if you do not pay. Be sure you understand all provisions of the contract before you sign.

F.S. 520.73 (5) (2005).

6. In addition, no home improvement contract may contain any of the provisions prohibited under F. S. Section 520.74 (2005).

7. Generally, "No act, agreement, or statement of any buyer under a home improvement contract shall constitute a valid waiver of any provision of this act intended for the benefit or protection of the buyer." F.S. 520.75 (2005).

B. Under the Act, the seller is prohibited from engaging in the following acts:

1. Substantial misrepresentations in procurement of contract, false

promises of character likely to influence, persuade or induce, F.S. 520.90(3) (2005);

2. Abandonment, willful failure to perform, F.S. 520.90(1) (2005);

3. Committing fraud in execution of contracts and mortgage, (such as notary fraud), F.S. 520.90(4) (2005);

4. Deceptive advertising, F.S. 520.90(6) (2005);

5. Willful disregard of building laws (such as failure to obtain permit or inspections, use of unlicensed, subcontractors, violations of building codes, etc, see F.S. Chapter 489 (2005)). F.S. 520.90(7) (2005).

6. Willful misrepresentation of any matter required to be disclosed to owner, F.S. 520.90(15);

C. Mortgages or mortgage notes must contain a boldface notice that it is subject to a home improvement sales contract, F.S. 520.80;

D. Gissendaner v. Rich, 365 So.2d 454 (1st DCA 1978): A home improvement contractor could not prevail in a foreclosure suit because he failed to obtain a signed completion certificate for repairs, F.S. 520.81 (2005);

E. However, Goldsten v. Betty Ginsburg Interior Design, Inc., 519 So. 2d 645 (4<sup>th</sup> DCA 1987) interpreting F.S. 520.61, now F.S. 520.69(1) (2005)): A contract that does not create a security interest does not qualify under the "Home Improvement Act";

F. A private right of action to recover an amount equal to the finance charges and any fees charged to the owner by reason of delinquency, costs and attorney fees exists under F.S. 520.98(2) for willful violation of the Act;

G. The FTC holder in Due Course Rule (16 C.F.R. Part 433) is similar to F.S.

520.88(4) (2005). Assignees are subject to all claims or defenses.

## **V. MAGNUSON-MOSS WARRANTY ACT, 15 U.S.C. 2301-2312; 16 C.F.R.**

**700.1-703.8** This federal act provides minimum standards for warranties on consumer products, and consumer remedies for violations.

A. A home improvement contract is covered by the Magnuson-Moss Act when it involves a “consumer product,” defined as “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).” 15 U.S.C. §2301(1). Federal regulations clarify that “separate items of equipment attached to real property, such as air conditioners, furnaces and water heaters” are covered by the Act, 16 C.F.R. 700.1(c), but the Act’s protections do not generally attach to “wiring, plumbing, ducts, and other items which are integral component parts of the structure.” 16 C.F.R. 700.1(d). The Act requires clear and conspicuous disclosure of each full or limited warranty prior to the sale. 15 U.S.C. §2302.

B. If a written warranty is given, the seller is prohibited from disclaiming implied warranties, 15 U.S.C. §2308(a).

C. Before asserting a Magnuson-Moss claim, a buyer must first give the warrantor a reasonable opportunity to cure after notice of the defect, 15 U.S.C. §2310(e), and must first use any qualifying dispute resolution procedure which the warrantor has established, 15 U.S.C. §2310(a)(3)(i).

D. Violations of the Act include:

1. The failure to honor written warranties, 15 U.S.C. §2304(a)(1), or implied warranties 15 U.S.C. §2304(a)(2);
  2. The failure to make warranties available for inspection prior to the sale, 15 U.S.C. §2302(b)(1); 16 C.F.R. 702.3(a) (door-to-door sellers are specifically obligated to comply with this requirement, 16 C.F.R. 702.3(d); and
  3. The failure to comply with the disclosure requirements of the Act, 15 U.S.C. §2302(a).
- E. Consumers may claim damages and other legal and equitable relief, 15 U.S.C. §2310(d)(1). Costs and attorney fees may be awarded to a prevailing consumer. 15 U.S.C. §2310(d)(2).

## **VI. COMMON LAW AND OTHER STATUTORY CLAIMS**

- A. Additional implied and express warranty claims (quality of work, materials) can be made under Article 2 of the U.C.C. if the sale is of goods, as opposed to services. F.S. 672.313 (2005) sets forth the requirements for creating an express warranty under the U.C.C., while F.S. 672.315 (2005) outlines the U.C.C.'s implied warranty of fitness for a particular purpose.
- B. Fraud. The elements of fraud (misrepresentation or omission of material fact made with the intent to deceive and to induce reliance, justifiable reliance and damages) must be proved by clear and convincing evidence. The remedy is rescission and cancellation of the mortgage or damages.
- C. Unconscionability. A court sitting in equity may provide relief from a

contract if it finds that the circumstances surrounding the entry into the contract, the terms of the contract itself, evidence of gross inequity of bargaining power, the presence of deception on the part of the seller, and/or other circumstances establish that enforcement of the contract would be unconscionable. See Williams v. Walker Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). Upon a finding of unconscionability, the court has the power to refuse to enforce the entire contract or the unconscionable provision, or may restrict the operation of the terms to avoid an unconscionable result.

D. Florida Deceptive and Unfair Trade Practices Act, F.S. 501.201, et seq., provides protections for consumers from unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.

E. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961- 1968 provides a private right of action for people injured in their business or property by reason of a violation of the Act, 18 U.S.C. §1964(c). The violation could take the form of a home improvement contract based on a fraudulent scheme with a pattern of mail or wire fraud.

F. Florida's Civil Remedies for Criminal Practices Act. – F.S. Chapter 772 requires clear and convincing proof of a pattern of criminal activity and provides for treble damages, attorney fees and costs. F.S. 895.05(b) authorizes injunctive relief; F.S. Chapter 895 is Florida's RICO Act, which is applicable to cases involving racketeering and illegal debts.

G. Fraudulent Practices – The following crimes listed under F.S. chapter 817 may be used as a predicate act for a RICO claim:

1. F.S. 817.54, which defines the crime of obtaining a mortgage or

promissory note by false representation.

3. F.S. 817.38, which defines the crime of simulated process;

4. F.S. 817.40, which defines the crime of false, misleading and deceptive advertising and sales;

5. F.S. 817.412, which defines the crime of sale of used goods as new.

H. Theft - F.S. 812.014 defines the crime of theft. This crime can also be used as a predicate act for a RICO claim.

I. Usury. F.S. Chapter 687 - A loan is usurious when the interest charged exceeds the lawful rate. Under Florida law, a contract for the payment of interest upon “a loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever,” is usurious if “at a higher rate of interest than the equivalent of 18 percent per annum simple interest,” F.S. 687.02(1), unless the amount or value of the “loan, advance of money, line of credit, forbearance to enforce the collection of a debt, or obligation exceeds \$500,000,” in which case it is usurious if the rate of interest exceeds “25 percent per annum.” F.S. 687.071(2). A usurious transaction has four (4) elements:

(1) An express or implied loan;

(2) An understanding between the parties that the money loaned shall be returned;

(3) An agreement that a greater rate of interest than is allowed by law shall be paid or agreed to be paid; and

(4) The existence of a corrupt intent to take more than the legal rate for the use of the money loaned.

Rollins v. Odom, 519 So.2d 652 (Fla. 1st DCA) rev. den. 529 So.2d 695 (Fla.1988); Dixon v. Sharp, 276 So.2d 819.

Usury is unlawful in Florida, F.S. 687.03(1) (2005); F.S. 687.071(2),(3), and the interest portion of a usurious contract is unenforceable. F.S. 687.04. A person who extends credit at a rate higher than 25 percent per annum is guilty of a criminal offense. F.S. 687.071(2),(3).

J. Truth in Lending (TILA) – 15 U.S.C. §§ 1601-1667(e); 12 C.F.R. Part 226. Under 15 U.S.C. §1602(f), most home mortgages are subject to the disclosure requirements of the federal Truth-In-Lending Act, 15 U.S.C. §1638. The required disclosures include the annual percentage rate, finance charge, amount financed, security interest, total of payments and a payment schedule, 15 U.S.C. §1638(a); 12 C.F.R. §226.23(a)(3) n. 48.

Notice of the right to rescind is also required for certain non-purchase money residential mortgage credit, 15 U.S.C. §1635(a). If the borrower is able to prove that she “did not receive the required notice and did timely exercise her right to rescind, the mortgage would be void and the parties entitled to be returned to the *status quo*.” Yslas v. D.K. Guenther Builders, Inc., 342 So.2d 859 (Fla. 2d DCA, 1977). Actual damages, statutory damages, costs and attorney fees can also be awarded. 15 U.S.C. §1640(a); 15 U.S.C. §1635(g). Creditors must strictly comply with TILA. “Liability will flow from even minute deviations from requirements of the statute and Regulation Z”. Shroder v. Suburban Coastal Court, 729 F.2d 1371, 1380 (11th Cir. 1984).

Harm need not be shown for recovery under TILA. “An objective standard is used to determine violations of the Truth-In-Lending Act based on the representations

contained in the relevant disclosure documents; it is unnecessary to inquire as to the subjective deception or misunderstanding of particular consumers.” Zamarippa v. CY’s Car Sales. Inc., 674 F.2d 877, 879 (11th Cir. 1982).

If a disclosure is one of the five designated as “material” at 12 C.F.R Section 226.23(a) (3) n. 48, then any error with regard to that disclosure, unless within the \$5.00 or \$10.00 tolerance, depending on the size of the transaction for the finance charge, 12 C.F.R. 226.18(e) n. 41, extends the rescission period. Steele v. Ford Motor Credit Co. 783 F.2d 1016, (11th Cir. 1986). Any deficiency in the notice of the right to rescind triggers a right to rescind. Michel v. Beneficial Consumer Discount Co., 140 B.R. 92, 100, (Bank R.E.D, Pa. 1992).

State and federal courts have concurrent jurisdiction over TILA. 15 U.S.C. §1640(e). A consumer can raise TILA rescission simultaneously as a defense to a state foreclosure proceeding and as an affirmative claim in federal court.

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