Tape 16, side 2, 568-end
Tape 18, side 1, 000-262

HOUSE COMMITTEE ON JUDICIARY
Consumer Protection Subcommittee

March 22, 1971 — 14 State Capitol

Minutes

Members Present:	Reps. Cole, Young, Stults
Members Absent:	Rep. Hollingsworth
Members Excused:	Rep. Macpherson
Also Present:	Jena Schlegel, Legal Counsel William Canessa, Research Asst.

The meeting was called to order at 3:15 p.m. by Chairman Stults and the clerk noted the roll.

Committee Counsel and William Canessa, Research Assistant, explained the provisions included in the proposed combined bill. There was lengthy discussion of further amendments to be made to the proposed combined bill.

Counsel will draft the additional proposed amendments requested by the committee. Mimeographed copies of the proposed bill will then be distributed to all interested parties and a hearing will be scheduled thereon.

The meeting adjourned at 4:30 p.m.

Respectfully submitted,
Joyce McCormack
COMMITTEE CLERK

Tape 20, side 2, 217-497

HOUSE COMMITTEE ON JUDICIARY
Consumer Protection Subcommittee

March 29, 1971 — 14 State Capitol

Members Present: Reps. Cole, Hollingsworth, Stults

Members Excused: Reps. Macpherson, Young

Also Present: Jena Schlegel, Legal Counsel
William Canessa, Research Asst.

The meeting was called to order at 3:25 p.m. and the clerk noted the roll.

Jena Schlegel explained the provisions of the previously distributed proposed bill to the members and answered question relative thereto.

The members suggested several additional amendments which will be incorporated into the proposed bill.

A public hearing will be held on Monday, April 5, at 3 p.m. on the proposed bill.

The meeting adjourned at 4:55 p.m.

Respectfully submitted,

Joyce McCormack

COMMITTEE CLERK

SB 50 & ? HB 1088
Tape 24, side 1, 217-548

HOUSE COMMITTEE ON JUDICIARY
Consumer Protection Subcommittee

April 5, 1971 14 State Capitol

Minutes

Members Present: Reps. Stults, Hollingsworth, Cole, Macpherson

Members Excused: Rep. Young

Also Present: Jena Schlegel, Legal Counsel
William Canessa, Research Asst.

The meeting was called to order at 3:15 p.m. and the clerk noted the roll.

Lee Johnson, Attorney General, testified that he feels the proposed bill has merit, however, he proposed several changes. His proposals included adding "of the buyer" after "indebtedness" in Section 1, line 4; changes to Sec. 5 and 6, particularly in the deceptive trade practices provisions, and the inclusion of the element of intent in that section and in Section 10. Mr. Johnson opposes criminal penalties and the inclusion of private sales in the deceptive trade practices section. He would like to see a provision for attorney fees in breach of warranty suits and hopes that referral sales prohibitions will be included in the bill. He favors the establishment of a consumer protection division in the Attorney General's office and thinks the effective date of the Act should be July 1.

Mr. Johnson will provide amendments relating to the breach of warranty with extended periods within which to answer complaints.

Fred Haase, Eugene, suggested that the committee include provisions in the bill which would prohibit the solicitation of family members by persons who obtained their names through the obituary columns of the newspapers. He suggests that such solicitors be required to immediately advise the prospective customer the source from which his name was obtained. Copies of Mr. Haase's statement are included in the committee files.

Charles Williamson, Portland Legal Aid Service, presented a prepared statement, copies of which are included in the committee files. Among Mr. Williamson's suggestions and comments were the inclusion of sales made in homes other than the seller's in the home solicitation sales provisions; a requirement in Sec. 2(e) that requests for emergency services must be handwritten personally by the buyer; reduction of cancellation fees; and an increase in the $1,000 deficiency judgment amount.

David Shannon, Metropolitan Consumer Protection Agency of Portland, testified that he would prefer to see a uniform act in Sec. 6 such as was in SB 50 and HB 1088. He feels the Attorney General should have power to establish rules and regulations in this field in order to cover practices not specifically included in the law. He objects to the proof of intent requirements and feels that class actions should be included in the bill. He favors a prohibition against referral sales and thinks civil, rather than criminal penalties for deceptive trade practices are much more procedurally efficient and effective.

Sen. Wilner testified that he preferred many sections of SB 50 to the proposed bill. He feels that the committee unnecessarily narrowed the scope of the bill. He favors the inclusion of class actions and the umbrella provisions of the Senate bill deceptive trade practices section. Holder-in-due-course provisions should be included and home solicitation provisions should be strengthened. He prefers the language of SB 50 and model acts in the deceptive trade practices section. He also objects to the criminal penalties provisions and feels grounds for issuance of temporary restraining orders should be more definitive. Attorney fees to prevailing parties would have an impact on state budgets and self-incrimination provisions are far too broad.

Laird Kirkpatrick, Eugene attorney and member of the Board of Directors of the Oregon Consumer League, presented a prepared statement, copies of which are included in the committee files. He suggested an increase in the $1,000 deficiency judgment provisions and attorney fees in breach of warranty cases. He objects to attorney fees to the prevailing party.

Gretchen Kafoury, representing Demoforum, presented a prepared statement concurring with other testimony relating to suggested changes and additions in the proposed bill (see committee files).

Marlin Boniface, representing automobile dealers, testified in opposition to the abolishment of deficiency judgments. The $1,000 base would exempt 1/2 of the automobile sales made. If the seller's defenses are taken away, vehicles could not be sold to low income, poor credit risks. Even a $500 base would be difficult to comply with. He explained the use of credit checks in the automobile business and various methods of financing used. In his business, 18 or 20 deficiency judgments are taken each year. He has some suggestions to make on the subject and will submit them to the committee.

Bill Hedlund, representing petroleum suppliers, advised the committee that deceptive trade practices must be defined to the point that a deception is there, per se. He objects to the penalties provided in Section 13 and does not feel a written report should be required.

Randy Ayres, representing Sears and the Oregon Retail Council, told the committee that he gives his basic support to the bill. He objects to the section which provides for the revocation of charters or licenses in Sections 11, 15(2) and 17. He feels there should be a condition precedent for repeated violations. He does not support SB 50 because he dislikes class actions; however, he did feel that there was headway made in the bill in providing safeguards. He feels prevailing party attorney fees in breach of warranty cases would be most appropriate.

Chairman Stults advised the committee and witnesses that there will be further hearings if the committee considers class actions, etc.

The meeting adjourned at 5:20 p.m.

Respectfully submitted,

Joyce McCormack

COMMITTEE CLERK

My name is Laird Kirkpatrick. I am an attorney in private practice in Eugene, Oregon associated with the firm of Johnson, Johnson, & Harrang. I am a member of the Board of Directors of the Oregon Consumer League and am Chairman of the Lane Consumer League, which is the Lane County affiliate of the Oregon Consumer League.

Oregon consumers will have significantly enhanced protection if the bill being considered by this committee today is enacted. However, consumers will continue to be deprived of a remedy for what is probably their most frequently-voiced complaint, namely breach of warranty in the sale and service of consumer goods. H.B. 1248 would have provided consumers with an effective means to enforce warranties by allowing them to recover their attorney fees if they are required to go to court to compel a seller to honor his warranty. The omission of H.B. 1248 or some similar provision from this bill is a serious blow to consumers.

Under present Oregon law there is no economically feasible remedy for a consumer who purchases a product costing $300 or less (which covers the vast majority of consumer transactions) if the product turns out to be defective and the seller refuses to honor his warranty. The cost of going to court over a claim of such an amount would in most cases exceed the amount the consumer would be able to recover. Thus a seller who refuses to stand behind his product can tell a consumer "Sue me" and know that the Oregon legal system in reality does not provide consumers with such an option. In most consumer transactions warranties aren't worth the paper they are written upon, except to the extent the seller chooses to abide by them for the sake of his good reputation. An unscrupulous seller who has no concern about his reputation is relatively free to make any number of "warranties" with no intention of standing behind any of them. As a practical matter, the seller will be

immune from legal liability, except in those cases where a consumer will pay attorneys fees and other costs in excess of the amount recoverable for the sake of principle. It should be noted that small claims court provides no remedy, because sellers will uniformly ask that the case be removed to District Court where the consumer will have to bear the expense of hiring an attorney.

The Legislature has already recognized that this problem exists in other areas and Oregon statutes presently provide for several situations where the plaintiff can recover his attorney's fee if he prevails in a lawsuit. For example, attorney's fees are awarded to a successful plaintiff in an action against an insurance company on an insurance claim (ORS 743.114), against the maker of a dishonored check (ORS 20.090), and against a person who has caused personal injury or property damage of $1000 or less (ORS 20.080). The proposal contained in H.B. 1248 would provide consumers the right to attorney's fees if they prevail in an action for breach of warranty for $1000 or less. Such a proposal would not encourage groundless suits, just as the other attorney's fees statutes have not, because no award of attorneys fees would be made unless the consumer actually proved his case to the court or a jury. If a frivolous suit were brought, under an amendment being offered today the court would have discretion to require the plaintiff-consumer to pay the defendant-seller's attorney's fees incurred in successfully defending the suit.

It is my personal opinion, and the opinion of many other persons in the Lane Consumer League and Oregon Consumer League, that providing attorneys fees to the consumer where there has been a breach of warranty is one of the most important consumer protection proposals being considered at this session of the Legislature. Certainly it would benefit as many if not more consumers than any other single bill. We sincerely hope that this committee is not going to fail to report this vitally significant bill.

My name is Fred D. Haase, Home address 1435 Holly Ave., Eugene, Oregon 97401. I am a printer by trade, and appear here before you today on my own behalf as a concerned citizen of Oregon.

The consumer and householder must and should be protected, and I am the first that would not like to see legislation be the means to accomplish this.

I believe very strongly in the 'Capitalistic Free Enterprise System' free from any and all government interference, but in my years of head of the household, raising a family, consumer, etc, The facts of being realistic is becomeingre important than the Idealist that we all would like to have prevail.

The public must and should be protected by legislation from a small minority in the business and selling market, that place a sales and the commission payment above sincere service to the public.

Full Disclosure of how a persons name is secured is important, regardless of the communication means out side of the regular advertising media. This should be done early in the presentation.

Because of experiences, I am in strong favor of Oregon to adopt a statute forbidding the clipping of the Legal Obituaries, looking up the address in directories, and mailing, calling on the phone or in person to sell any item. Of course this would specificly mention Florists, Cemeteries, Monument (grave marker) Dealers, Lawyers, Rest Homes, Funeral directors, and the like and should include any other type of sales, such as securities, real estate, and any other product.

This, I realize is a difficult problem to legislate that could or would be controlled. The persons that work with this committee and others in the legislature could work out a good piece of legislation, and it could be enforced.

Only as suggestions: A Preceeding statement on the legal notice of the newspaper for the death, and/or funeral notice could be a statement to the effect--and the language could be worked out by your group and newspaper publishers--"It is against Oregon Law to use the names appearing as surviving members of the deceased family to canvass or offer to sell anything.

This is done on the employment sections of Classified Ads now and could very easily be accomplished in the Obituary section of the legals of the newspaper.

A statement could be required on the forms of the Funeral Director which the family receive could be the statement listing the fact no canvass or offer to sell is allowed by state law and if such should happen, to report to the District Attorney, or allow the Funeral Director to file for the family when such has been reported to him that any type canvas, letter offering services, or a sales has been made by any person, persons, firm, etc. Bold face type could be specified.

The District Attorney should be, could, and should be authorized to investigate such misconduct and prosecute within limits that you people see fit and proper to impose.

Any and all phone calls, letters, folders, or other advertising addressed to a specific person should state close, and to the first of the advertisment, or offer to sell service and/or goods should state where the prospects name was secured. On Phone calls, this should be done in the first 30 seconds.

As I earlier stated, I strongly believe in the Free Enterprise System, but do feel strongly that there are times when the public should and must be protected by legislative act. Because of a very few enterprising and eager sales men and firms for the gain of a few more dollars.

I donot believe that at any time, a poorly managed, or operated business should be protected by legislation, but the well managed and sincere business should be encouraged to Protect the public and this can be accomplished by legilation for all consumer, and at this time I feel strongly about the bereaved being canvassed by all types of peddlers when their name is published in an obituarty. This action must stop.

We need the service of death and funeral notices in the newspapers, BUT please help protect the families from the few that use the column for a profit. Their problems are great, without being bothered needlessly.

I thank you very much and would be most happy in any discussion that could help you, or that this meager person that I feel to be would assist you in your deliberations. I feel humble and honored that the committee listened to my ideas and suggestions.

Fred D. Haase
1435 Holly Ave.
Eugene, Oregon 97401

Testimony of Charles R. Williamson-Legal Aid Service
517 N. E. Killingsworth
Portland, Oregon

My name is Charles R. Williamson and I reside at 6903 N. Williams, in Portland, Oregon. I am a member of the Oregon State Bar, Massachusetts Bar Association, and I am presently employed as a staff attorney for Legal Aid Service in Multnomah County.

The Home Solicitation Sales Act contained in the proposed Consumer Protection Bill is deficient in several ways. Senate Bill 123, which also provides for a 3 day cancellation period in home solicitation sales contains many features which this proposed section does not. In order that Oregon may adopt a truly effective and worthwile home solicitation sales act, we would suggest that the following changes be made:

1. Subsection (1) of Section 19 should be amended to allow home solicitation sales to include all sales made "at a residence <u>other than that of the seller</u> ". At present the bill covers only sales made at the home of the buyer. Thus, if the purchaser under the present bill is visiting the home of a friend and both the visitor and homeowner purchase items from a door-to-door salesman, only the owner of the home could cancel, while the visiting purchaser could not.

   Further, "home parties" used as merchandising schemes by several companies would not be covered under the present bill. Only the hostess at the party could cancel any purchases made from a visiting salesman, while under this bill everyone else who made a purchase

at the party could not cancel.

2. The following paragraph should be added Section 2 (e) on page 17:

" the buyer's request to provide goods or services without delay must be contained in a statement that is separate from any other instrument involved in the sale and must be personally dated and signed by the buyer. The statement must describe the emergency and modify or waive the buyer's right to cancel the sale. A request to provide goods or services without delay and a modification or waiver of the buyer's right to cancel the sale is void if it appears on a printed form furnished by the seller".

Under the bill as it presently exists, it might be possible for buyers to waive their right to cancel as a matter of course in a home solicitation sale. The addition of the suggested paragraph would insure that a buyer knew of his right to cancel prior to exercising it.

3. The provisions regarding the cancellation fee should be deleted. These are the top of page 18 and Section 4(c) on the top of page 19.

The seller needs to do nothing except to get the buyer to sign in order to be awarded what could amount to a $25.00 cancellation fee. In most situations, the seller will have provided no service and will have delivered no goods and will still be entitled to 5% or $25.00 under the present bill. It would seem to be unfair for a merchant to be rewarded simply for delivering a successful sales pitch when he has delivered nothing.

If the cancellation fee is desired, certainly $5.00 would be a sufficient deterrent to prevent people from making contracts and cancelling them at will.

DEFICIENCY JUDGMENTS

Charles Merten briefly addressed himself to this Committee on the Deficiency Judgment issue in testifying on House Bill 1088. It is very possible that this session is the the most important section proposed in this Consumer Protection Bill. I would like to elaborate on this briefly.

We believe that many merchants who engage in separate trade practices and fraudulent activities depend on the deficiency judgment to collect for shoddy merchandise which consumers stopped paying for and which was re-possessed. If unscrupulous merchants were not able to rely on deficiency judgments, they would be far less likely to induce consumers to purchase over-priced items on easy credit terms when a deficiency will result.

The proposed Consumer Protection Bill has lowered the limitation on the balance due at the time of repossession from $2,500 to $1,000 below which a merchant cannot sue for a deficiency judgment after repossession. It should be noted that a study in California reported in the American Bar Association Journal determined that in automobile deficiency judgments in California, the average balance due at the time of repossession was $1879.16. The lowering of this limitation to $1,000 will thus effectively exclude most automobile deficiency judgments.

This $1,000 limitation is thus far too low to truly provide

effective protection for consumers from deficiency judgments. It is, however, a substantial beginning.

The arguments most frequently raised against the abolition of deficiency judgments involve cases where consumers have wrongfully damaged collateral or where collateral has been accidentally damaged. It is important to understand that HB 1251 does not limit a dealer's right to recover damages from someone who has willfully, negligently, or even innocently, damaged the goods he has purchased on credit.

Almost every contract whereby a seller retains the security interest in goods contains a clause that the buyer must keep the goods insured and take reasonable care of the property. If the buyer willfully damages the goods, he can be sued either in tort or for breach of his contractual agreement, and if the goods are otherwise damaged, for example, in an accident, the buyer can be sued for breach of his agreement to maintain insurance coverage. Thus, there is no need for a deficiency judgment remedy in these cases.

I have attached copies of excerpts from a testimony which was presented to the Financial Affairs Committee in the House. It explains deficiency judgments and goes into further depth on the statistics and the need for this type of legislation proposed here. I have also attached a copy of the article from the American Bar Association Journal entitled "Kill the Automobile Deficiency Judgment" as well as the testimony of Mamie B. Lee and Ira S. Packard, who submitted testimony to the Financial Affairs Committee on Deficiency Judgments. I hope that if you have any questions regarding this matter, you will take the time to examine this material.

We have found deficiency judgments often used to victimize the consumer, especially the young, the poor, or unsophisticated consumer. Deficiency judgments result when goods are repossessed from a purchaser and resold. The original purchaser must pay the difference between the balance due at the time of repossession and the resale price. Thus, if a consumer owes $1,500 on an automobile and it is repossessed and resold by the dealer for $800, the consumer will be liable for a $700 deficiency judgment, plus costs of repossession and resale. A consumer is often stuck paying several hundred or even thousands of dollars for items he no longer owns.

It should be noted that under existing law, a merchant need not try and get the best possible price he can on resale because he knows he can collect a deficiency from the original purchaser. The amount which is realized at resale is often below the actual value of the goods -- especially when the creditor is the only bidder -- which is often the case. Sometimes unscrupulous merchants

or salesmen sell at artificially low prices to a friend or relative -- and then receive a rebate.

Indeed, it has become a common practice for automobile dealers and finance companies to work together to create deficiencies. A finance company will repossess a car and resell it to the dealer for far less than its actual value. The dealer will give the finance company a kickback so the finance company will lose no money. The dealer will then resell the car for its actual value and in addition get a deficiency judgment against the consumer. This practice is described in a Law Review article by Philip Shuchman in 22 Stanford Law Review 20 (1969) and was reported in a UPI story, a copy of which is attached to this testimony for examination at your convenience.

The primary beneficiaries of deficiency judgments are sellers who do not necessarily deserve such protection. They are either sellers of overpriced merchandise or else they are easy credit sellers who take no down payment and small monthly payments so low that depreciation is not fully covered. It is the overpricing and the easy credit which creates most deficiencies.

In addition to being injured by low resale prices, the debtor must bear the high costs of resale and repair. The original buyer has no effective way of challenging the necessity of repairs made for resale or showing that the repair costs are reasonable. The collateral is usually long gone by the time a suit is brought for the deficiency. It is very difficult for me as an attorney to explain to a client why the law compels him or her to make payments of several hundred dollars for an item a seller has taken back.

An article entitled "Kill the Automobile Deficiency Judgments" appeared in the American Bar Association Journal last year. A copy of that article is also attached to this testimony for your convenience. The article contained results of a study done in California on deficiency cases. The study concluded that:

> "The average defaulting buyer bought a vehicle for a total price of $2,660.55 with a down payment of $285.22 or 10.7%. After making payments that total $1,066.62, or 40% of the purchase price, he winds up without the vehicle and with a judgment against him of $514.64."

Perhaps most importantly the study points out that:

> "These statistics did not reflect settlements without the filing of a complaint, which logically could have been brought about in many instances by reason of the high amount of deficiency claimed and the threat of attorney's fees and court costs."

It is much more palatable for a defendant's attorney in these matters to settle a case out of court or put his client through bankruptcy, even if repairs and resale costs appear excessive as a contest will most often result in attorney's fees and court costs being awarded to the plaintiff, even if the plaintiff does not recover all damages he has asked for.

Deficiency judgments help to make people poor and they help to keep people poor. Often a mother with children is hit by a deficiency judgment after a divorce when her husband fails to make payments on an item they both signed for. Techniques of collection used to satisfy deficiency judgments such as wage garnishments, wage

assignments, harassing phone calls, letters and telegrams, have caused many people to lose jobs and swell the welfare rolls. There is a close correlation between deficiency judgments and bankruptcies.

It should be noted that the Legislature has already recognized the evils of deficiency judgments as applied to homeowners. Deficiency judgments are abolished in real property transactions involving purchase money mortgages.

ORS 88.070 provides in part,

> "When a decree is given for the foreclosure of any mortgage given to secure payment of the balance of the purchase price of real property ... the mortgagee shall not be entitled to a deficiency judgment ..."

The same protection should be afforded to purchasers of personal property.

Both HB 1200 and HB 1251 go a long way towards eliminating deficiency judgments with regard to personal property credit transactions. HB 1200 is broader than HB 1251 is one respect, i.e., it applies regardless of the balance due at the time of repossession. HB 1251 applies only to transactions where the balance was less than $2,500 at the time of repossession. HB 1330, which introduces the Uniform Consumer Credit Code to the Legislative Assembly this year, also deals with deficiency judgments. The dollar limitation set by section 5.103 of HB 1330 makes this restriction on deficiency claims relatively minor. Section 5.103 limits deficiency claims in cases where the original purchase price of the property involved was $1,000 or less. Table 1 on page 366 of the American Bar Association Journal article attached to this

testimony indicates that the average balance due at repossession on an automobile contract on which a deficiency judgment is obtained is $1,879.15. HB 1330 would cover practically no automobile sales, however, HB 1251 with a dollar limitation of $2,500 would cover the bulk of secondhand automobile sales.

ATTORNEY FEES FOR BREACH OF WARRANTY

Like deficiency judgments, the provision for attorneys fees in breach of warranty suit motions is one of the most important proposals under consideration this year. This has been omitted from the proposed bill.

Many of our clients are sold defective merchandise at inflated prices and at present they have no effective legal remedy to enforce warranties. They simply cannot afford an attorney and even if they could, it is simply uneconomical to sue for a breach of warranty when your attorney's fee will exceed your recovery.

The adoption of the proposed attorney fee provision would go a long way toward helping Legal Aid to have private members of the Bar provide legal services to low income people. It would substantially expand the presently very inadequate amount of assistance available to low income people. It would further greatly help in building the faith of the poor and the working poor in lawyers and the legal system.

Testimony of MRS. MAMIE B. LEE:

My name is Mamie B. Lee and I live at 4911 N. E. 12th, Portland, Oregon. I have been employed as a registered nurse, however, I am presently not employed. My sole income is $108.60 per month received from social security disability payments, together with a small amount I make babysitting. In October of 1969, when I was employed, I signed a contract for my minor son to purchase a Ford automobile for approximately $1,500. My son made all the necessary payments, however, he had to go into the service in early 1970 and could not continue making the payments. We returned the car to the dealer with a balance of a little over $1,100 left on the contract.

The automobile was resold by the dealer for over $1,000, however, because of what the dealer and collection agency claim are "repair costs and costs of the sale" I am now stuck with payming $477 on a deficiency for this car which I no longer have. I have been hounded by creditors and I have finally worked out a payment plan and arranged for my son to help in the payments. This is still a constant worry to me.

I am afraid that if I do get a job again the collection agency will attach or garnish my wages and I will be fired. This has been less of a worry to me since we reached this agreement, but my son has missed payments and I still constantly receive threatening letters. I feel it is wrong that we should be forced to continue to make payments on a car we no longer have. We returned the automobile to the dealer in good condition and in fact put several hundred dollars of repairs into it while we had it.

Mamie B. Lee

Testimony of IRA PACKARD
Route 2, Box 86, Skyline Blvd.
Portland, Oregon

My name is Ira Packard. I am married. I have six children and live at Route 2, Box 86, Skyline Blvd., Portland, Oregon. During October, 1967, I purchased a 1967 pickup-camper from a Chevrolet dealer. I make a down payment of $600 and assumed payments of $134 per month. At this time both my wife and I were working and we foresaw no difficulties in meeting the payments. After making 15 payments on the balance, I was laid off and was unable to make any further payments at $134 and requested that the truck be refinanced. The Bank which financed the truck absolutely refused to consider refinancing and later repossessed the truck when I could not meet the payments.

When the pickup was repossessed, I was out of work with four children living at home. Although my wife was still working, her salary went towards the house payments. I made every attempt to have the pickup refinanced, since I wanted to keep it. I could have paid reduced payments of around $85 per month, at least until I was employed again.

I did not realize that the bank could repossess the truck, resell it, and then sue me for the balance -- without giving me some opportunity to refinance it or otherwise make good on the payments. I am now being sued for a deficiency of about $400 plus interest, plus $200 in attorney fees. I could get stuck paying over $600 for a truck I no longer own.

Ira S Packard

STATEMENT TO HOUSE JUDICIARY SUB-COMMITTEE ON CONSUMER PROTECTION April 5, 1971

My name is Gretchen Kafoury. I live at 1508 NE Stanton, Portland, Oregon 97212, and I am representing Demoforum.

For the past several months I have been Chairman of Consumer Legislation for Demoforum's Legislative Action Program. In connection with this job I have done considerable research on various subjects which have been introduced in the Oregon State Legislature this year. I am delighted to see that there is an effort to give the Oregon Consumer more rights under the law, as is evident in some of the provisions of the new, composite Consumer Protection Bill. I do feel, however, that several important provisions have been left out of the new bill.

The first omission regards referral sales. When testimony was taken on this subject earlier this spring before the House Financial Affairs sub-committee, there seemed to be unanimous agreement that referral sales should be outlawed. The same feeling was evidenced in a hearing on SB 123 before the Senate Consumer Affairs Committee, so for this reason I feel it must merely be an oversight that referral sales weren't prohibited in this new draft.

Secondly, I would hope very much to have some provision made for Class Actions. When testimony was being taken on SB 50 before the Senate Consumer Affairs Committee, representatives of the Retail Credit Association worked with the sponsor of the bill, State Senator Don Willner, to reach an agreement regarding class actions, and I feel that the revised provision as stated in SB 50 should certainly be contained in this composite bill. Last weekend when United States Senator, Birch Bayh of Indiana, was visiting Oregon, he attended a consumer protection workshop here in Salem. When asked what kinds of consumer protection legislation he felt needed passage both on a state and federal level, he singled out class actions as one of the most important types of legislation that was needed. He has introduced national legislation on this subject, and I have written him for a copy of his bill and will present it to this committee when I receive it.

There are several other items which I feel should be added to make a more meaningful bill, but the item which I personally am most concerned about is Deficiency Judgments. I am delighted that provision was made for some type of limitation on deficiency judgments in the composite bill, but would suggest that the $1000 maximum on the unpaid balance is much too low.

Those of you who served on the House Financial Affairs Committee will remember the amount of testimony we presented regarding HB 1251 in February. One point we stressed was the connection between the availability of deficiency judgments and bankruptcy. I quoted from a conversation with Judge Estes Snedecor, retired from the Oregon bankruptcy court, when he states, "One of the chief causes of bankruptcy in this state is our law regarding deficiency judgments." He feels that "merciless collection agencies" resort immediately to repossession and deficiencies rather than working out an equitable arrangement for payment of loan balances.

In researching deficiency judgments, I have talked with numerous attorneys, both private and legal aid attorneys, and most of them favor restrictions in some form. They seem to feel, as do I, that deficiency judgments are simply one more example of how the laws in Oregon are weighted in favor of the creditor. I would like to submit a letter from Mr. John Almeter from the Portland Postal Employees Credit Union which is typical of the response I got from many credit untion administrators who also support this legislation. I would also like to submit a statement from Mr. Charles Atkins of Pendleton who has a rather classic example of what happens when deficiency judgments are taken.

In the testimony given earlier opposing deficiency judgments, I felt the only valid objection that automobile dealers had was that when repossessed merchandise was damaged they should be protected. Both HB 1251 and this composite bill protect the creditor when goods have been "wrongfully damaged." I have yet to see any arguments stating why dealers and creditors should have the right to both repossess and charge for a deficiency. Often people default on payments for unavoidable reasons, such as a loss of income, job, etc. When creditors have the ease of repossessing and obtaining a deficiency judgment, there is absolutely no incentive for them to work out a new payment schedule with the debtor. And as this system often forces a person into bankruptcy, it seems logical that both the debtor and the creditor would gain from negotiating a new payment arrangement. And, despite arguments to the contrary, no factual statistics can show that restrictions or outlawing of deficiency judgments have an adverse effect on business or credit.

For you information I would like to submit a summary of the most often cited article regarding deficiencies, by Philip Schuchman entitled, "Profit on Default: An Archical Study of Automobile Repossession and Resale." One important point that he makes covers the suggestion that resale of repossessed goods be regulated by law, rather than the complete abolition or restriction on deficiency judgments. (Quote p. 2 paragraph 4).

Evidence will be given today regarding the average amount owing when deficiency judgments are enforced (over $1800) and for this reason we would strongly urge this committee to raise the $1000 figure contained in the composite bill to at least $2500.

Finally, we would hope this committee would incorporate the provisions of SB 50, which has already passed the floor of the Senate, regarding what constitutes a deceptive trade practice. In order to control the fast-buck activities of a number of unscrupulous merchants operating in Oregon, we feel the "catch-all" provision is a must.

Demoforum joins with the Oregon Consumer League and a number of other organizations urging this committee to amend the Composite Consumer Protection Bill to contain some if not all of the points covered above.

Thank you.
Gretchen Kafoury
Consumer Legislation Chairman
for Demoforum

EXAMPLES OF ABUSES:

AUTOMOBILE REPOSSESSION AND RESALE

One of the most obvious areas where abolition of deficiency judgments is needed is in automobile sales. Automobile credit contracts represent 38% of all consumer retail-installment indebtedness. Half of all American families spend 22% or more of their disposable income on new cars purchased on credit.

What happens to consumers who default on their car payments and have their cars repossessed, and how the repossessing dealers and financers make out financially, were the subjects of an in-depth study by Philip A. Schuchman, a law professor at the University of Connecticut.[1] A representative sample of 83 litigated cases in Connecticut was used to determine the circumstances and economic consequences of repossession and resale.

As is well known, most automobile consumer paper is carried by banks and finance companies, although some dealers carry their own contracts. Depending upon the nature of the agreement between financer and dealer, one or the other has the right of repossession in the event of default. In either case the repossessing party resells the car, applies the proceeds (less cost of repossession, resale, attorney fees, etc.) to the outstanding balance of the contract, and sues the consumer for the difference in a deficiency suit. The higher the amount the car brings at resale, thelower will be the amount of the deficiency judgment. Conversely, the lower the resale price, the greater the amount the defaulting consumer will be required to make up.

With these basic relationships in mind, it seems clear that the circumstances of the resale process are crucial tothe interests of consumers. In an ethical business climate it would seem reasonable to expect that the repossessor would attempt to obtain a fair price for the automobile, and that the sale would be conducted in an above-board fashion.

As Professor Schuchman discovered, however, such is not the case. In the absence of legal restraints or economic incentives to maximize the resale price, most such transactions are conducted in an exceedingly casual and inefficient manner. The Connecticut study revealed, for instance, that in 35% of the cases the purchaser of the repossessed automobile at resale was the original dealer. In some cases the original dealer both repossessed the car and repurchased the car <u>from himself</u>, while in the bslance of the cases the purchaser of the vehicle was a second dealer. In no case was there any incentive to maximize the resale price.

As a result, the resale prices brought by repossessed cars are far from being fair or just. The wholesale book value would seem to be a reasonable price, yet the average price brought by the 83 cars in the study was only 71% of the list wholesale value. The average difference between book wholesale value and price brought at resale was $246.

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[1] Schuchman, Philip, "Profit on Default: An Archival Study of Automobile Repossession and Resale", Stanford Law Review, Vol. 22 (November, 1969).

Some may suggest that $246 is not an unreasonable penalty for defaulting on a contract. This might be true if it were the only penalty imposed; but as a matter of fact the average deficiency judgment in the study was nothing like $246, but rather $610.

The average price brought by the wholesale resale covered only 51% of the total claim sought by the repossessing dealer or financer. (The total claim is the contract balance plus repossession and resale expenses.) If the car had been promptly sold at retail, however, the survey shows it would have brought in an average of 108% of the total claim. In at least half the cases an efficient retail resale would have completely eliminated t the need for any deficiency claim.

It seems clear that under present practices of repossession and resale, the defaulting consumer is being fleeced by dealers who not only are able to secure a court judgment against the consumer to secure the total claim, but also gain additional profits from the eventual retail resale of the automobile. Two basic remedies are possible: Either regulate the conditions of theresale in such a way that the resale price is maximized and the deficiency is minimized; or abolish the deficiency judgment in cases where the property is repossessed. The latter alternative, which requires less governmental intervention in the marketplace, and relieves the courts of the burdens of deficiency suits, seems clearly preferable. As Professor Schuchman, author of the study, comments:

> The choice between greater regulation of the disposition of collateral and elimination of the deficiency judgment may reduce itself to a choice between the effectiveness of the consumer as an adversary in the judicial process and the effectiveness of therepossessor as a seller in his marketplace. The latter alternative has the incidental benefit of freeing a bit more of our limited judicial resources.

One common argument against abolition of deficiency judgments (and other consumer credit reforms) is that such regulation of credit practices tends to decrease profits of financial institutions, drive interest rates up, and in general make it more difficult for the consumer to obtain credit. There is factual data, however, to indicate that such arguments are groundless. Four Canadian provinces have abolished deficiency claims arising out of retail-installment sales, and the experience of these provinces indicates that, as Professor Schuchman says, there is little or no difference from other provinces with respect to per-capita consumer credit actually extended.

Denied the opportunity to increase their profits by inefficient resale and by securing deficiency judgments, automobile dealers and other retailers would undoubtedly use the same enthusiasm and efficiency in reselling repossessed cars that they use in the original sale. The Connecticut data show that under these circumstances dealers would wind up with the same profit they originally contracted for. And consumers would be spared the cost of providing extra profits for dealers at the expense of wage assignments, property execution, and other ways our society has devised of securing debts.

Charles Atkins is 43 years old; his 11 year old son lives with him and his wife, and they have a daughter they are putting through a special school.

In March, 1970, Mr. Atkins, usually called Chuck, bought a 1966 Buick Wildcat. He received $400 in trade on his Opel and paid $155 extra. Payments were $100 a month.

Chuck made five payments. Then, his job was erased under the Southern California Business crunch, and he came back to Oregon where he was able to get a job in his trained filed as an auditor. When he left California he told the car company he was going, and that he would be picking up his payments as soon as possible.

In Oregon he contacted a holder of the paper, said he had missed two payments and wished to get back on schedule; he asked that the two missing payments be placed at the end of his pay-out schedule plus the interest thereon. The local representative thought that was reasonable. The paper holder in Pasedena said no; they wanted the car back. So, they took the car back. They took the car back to California, and ostensibly sold it.

In January, 1971, Chuck Atkins got a bill for $419. There was no itemization; he called the credit bureau who claimed to be assignee of the obligation and was told the bill included $119 for "reconditioning," a little over $100 for "cost of transporting car to California," a large "service charge," and a deficiency in the sale price of the car.

A credit bureau demanding payment has a retained lawyer in the town where he lives who automatically signs complaints prepared by the Bureau itself for filing suit. If Chuck refuses to pay, he can be sure he will be sued. Within two weeks before the car was repossessed, he had purchased new tires and given the car a tune; its pretty doubtful there was a reasonable bill of $119 "reconditioning" incurred. (In Chuck's hometown, there is a full time professional reconditioning and detailing shop which does complete reconditioning of used vehicles for dealers at $25 each.) The "transportation charge" is pretty rough, since the market for that car was higher in Northeastern Oregon than in Los Angeles when it was taken back. He might win in a trial on those two items; it will cost him at least $300 to hire a lawyer to fight his case though.

In the meantime, the credit bureau has him listed as inexcuseably in default on a contractual obligation.

Chuck went to see a District Attorney in his town; Chuck feelingly observed "it just isn't fair."

There is only one response: 'Tain't fair; 'Tain't right; 'Tain't just. But... Until and unless the Oregon Legislature abolishes deficiency judgments, it's legal.

Portland Postal Employees Credit Union

Established 1928

421 S. E. 10th Avenue, PORTLAND, OREGON 97214

Area Code 503 — 235-3128

February 12, 1971

Mrs. Gretchen Kafoury
1508 N. E. Stanton
Portland, Oregon 97212

Dear Mrs. Kafoury:

The following letter was endorsed by our Board as their feeling regarding deficiency judgements. It is my understanding there is to be a bill in the Legislature regarding this.

We have discussed the matter, and although we are in the business of lending money, we feel this is too harsh a law, as far as the consumer is concerned. We believe any law which benefits one class against another is not good legislation. This is certainly the case, as far as deficiency judgements are concerned. It benefits only the seller, to the detriment of the consumer.

It seems that if this law is deleted from the books, it would benefit both the reputable seller and the consumer. A deficiency judgement might be helpful in a very few cases. In most cases, however, if there were no deficiency judgement, it seems the seller would have to cooperate a little more with the purchaser. It would be to the seller's advantage to work with the purchaser in decreasing payments, making adjustments in order that an equitable arrangement could be worked out. At the present time, with the deficiency judgement, there are too many sellers who would rather repossess and tack on a big deficiency, than work with the purchaser towards an equitable arrangement of repayment.

We loan only money, and certainly would stand to lose more than a seller who makes a certain amount of profit over wholesale on merchandise. We feel, however, that people should come before dollars and that the deficiency judgement certainly does not solve the problem of the delinquent creditor. The only thing it does, is create more problems by the person being forced into bankruptcy with creditors losing, because one creditor will not work to try to solve the delinquency problem, since he has the deficiency judgement to fall back on.

Portland Postal Employees Credit Union

John W. Almeter

John W. Almeter, Secretary - Treasurer

$1-Billion Auto Credit Bilk Charged

WASHINGTON (UPI) — A scholarly report called to public attention by Ralph Nader contends the nation's largest banks and finance companies team up with auto dealers to fleece poor people of millions of dollars a year.

Nader called it a "billion-dollar-a-year steal" in testimony before the Senate subcommittee on Executive Reorganization Wednesday, and said he sent the Federal Trade Commission (FTC) an article in the Stanford Law Review describing the practice.

"I think you've given Mr. Weinberger his first test," said Sen. Abraham Ribicoff, D-Conn., subcommittee chairman. He referred to Casper W. Weinberger, new FTC chairman.

The article's author, Prof. Philip Shuchman, 42, of the University of Connecticut law school, says the practice "is not unlawful."

"It is common, accepted practice," he said. "Everyone does it." He said it should be outlawed.

He said every state except Louisiana has laws permitting the same practice, and he checked a few other states and determined it was as common there as Connecticut.

Shuchman said Americans owe about $30 billion on their cars. If the default rate is only 2 per cent, he said, that would mean $600 million a year involved in the alleged scheme. Schuchman described a typical case:

A customer buys a car for $2,000, including finance charges. After paying $500, he defaults, owing $1,500. Under the normal arrangement, the dealer has promised the finance company to make good the entire balance in case of default.

The finance company repossesses the car, which could bring about $1,400. But the finance company sells it back to the dealer for only $400. The dealer gives the finance company a second check covering the $1,100 balance.

The dealer then sells the car for $1,400. But he credits the consumer with only $400 —the "price" he paid the finance company. So he sues the consumer for the other $1,100 of the $1,500 the man owed and collects, often through a court order garnishing the man's wages.

The bank or finance company has thus made its full profit, usually at a high interest rate, with no risk. The car dealer has invested $1,500 and received $2,500 in return. The consumer has lost his car and paid an extra $1,100.

Consumers Flay Deception in Food Ads

WASHINGTON (AP) — A rich vein of consumer unrest was tapped in two days of Federal Trade Commission hearings on proposed action against false supermarket advertising.

The hearing's purpose was to gather testimony on a proposed rule to require supermarkets to have their advertised bargains in stock at or below the price in the ad. FTC surveys of 10 chains found no bargain on the shelf or a higher price for it as much as a quarter of the time.

But witnesses often went beyond the point.

Father Robert McEwen of the Massachusetts Consumer Association said some terms applied to meat were deceiving and sometimes masked poor grades.

McEwen, several welfare mothers and Rep. Benjamin Rosenthal, D-N.Y., testified in the hearings that closed Wednesday that a lack of competition makes the food advertising practices possible and that the practices work especially against the poor.

The FTC surveys showed the false advertising practices tended to be more prevalent in the ghetto though also present in the suburbs.

McEwen, Berman and Mrs. Virginia Knauer, the President's expert on consumer affairs, all urged that the FTC rule be applied in other areas — autos, furniture, retail drugs.

Mrs. Knauer said she feels the FTC has the power now to act.

HB 1213, 1267, 1297, 1298, 1343, 1851, 1347, 1348, 1351, 1423, 1643, 1755
Tape 26, side 1, 766-820; side 2, 000-351

HOUSE COMMITTEE ON JUDICIARY

April 16, 1971 — 14 State Capitol

Minutes

Members Present: Reps. Cole, Crothers, Haas, Hollingsworth, Paulus, Skelton, Stults, Young, Macpherson

Also Present: Jena Schlegel, Legal Counsel

Work Session

The meeting was called to order at 8:10 a.m. and the clerk noted the presence of all members.

Chairman Macpherson advised the committee that the Consumer Protection Subcommittee has completed its work on a consumer protection measure which is proposed to be introduced as a committee bill. Rep. Stults explained the provisions of the bill to the members and answered their questions thereon. By unanimous consent, it was ordered that the bill be introduced as a Judiciary Committee bill.

HB 1213

Rep. Crothers explained that the subcommittee had not voted on a recommendation for the bill. He explained an amendment recommended to resolve the Department of Employment's objection to the bill. Counsel gave a brief outline of the contents of the bill and proposed amendments. There was extensive discussion.

Rep. Young moved that the bill be tabled. The motion failed. Aye: Haas, Stults, Young; No: Cole, Crothers, Hollingsworth, Paulus, Skelton, Macpherson.

Reps. Stults, Haas and Young explained their objections to the bill, which included the possible fiscal impact, the extreme complexity of the bill and lack of understanding regarding the provisions, and the question of need for revision of the Act.

Rep. Skelton discussed present administrative hearing procedures which he objects to and which are not resolved by the bill. He thinks there is a need for uniformity in administrative procedure but feels perhaps creation of a hearings division would be advisable.

Rep. Hollingsworth suggested that action be deferred to give the committee time to study the bill. Rep. Skelton will prepare a brief analysis for the members' information.

Rep. Skelton moved that the bill be tabled. The motion failed. Aye: Reps. Skelton, Young; No: Reps. Cole, Crothers, Haas, Hollingsworth, Paulus, Stults; Excused: Rep. Macpherson.

Rep. Haas moved that the amendments dated March 30 be adopted.

Rep. Skelton moved that the proposed amendments be amended to return the bill to its original form and to amend the original bill to provide that there be circuit court review on the basis of the substantial evidence rule; the only appeal from the circuit court to be to the Supreme Court, and to further provide that the Board's review would be limited to matters of law.

Rep. Skelton's amendment to the proposed amendments failed. Aye: Reps. Skelton, Young; No: Reps. Cole, Crothers, Haas, Hollingsworth, Paulus, Stults; Excused: Rep. Macpherson.

Rep. Haas' motion to adopt proposed amendments dated March 30 passed. Aye: Reps. Cole, Crothers, Haas, Hollingsworth, Stults; No: Reps. Paulus, Skelton, Young; Excused: Rep. Macpherson.

Rep. Haas moved that the bill be sent to the floor with a recommendation of do pass as amended. The motion passed. Aye: Reps. Cole, Crothers, Haas, Hollingworth, Stults; No: Reps. Paulus, Skelton, Young; Excused: Rep. Macpherson. Rep. Haas will lead the floor discussion.

Reps. Skelton, Young excused.

HB 3037

Rep. Stults explained that this bill was prepared by the Consumer Protection subcommittee. He advised the committee of the features of the bill.

The limitation of $500 on the deficiency judgment prohibition was discussed. It was agreed that this figure would allow deficiency judgments on most car sales. Some members felt that the problem was not widespread enough to merit further increase, and others felt that raising the figure would serve to encourage unscrupulous buyers. This figure is a compromise which attempts to satisfy both proponents and opponents of the provision and is considered to open the door to further study in future legislatures.

Rep. Young present.

Rep. Hollingsworth moved that the $500 figure be amended to $1,000. The motion failed. Aye: Reps. Haas, Hollingsworth; No: Reps. Cole, Crothers, Paulus, Stults, Young: Excused: Rep. Macpherson; Absent: Rep. Skelton.

Rep. Stults moved that the bill be sent to the floor with a recommendation of do pass. The motion passed by unanimous consent of the members present. Excused: Rep. Macpherson; Absent: Rep. Skelton.

Action will be deferred on HB 1088, 1330, SB 50 and SB 123 pending action on the floor on HB 3037.

The meeting adjourned at 10:30 a.m.

Respectfully submitted,

Joyce McCormack

Joyce McCormack
Committee Clerk

HOUSE COMMITTEE ON JUDICIARY

MEMORANDUM
April 14, 1971

To: Al Jennings, Assistant to the Speaker

From: Jena Schlegel, Legal Counsel to the Committee

Re: Proposed Consumer Protection Bill

The proposed bill makes substantial changes in seven different areas of the law. Each of these changes expands the right of the state and individuals to protection against "sharp" or deceptive trade practices on the part of sellers.

(1) The buyer could assert defenses against a bank or lending institution that purchases his installment contract or note which is secured by consumer goods or motor vehicles.

Example:

> John Doe purchases a refrigerator on contract. After making payments for 2 or 3 months he stops making payments because the refrigerator doesn't work and the dealer won't repair or replace it despite the warranty. The contract he signed to get the refrigerator was sold by the store to the bank. When John Doe stops making the payments the bank threatens to sue and get a judgment. The bill would allow John Doe to raise the defense against the bank that the refrigerator does not work and the dealer won't repair it according to the warranty. Under present law, this defense would not be good against the bank.

(2) If a buyer defaults on his contract or loan that is secured by consumer goods and his balance due is less than $1,000, the seller or lender may choose to repossess the goods or automobile, but then he cannot collect the deficiency. The seller is not prohibited from collecting for wilful or malicious damage to the goods by the seller. Under present law the seller

or lender can repossess and collect on the deficiency regardless of the amount of money involved.

Example:

> John Doe purchases a color television set on contract. After 2 or 3 months he is no longer able to make payments. He still owes $800 on the set. If the seller repossesses the set, he cannot collect the difference between what he resells it for and the $800. Under present law if he resold the set for $500 he could collect the other $300 from the buyer.

(3) Deceptive trade practices are redefined so that they include what is prohibited in present law and some additional practices which are not in present law. The Attorney General is given authority to establish by rule that certain conduct is misleading and therefore prohibited. Commission of certain of the prohibited acts is declared to be a misdemeanor; i.e., telephone solicitation when the caller does not identify himself and the purpose of his call within 30 seconds. One of the more significant of the acts prohibited is the prohibition against referral sales.

Example:

> John Doe buys a freezer from X Co. on contract. X Co. tells John Doe that if he gives them the names of other customers and those customers buy a freezer from X. Co., John Doe will be given credit for $25 for each sale he referred to them. The bill makes this type of agreement a deceptive trade practice.

(4) The Attorney General, as well as the district attorney, is given authority to enforce the Deceptive Trade Practices Act. A procedure is set up whereby written assurances of discontinuance of a practice may be secured. The Attorney General and district attorneys are given more investigative powers.

The courts are given more authority for enforcement of violation of either written assurances or injunctions against certain acts, including the authority to suspend licenses to do business for wilful violations.

Example:

> X. Co. is believed to have been making false representations regarding the country from which its product came. The Attorney General obtains a written assurance from X. Co. that they will not make these representations. X. Co. continues to make the representation. X. Co. is in contempt of court. The Attorney General secures an injunction against X. Co. continuing the practice. X. Co. repeatedly continues the practice. The court can suspend X. Co.'s license to do business in the state.

(5) Individuals are allowed to bring a suit for damages against a company arising out of a wilful deceptive trade practice and may recover their actual damages or $200, whichever is larger and may recover their attorney fees and costs. Present law does not provide for this.

Example:

> Y. Co. representative, claiming to be an inspector goes into a home and takes the furnace apart, advising the owner that he needs certain replacement parts in the furnace. The owner did not authorize him to take the furnace apart and declines to buy the replacement parts. The owner has to pay a repairman $25 to put the furnace back together. The owner can sue Y Co. and collect damages in the amount of $200 along with his attorney fees and court costs.

(6) Restrictions are placed on home solicitation sales of consumer goods and services (not including sales of insurance, farm equipment or motor vehicles). If the seller makes a sale at a residence other than his own, the buyer is given three days in which to cancel the contract and the seller must give

him notice of this right. In emergency situations, the buyer can waive the right to cancel. If the buyer does cancel, the seller can retain up to $25 as costs for his efforts. Present law does not provide these rights.

Example:

Joe Smith goes to Jones' residence and sells Mrs. Jones a vacuum cleaner for $200. Mrs. Jones gives him a down-payment of $15 and signs a contract to pay off the balance. The next day Mrs. Jones is convinced she either does not want or cannot afford the vacuum cleaner. She notifies Mr. Smith and the contract is cancelled. Mr. Smith can keep the $15 down-payment.

(7) If a buyer brings an action for breach of warranty where the damages are $1,000 or less and has made demand for payment at least 30 days before filing the action, he can recover his attorney fees if he is successful. Under present law he cannot.

Example:

Joe Doe buys a toaster for $25. The toaster doesn't work. He makes demand on the seller to replace it or refund his $25. The seller refuses. Joe Doe brings an action against the seller for breach of warranty and $25 damages. He wins. The court can make the seller pay the attorneys' fees Joe Doe was out to bring the suit.

* * * * *

Note: The bill incorporates many of the features of both the Attorney General's bill and Senator Wilner's bill. It includes provisions relating to holder-in-due-course and the deficiency judgment which were not a part of those bills. This resume may be an oversimplification but I think it does explain what the bill does in simple terms.

There may be minor changes made in the bill at the meeting of the subcommittee scheduled for this afternoon.

MEMORANDUM

FOR: House Judiciary Committee
Rep. Gordon Macpherson, Chairman

BY: William R. Canessa

DATE: 1 March 1971

SUBJECT: Comparison of Senate Bill 50 with House Bill 1088, House Bill 1250, House Bill 1330 (UCCC) and Senate Bill 123

I. PURPOSE OF MEMORANDUM

The objective of this memorandum is to compare the substantive and procedural provisions of Senate Bill 50 with other Senate and House Bills dealing with similar subject matter. This memorandum emphasizes dissimilar and unique provisions and does not proport to be a summary of all the provisions of Senate Bill 50.

II. DECEPTIVE TRADE

A. Comparison of the substantive provisions of Senate Bill 50 and House Bill 1088.

1. SB 50(3) provides that unfair methods of competition and deceptive acts or practices by a person are unlawful. HB 1088(3) declares deceptive trade practices unlawful but limits the scope to persons engaged in deceptive trade practices in the course of his business, vocation or occupation.
2. The list of specific deceptive trade practices found in SB 50(3)(2) and HB 1088(3)(2) are substantially the same except that SB 50 includes, where HB 1088 does not, the following:
   (l) Representing that the consumer transaction confers or involves rights, remedies or obligations that it does not have or involve or which are prohibited by law;
   (m) Representing that a part, replacement or repair service is needed when it is not or that continued use of equipment will endanger health or safety when it will not;
   (n) Representing that the subject of a consumer transaction has been supplied in accordance with a previous representation when it has not;
   (o) Causing likelihood of confusion or of misunderstanding with respect to the authority of a salesman, representative or agent to negotiate the final terms of a transaction with a consumer;

(q) Engaging in any act or practice which is unfair or deceptive to the consumer;
(r) Making any false, misleading or deceptive statement about a prize, contest, or promotion used to publicize a product, business or service.

and, HB 1088 includes, whereas SB 50 does not, the following:

(l) Makes false or misleading representations concerning the availability of credit or the nature of the transaction of the obligation incurred;
(m) Makes false or misleading representations relating to commissions or other compensation to be paid in exchange for permitting property to be used for model or demonstration purposes or in exchange for submitting names of other purchasers to the seller.

B. Comparison of the procedural law of Senate Bill 50 and House Bill 1088.

1. SB 50(6)(1) and HB 1088 (5)(1) provide that the State may seek injunctive relief to enforce the substantive provisions of their respective bills. (SB 50 (6)(1) also authorizes the courts to issue temporary restraining orders, preliminary and permanent injunctions to restrain and prevent violations. Such orders and injunctions to be issued without bond.
2. SB 50(6)(2) and HB 1088(5)(2) provide identical requirements for notification to persons charged for violations except that SB 50(6)(2) requires that notice must be served at least seven days before the hearing.
3. SB 50(7) and HB 1088(5)(2) provide for voluntary compliance. SB 50(7) provides no time limit whereas HB 1088(5)(2) gives the person served ten days to execute and deliver the assurance of voluntary compliance.
4. SB 50(8) and HB 1088(5)(4) provide that the State may be awarded reasonable costs and attorney fees, if the State prevails in the suit. HB 1088(5)(4) also gives the courts the authority to award reasonable attorney fees to the defendant, if he should prevail in the suit.
5. SB 50(9) and HB 1088(6) give identical power to the courts to make any additional orders or judgments to restore to any person his interest in money or property which may have been acquired by unlawful trade practices. HB 1088(6) also grants to the courts the power to make any orders or injunctions necessary to insure cessation of the deceptive trade practices.

6. SB 50(11) and HB 1088(8)(1) provide identical rights for the injured person to bring a private cause of action. SB 50(11) gives the court the authority to award punative damages whereas HB 1088(8)(1) gives the court and jury the authority to award punative damages.
7. SB 50(11)(2) provides that a private individual under proper circumstances may bring a class action to recover damages, equitable relief for himself and other members of the class. There is no similar provision in HB 1088.
8. SB 50(12) and HB 1088(9) provide identical investigatory powers. HB 1088(9)(3) also provides immunity to witnesses who would be disqualified on grounds of self-incrimination.
9. HB 1088 declares an emergency.
10. SB 50(5(1) provides that it is the legislative intent that in construing Section 3 of SB 50 due consideration shall be given to the interpretation by the Federal Trade Commission and federal courts of the Federal Trade Commission Act (15 USC 45(a)(1). SB 50(5)(2) empowers the Attorney General to make rules interpreting Section 3 of SB 50. There is no similar provision in HB 1088.

C. The Federal Trade Commission Act has not preempted the field of deceptive trade practices.

1. The Federal Trade Commission Act provides that unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are unlawful. (15 USC 45 (a))
2. There is no specific language in the Federal Trade Commission Act which manifests Congress's intention to preempt the field of deceptive trade practices. (Double-Eagle Lubricants v. Texas, 248 F. Supp 515 (1965))
3. In Double-Eagle Lubricants v. Texas, Supra, the court upheld the validity of a state deceptive trade statute. The defendant attacked the validity on a theory of Federal preemption. The court stated that state laws providing for regulation of unfair and deceptive practices in commerce are valid unless they conflict with federal law to the extent that both cannot stand in the area. Appeal was dismissed in 86 S.Ct. 1601 (1965).

III. TELEPHONE SOLICITATION

SB 50(15)(1) and HB 1088(16)(1) have identical provisions on telephone solicitation.

IV. DISMANTLING EQUIPMENT

SB 50(15)(2) and HB 1088(16)(2) have substnatially the same provisions concerning servicing and dismantling equipment in a residence. SB 50 states that a person shall not dismantle equipment in a residence when not authorized by the owner whereas HB 1088 states that no person..... unless specifically authorized by the owner.

V. REFERRAL SALES AGREEMENTS

A. SB 50(15)(3) and HB 1088(16)(3) have identical provisions concerning referral sales agreements.

B. SB 50, HB 1088, HB 1250 and SB 123 have substantially the same provisions as HB 1330 (UCCC-2.411) except:
   1. SB 50 and HB 1088 makes it unlawful to offer or make a referral sales agreement in any sale of consumer goods or services whereas HB 1330 is limited to consumer credit sales or a consumer lease.
   2. SB 123(10)(2) limits unlawful referral sales agreements to home solicitation sales.
   3. HB 1250(3) makes it unlawful for a lender to make a referral sales agreement. HB 1250(4) makes it unlawful for a seller to make or offer a referral sales agreement.
   4. HB 1330(UCCC-2.411) provides: ".....the seller or lessor may not offer or give a discount..... to the buyer as an inducement for a sale in consideration of his giving to seller.....the names of prospective purchasers". SB 50, SB 123, HB 1088, HB 1250 omit the phrase "as an inducement for sale."

C. HB 1330, SB 123, and HB 1250 provide that a buyer under an unlawful referral sales agreement may either rescind the transaction or retain the benefits of the transaction without obligation to pay. Neither HB 1088 or SB 50 have a similar provision for remedies but only provide that referral sales agreements may be enjoined.

DONALD J. WILSON
ATTORNEY AT LAW
280 11TH AVENUE EAST
EUGENE, OREGON 97401
TELEPHONE 342-2497

May 14, 1971

Representative Gordon Macpherson
House of Representatives
State Capital
Salem, Oregon 97310

Re: H.B. 3037

Dear Gordon and Tom:

I appeared before the Senate Consumer Affairs Committee yesterday on H.B. 3037. I had hoped to convince the committee that the bill should provide for Registered Mail or Certified Mail, return receipt requested, in home solicitation sales.

In it's present form it gives the dishonest purchaser - and I'm certain that we all know a few, a license to steal. All the purchaser has to do is to say that he wrote a letter to the seller cancelling the contract, that the seller didn't pick up the goods within 20 days and that the good are now his and that he has no obligation to pay for them. I would feel less concerned about this if there was proof that the purchaser did, in fact, mail a notice of cancellation.

Senator Roberts indicated that they were really trying to protect the little old lady, that through some infirmity or senility couldn't get out of her home and go to the post office to send the registered mail -- or that the little old lady didn't know about registering mail. Most of adult society knows that there are different ways of sending mail that is more than of average importance.

My suggestion is that the bill provide for certified mail, return receipt requested and that the seller be required to

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Re: H.B. 3037

furnish the purchaser with the post office form at the time of purchase. How's that for a simple solution?

I'm enclosing a Decision and Judgment rendered in Arizona which may be of interest. It's my understanding that the case is now on appeal to the Arizona Supreme Court. I would appreciate your reading the last paragraph of Page 4 and all of Page 5.

My best wishes to you. I'm sorry that I didn't get to see you when I was in Salem. I miss you and can't possibly imagine how Gordon had/ is having his sing-a-long without me.

Cheers!

Sincerely,

DONALD J. WILSON

DJW:sg

Enclosures

cc: Representative Tom Young
Jona Schlegel

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DIRECT SELLERS ASSOCIATION OF ARIZONA, a trade association, Plaintiff, vs. STATE OF ARIZONA, et al., Defendants.	No. C 240188 DECISION and JUDGMENT

The issues herein are before the Court on motions for summary judgment by the respective parties - memorandums having been submitted and oral arguments presented. The primary concern is whether or not Chapter 114 H.B. 102 is constitutional.

All appreciate that in this modern day, house to house solicitation has increased to the extent that proper regulatory measures are worthy of consideration. However, such an objective must be accomplished properly within the framework of the Constitution of Arizona.

The Court bears in mind that every intendment must be considered in favor of the validity of the act.

Contractual relationship is one of the primary issues to consider. The right to make a legitimate contract in relation to ones' business is a property right.

Lockner v. New York 25 S.Ct. 539 - 198 U.S. 53.

That right is protected by the due process and equal protection clauses of the Fourteenth Amendment.

Application Levine 97 Ariz. 88.

In legal regulation of classes under the police power of the State, laws enacted for the general welfare, health, safety or morals of the public must not be unreasonable,

arbitrary or discriminatory and must bear a reasonable relation to the purpose for which it was enacted.

Killingsworth vs. West Way Motors, Inc. 87 Ariz. 74.

Chapter 114 excludes from the provisions of the Act all home solicitation sales or services if same are made pursuant to a pre-existing account with a seller whose primary business is that of selling goods or services at a fixed location or if it is a sale made pursuant to prior negotiations between the parties at a business establishment at a fixed location where goods or services are offered or exhibited for sale.

All other persons making home sales are subject to the act. Is the above classification reasonable and not discriminatory?

No definition is given as to what constitutes a fixed business location, which exempts a person from the Act. Should a physically handicapped person who sells and operates from his home in house to house solicitation be considered in a different classification than the person who operates a small TV shop in a rented building? Should a person operating from a large corporate establishment be privileged to sell from house to house and be exempt and the vacuum cleaner salesman who lives at and operates from his home and sells house to house, be handicapped and deprived by virtue of the restrictions of the Act and the corporate salesman not?

Assume a person permanently operates a small TV business of sale and service in a rented building in Los Angeles, California. That person comes into Arizona and solicits house to house, sales of TV sets and/or service repair. He has a fixed place of business in California. Is he exempt from the Act? He has a fixed place of business. The foregoing are illustrations to show the

necessity for a definition of "fixed location". Without such a definition a hiatus is created which in turn violates the requirements of reasonable constitutional classification, clarity, and may effect discrimination.

This important feature of the Act becomes more important when consideration is hereinafter given to the penal provision in the Act. The Court is of the opinion that all home solicitation salesmen sought to be classed must be classed and governed by the same uniform regulations.

If a law is applied and administered by public authority so as to make unjust discrimination between persons in similar circumstances material to their rights, such denial of equal justice is within the prohibition of the due process clauses of the Federal and State Constitutions.

Howard Sports Darly vs. Weller, 18 Az. 2d 210, 179 Md. 355

Theil vs. Rapid Transit, 6 W.2nd 560.

A legislative act that does not clearly, properly and fairly classify is unreasonable, arbitrary and discriminatory.

Truax vs. Corrigan, 42 S.Ct. 124, 257 U.S. 312.

> "Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."
>
> "Mr. Justice Matthews, in Yick Wo vs. Hopkins, 118 U.S. 356, 369, 30 O. ed. 220, 226, 6 Sup. Ct. Rep. 1064, speaking for the court of both the due process and equality clause of the 14th Amendment, said:
>
> "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

Liberty to Contract

> "Freedom to contract is both a liberty and property right which is protected against arbitrary or unreasonable restraint, but this freedom is not absolute." 16 ACJS Sec. 575.

The burdens placed upon the sellers' and buyers' contracts as to negotiability are unbearable and discriminatory. Legitimate negotiable contracts which meet legal requirements are stripped of their face and legitimate value. The ability to transact business today in most instances are dependent on a time payment basis with the necessity of transferring the obligation to realize cash to operate a business.

Note Sec. 44-5005, Sub D, where an attempt is made to exclude a promissory note payable to order or bearer (and as stated, issued in violation of this section) may be enforced as a negotiable instrument.

This provision "to be enforced" in the face of the burdens placed under Sub Sec. B which provides: "This instrument is not negotiable". Also note under Declaration of Purpose, Sec. I, Sub 2:

"Note shall be deemed as assignment only, etc."

Why is a particular note singled out and many other forms of valid negotiable instruments are left with the burdens imposed and are discriminated against? If a note is made payable to order or bearer and negotiable, although in violation of Chap. 114, what conscionable reason can be given why other legitimate negotiable instruments obtained by the seller should not occupy the same exalted position? Such discrimination as to contracts, in effect, constitute discrimination against the parties and impairs right to contract.

Sec. 44-5007 provides that if seller does not take possession of property sold after 20 days from date of cancellation the property becomes the property of the buyer without obligation to pay.

Such a provision violates the due process clause of Federal and Arizona Constitutions.

No opportunity for a hearing to determine the rights of the parties. If the notice of cancellation by mail is not received by seller, although mailed by buyer, he forfeits his property regardless of facts.

The law abhors an unjust forfeiture.

The owner or claimant must be notified without unreasonable delay and given an opportunity to be heard and it must be judicially determined that the act giving rise to the forfeiture occurred.

Santos vs. Dondero, 54 Pac.2d 964, 16 ACJS 900.

19 SW 910.

As pointed out by our own Supreme Court in McManus v. Industrial Commission, 53 Ariz. 22, 85 P.2d 54:

> ". . . a law which attempts to authorize the taking of money belonging to one person and giving it to another without a hearing on the question, of which parties should have notice and an opportunity to make a defense, would be unconstitutional. Ex parte Wall, 107 U.S. 265, 2 S.Ct. 569, 27 L.Ed. 552, Galpin v. Page, 18 Wall 350, 21 L.Ed. 959."

Section 44-5006(a) which provides:

> "Except as provided in this section. . . -- the seller shall tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness."

Under Sec. 44-5007 Sub C, the seller is allowed to keep a "cancellation fee" of five percent of the cash price or $15.00 of the amount of the cash down payment.

The provisions that the seller is required to restore any payments made by the buyer and the provision that he is entitled to keep the cash down payment are inconsistent, confusing and contradictory.

Sec. 44-5008, the criminal provision, provides:

> "Any person who violates any provision of this chapter shall be guilty of a misdeameanor punishable by a fine of not more than Three Hundred Dollars or imprisonment not to exceed ninety days, or both."

The statue applies to any person and also to any act of non-compliance by buyer or seller.

Sec. 44-5008 - This criminal penalty clause may be termed a blanket provision which intrudes into almost every section of Chapter 114, and implies every criminal element necessary to constitute a crime, thereby creating a criminal offense for non-compliance with a purely civil transaction.

Criminal statutes must bear the indicia of certainty and clarity. Is it reasonable to assume that the legislature intended to make a crime out of business transactions not unlawful per se or not tainted with fraud, etc., or that are consummated a thousand times daily not only in home solicitation transactions but in the ordinary legitimate transaction of business? Further, notes, checks, conditional sales contracts and many other instruments are legitimately post-dated or anti-dated for many legitimate reasons.

Under this statute, a person either buyer or seller, commits a crime if such an instrument is so dated.

In the case of State of Arizona vs. Menderson, 57 Ariz. 103, 111 P.2d 622 (1941):

> "The members of society at whose acts the law is directed must, in such circumstances, themselves determine in advance what they may legally do and what is forbidden. In 22 Corpus Juris Secundum, P. 72, Criminal Law, Section 24, is found this language:
>
> > '. . . where the legislature declares an offense in words of no determinate signification, or its language is so general and indefinite that it may embrace not only acts commonly recognized as reprehensible but also others which it is unreasonable to presume were intended to be made criminal, the statute will be declared void for uncertainty: . . . '"

Consider what may become a crime for the buyer or seller under Chap. 114.

1) The buyer may be guilty of a crime, and subject to imprisonment, if he violates any of the provisions of

the following:

a) A.R.S. Sec. 44-5505(a) - If the buyer, as the actor, dates the note that he gives earlier than his offer to purchase:

b) A.R.S. Sec. 44-5005(b) - If the note given by a buyer, as the actor, does not bear on its face the statement required under Subsection (b); (yet under Sec. 44-5005 Sub.D, he may execute a note payable to order or bearer, etc., in violation of the provisions.)

c) A.R.S. Section 5007(a) - If the buyer fails to tender the goods to the seller after cancellation and when a demand has been made; and

d) A.R.S. Section 5007(b) - If the buyer fails to take reasonable care of the goods in his possession. (Shall it be final that the buyer alone may determine whether or not he has used reasonable care?)

2) The seller may be guilty of a crime, and subject to imprisonment, if he violates any of the provisions of the following:

a) A.R.S. Section 44-5006(a) - If he fails to tender back any payments made;

b) A.R.S. Section 44-5006(a) - If he fails to return a primissory note or other evidence of indebtedness to the buyer;

c) A.R.S. Section 44-5006(b) - If he fails to tender back goods traded in;

d) A.R.S. Section 44-5006(b) - If he tenders back goods traded in not in substantially as good a condition as when received; and

e) A.R.S. Section 44-5007(c) - If he fails to restore the buyer's property in substantially as good a condition as when services were rendered. (Shall the seller be the final judge of the facts?)

The above provisions make criminal, ordinary, legitimate business transactions which do not in any way involve fraud or criminal intent.

The language in the act which attempts to convert a civil transaction into a criminal offense under Sec. 44-5008, is contrary to the decision in the Henderson case, supra.

The Court determines that Chapter 114 is unconstitutional:

(1) It violates the due process clause of Arizona Constitution.

(2) Does not operate alike upon all of a given class.

(3) Makes an unreasonable discriminatory and arbitrary classification as to persons affected.

(4) Is contradictory in its provisions.

(5) Denies an equal protection of law to persons affected and is not linited to the preservation of the public safety, public health, and morals.

Summary judgment is granted in favor of plaintiffs and against defendants.

Defendants' motion for summary judgment denied.

DATED this 11 day of January, 1971.

s/ W. E. Patterson
Judge of the Superior Court

AMENDMENTS TO CONSUMER PROTECTION BILL

Add the following sections:

Section 21. Section 22 of this Act is added to and made a part of ORS 20.010 to 20.180.

Section 22.

(1) In any action for damages for breach of an expressed or implied warranty in a sale of consumer goods or services where the amount pleaded is $1,000.00 or less and the plaintiff prevails in the action, there shall be taxed and allowed to the plaintiff, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney fees for the prosecution of the action, if the court finds that written demand for the payment of such claim was made on the defendant and that the defendant was allowed a reasonable opportunity to inspect any property pertaining to the claim, not less than 20 days before the commencement of the action; provided, that no attorney fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount not less than the damages awarded to the plaintiff.

(2) If the defendant pleads a counterclaim, not to exceed $1,000. , and the defendant prevails in the action, there shall be taxed and allowed to the defendant, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney fees for the prosecution of the counterclaim.

(3) If the defendant prevails in an action in which the plaintiff requests attorneys fees under subsection (1) hereof, the court may in its discretion allow reasonable attorneys fees to the defendant if it finds the action to have been frivolous.

Report #1

Jud 14

4/23/71

HB 3037 E

may conflict with

HB 1088 E
SB 50

because all bills amend ORS 646.990

because all bills repeal ORS 646.210, 646.220, 646.230, 646.615, 646.625, 646.635, 646.645, 646.655, 646.810, 646.820, 646.830 and 646.840

because HB 3037 E amends, HB 1088 E and SB 50 repeals ORS 646.605

Prepared by:

Budget Division
Executive Department

STATE OF OREGON
ANALYSIS OF PROPOSED LEGISLATION
1971 Regular Legislative Session
FORM BF 20

6.

ANALYST: Jacobson/ Sexson/Brauner DATE COMPLETED: May 10, 1971

1. Number of Measure	2. Status	3. Class of Bill	
		Fiscal	Non-Fiscal
HB 3037	Original and House Amendments, 5/4/71	[x]	[ ]

4. Subject

Revises laws relating to deceptive trade practices.

5. Government Unit or Program Affected

Law Enforcement, Local Government, Courts

6. Fiscal Impact

Effect on Revenue

Civil penalties of up to $25,000 per violation may generate some revenue. No amounts can be estimated.

Effect on Expenditures

Moderate increases in administrative costs will be incurred by the Attorney General and District Attorneys in the processing of required reports, depending on the number of cases prosecuted.

The effect on courts cannot be accurately estimated, as it will depend on the future actions of prosecutors and sellers. Possible increased caseloads in appeals courts may result initially as provisions of the bill are challenged.

TJ:sq

Reviewed by Legislative Fiscal Office.

Analyst: Lamb
Date: May 10, 1971

Prepared by:

Budget Division
Executive Department

STATE OF OREGON
ANALYSIS OF PROPOSED LEGISLATION
1971 Regular Legislative Session
FORM BF 20

ANALYST: Jacobson/ Sexson/Brauner DATE COMPLETED: May 19, 1971

1. Number of Measure	2. Status	3. Class of Bill
HB 3037	Senate Amendments, 5/15/71	Fiscal [x] Non-Fiscal [ ]

4. Subject

Revises laws relating to deceptive trade practices.

5. Government Unit or Program Affected

Law Enforcement, Local Government, Courts

6. Fiscal Impact

Amendments do not affect analysis of 5/10/71.

TJ:sq

Reviewed by Legislative Fiscal Office.

Analyst: Lamb
Date: May 25, 1971

7.
3037

2111 E. Main
Cottage Grove

Dear Mr. Macph erson,

The consumer protection bill now in your house judiciary committee contains a serious weakness.

In the area of financing, deficiency judgements will not be prohibited unless they are under $1,000.

Since most deficiciency judgements are involved in car centracts, $1,000 is an extremely unrealistic figure.

Oregon Consumer League bill 1251 advocated prohibiting deficiency judgements if the amount owed was less than $2500.

Please consider that this figure will protect the consumer from extortion by car dealers.

We feel that the Oregon Consumer League bill no. 1248 which provides for attorney's fees for breach of warranty is terribly important and should be included in the Comprehensive Consumer Bill.

Thank you for your support of consumers.

Sincerely,

Patricia Bradbury

P. Bradbury

House Bill 3037

Senate Committee on Consumer Affairs

May 12, 1971 3:00 p.m. 309 State Capitol

Members Present: Senator Betty Roberts, Chairman
Senator Sam Dement, Vice Chairman
Senator Hector Macpherson
Senator Don Willner

Absent: Senator Tom Mahoney

Witnesses: Rep. Robert Stults
Attorney General Lee Johnson
Charles R. Williamson, Legal Aid Service, Multnomah Bar Association, 402 Senator Building, Portland
Gretchen Kafoury, Consumer Protection Legislation Chairman for Demoforum, 1508 NE Stanton, Portland
Mr. Ernest Moore, Director of Administrative Services for the Department of Commerce; and Secretary to the Governor's Consumer Task Force
Mr. Hayes Beall, representing the Oregon Consumer League
Mr. Les Green, General Motors dealer, Salem
Mr. Lou Norris, Oregon Retail Council
Mr. Lloyd Knudsen, representing Oregon AFL-CIO
Mr. Don Wilson, representing the Kirby Company
Mr. Harry Long, President, Kirby Company

Chairman Roberts called the meeting to order at 3:00 p.m.

House Bill 3037

Rep. Stults was called as the first witness. He explained that he was Chairman of the special subcommittee on Consumer Affairs in the House Judiciary Committee, which put together the package called House Bill 3037, from items in Senate Bill 50, the Attorney General's bill, House Bill 1088, and a number of other

bills which had been introduced in both houses. House Bill 3037, he said, is a composite of what the bi-partisan committee thought were the best features of various consumer legislation bills. He examined and explained portions of the bill for the Committee. Section 2, he said, eliminates the defense of the holder in due course. Sections 3 and 4 have to do wtih deficiency judgments. Section 5 is a definitive section, including the definition of "prosecuting attorney" which includes the Attorney General's office or the district attorney of any county. In addition to other deceptive trade practices, this measure would prohibit referral sales.

Chairman Roberts called attention to the fact that this bill was, in fact, four bills in one. She therefore, asked the Committee if they would like to direct questions to the first item in the bill, which was the holder in due course provision. Since there were no questions on that subject, she suggested that they go on to the deficiency judgment provision.

Senator Willner asked why the $1,000 had been changed to $500, and Rep. Stults replied that it had been changed by committee action.

On the section regarding deceptive trade practices, Senator Willner wondered why a criminal penalty had been imposed on paragraphs (m), (n), (o) and (p) of subsection 1 of section 7, and not on the other unlawful practices under that section. Rep. Stults said it was the result of testimony which led the committee to believe that these practices were of a more serious nature.

Senator Willner asked Rep. Stults if he would object if there were no criminal penalty imposed in these sections. Rep. Stults indicated that he did not think it would be a change that would endanger passage of the bill.

Chairman Roberts asked if there were questions on the home solicitation sales provision of the bill. Senator Willner noted an inconsistency in the bill, suggesting that in the Buyer's Right to Cancel" contract, it should specify "a residence other than that of the seller", so that it would conform to the first part of section 21. Rep. Stults agreed.

Senator Willner also questioned the inclusion of the $25 forfeiture if the contract was cancelled during the three day "cooling off" period, and wondered if Rep. Stults would object if that amount were reduced to $10. Rep. Stults said he had no strong feeling about it but said it seemed that there should

be the requirement of some fee, if for no other reason than to prevent someone from signing contracts without due consideration.

Senator Willner said he was bothered about subsection (2) of section 23 and suggested that that section be deleted.

Mr. Charles Williamson pointed out that section 23, with respect to attorney's fees was drafted by Mr. Kirkpatrick and himself and submitted to the Judiciary Committee. (See Appendix A for his written statement in favor of the bill.) He did, however, submit amendments relating to the section on deficiency judgments, but assured the Committee that he did not want anything to endanger passage of the bill. The only other amendment that he offered had to do with deletion of the home solicitation sales act cancellation fee. (See Appendix B for proposed amendment.)

Mr. Williamson also passed out a fact sheet written by Edward Jackson Fyfe, a student at the University of Oregon Law School, about deficiency judgments. At the request of Chairman Roberts, Mr. Williamson explained for the Committee's benefit just what deficiency judgments were.

Attorney General Lee Johnson spoke in favor of House Bill 3037. He gave a brief background of the bill, stating that it contained most of the features of House Bill 1088, with the exception of the deficiency judgment. House Bill 1088, he said, had been introduced at his request, as a result of a two year study made by a committee which he had appointed and chaired. The purpose was to try to develop a comprehensive program for consumer protection in this state. It was his feeling that this measure, however, had incorporated most of the better features of all the consumer legislation introduced in this session.

Senator Willner moved to delete section 9 from the bill. The motion passed unanimously with Senator Mahoney not present.

Senator Willner then moved on page 11, line 15, after "cause" to insert "including privileged material" and to delete the following subsection (3). That motion also passed with the same four members voting consent.

Gretchen Kafoury stated that she was greatly distressed over the fact that House Bill 3037 stipulated the maximum limit in the deficiency judgment provision as $500, rather than the $1,000 as originally drafted. (See Appendix D for her statements: A statement for this hearing; a statement of examples of abuses in deficiency judgments; and her statement to the House Committee on State and Federal Affairs on House Bill 1251 on February 15). She strongly urged that the Committee consider a higher level than the $500 now provided for in the bill.

Mr. Ernest Moore, testifying in favor of the bill on behalf of the Governor's office, said that he would prefer to see the deficiency judgment limit raised from $500 to at least $1500.

Mr. Hayes Beall stated that the Oregon Consumer League adopted, at the beginning of this year, a goal with respect to consumer legislation. This bill embodies a good deal of those goals, he said. However, he indicated that their group had preferred to see a higher figure on the deficiency judgment portion of the bill.

Mr. Les Green said that although his group was prepared to support the bill, he pointed out that the deficiency judgment was originally provided as some protection for the seller. His concern was that if the limit got too high, along with the irresponsibility he has noticed in the market place, it would perhaps be abused and result in severe losses on the part of automobile dealers.

Mr. Lou Norris was called as the next witness. He offered one amendment which, he said, was taken from Senate Bill 50. On page 7, lines 27, 28 and 29, he suggested that that subsection be deleted as it had been in Senate Bill 50, with language from Senate Bill 50 inserted in its place.

Mr. Johnson defended the present language, explaining that it had been taken from House Bill 1088 and that all the model acts have identical language, with the exception that they are all-inclusive,whereas this language is limited to the prosecuting attorney. Deleting this language, he thought, would put the state in the awkward position of having to prove the misrepresentation. He considered this as a very essential feature of the bill and urged that it be retained.

Mr. Lloyd Knudsen offered approval of the bill and urged its passage by the Committee. He observed that the bill was long overdue and would offer protection for many poor people who are unaware of the best methods to buy and who are often forced to buy on credit. The $500 deficiency judgment figure seemed too low,in his opinion, and he said he would agree to $1,000.

Mr. Don Wilson said that although he was not opposed to this type of legislation, there were areas of the bill that seemed to be unfair and could be improved upon. He opposed the three day waiting period for the reason that by the time three days

had elapsed, friends or relatives would be more likely to influence the purchaser that he could have made a better deal somewhere else. He advocated giving greater thought before making an agreement, or contracting for a major purchase. His main criticism, however, was directed to the notice requirement. He thought the notice of cancellation should be required to be by certified or registered mail.

Senator Dement pointed out that if a dealer, for instance, anticipated that he would be getting a certified letter from a purchaser wishing to cancel his contract, that dealer could simply refuse to accept the certified letter. Mr. Willson noted that in the case of a certified letter, there is a stub that is returned to the writer that the letter has, in fact, been delivered.

Chairman Roberts observed that the purpose of this bill was to protect the kind of person who is not likely to get out of the house much, or to know of, or even think about, sending a certified or registered letter. The idea of making the cancellation that much more complicated, she said, would not be serving the best interest of these people.

Mr. Harry Long, President of the Kirby Company, said that he was is favor of the bill. He stated that his company has been practicing the provisions in this bill for many years. It was his feeling that a reasonable period of time is a good provision and will protect those who might otherwise be persuaded to buy something they would not, or should not, have bought. He informed the Committee that in areas where there is a 24 hour waiting period required, their company does not lose sales. He was fearful, how ever, that they would lose sales under the three day cooling off provision.

Senator Macpherson moved to delete the $500 provision from page 3 (lines 14 and 21), page 4 (lines 7 and 15). The motion passed with all four present members voting "aye."

Senator Willner moved that on page 14, line 21, delete "your" and insert "a" and after "residence" insert "other than that of the seller". That motion also passed by the same four "aye" votes.

Senator Willner moved on page 14, line 30, and on page 15, lines 8 and 23, to delete "$25" and insert "$10". He reminded that when SB 50 was moved out of this Committee, there had been no cancellation fee. Since the House had seen fit to add a fee, it seemed to be good relations with the House to amend the amount to $10, rather than cancelling it out altogether, he said. Vote was then taken on the motion and it passed with the same four members voting for the motion.

Senator Willner moved that at the bottom of page 16, and the top of page 17, subsection (2) be deleted and subsection (3) be renumbered to subsection (2). This motion passed without opposition.

Senator Dement moved on page 14, line 24, to delete "third" and insert "second". His motion failed with three "no" votes against Senator Dement's one vote in favor.

Senator Willner moved that House Bill 3037 be passed out with a recommendation of "do pass as amended subject to referral to Ways and Means." The motion passed unanimously with Senator Mahoney still not present.

The meeting was adjourned at 5:00 p.m.

Respectfully submitted,

Connie Wood, Clerk

Tape 7, side 1,
130 to 520

TESTIMONY OF CHARLES R. WILLIAMSON, Legal Aid Service, Multnomah Bar Association, 402 Senator Bldg., Portland, Oregon, on HOUSE BILL 3037

House Bill 3037 contains a tremendous amount of effective consumer protection legislation. The bill also contains some serious defects. While we are satisfied with the bill as is and would like to see it pass without further amendment, we would like to point out certain defects to the committee so that if the bill is to be sent back to the house, some corrections can be made. I would like to emphasize that we oppose any amendment which the committee believes might endanger the bill as a whole.

The first problem we have is that the deficiency judgment restrictions contained in Sections 3 and 4 of HB 3037 are so limited that they fail to provide relief in the areas where deficiency judgments are most abused. Edward Jackson Fyfe, a law student at University of Oregon, has statistics which will indicate the bill as it is now written will apply to only about 15% of the cases where deficency judgments are obtained. This is because the balance due at repossession must be less than $500 for the bill to apply. The balance due at repossession is almost always far more than $500 when a deficiency results.

A second defect in the deficiency judgment portion of the bill results from the failure of the bill to prohibit a seller or creditor from levying or attaching the goods in question in executing on a judgment he has obtained for the full balance due. If the merchant can satisfy his judgment by executing on the goods sold, he will be able to get the goods back as well

as collect the deficiency -- the very evil the bill seeks to remedy.

The proposed amendments would make the goods in question exempt from attachment or levy. The language of the amendment is taken from HB 1251.

In defense of HB 3037, we do recognize that it does take a major step in establishing the principle of limiting deficiency judgments. We feel this is an important achievement and that we will more easily be able to expand this principle in future sessions.

The only other serious change we would suggest is the deletion of the cancellation fee in the Home Solicitation Sales Act, contained in Section 21 of HB 3037. We see no reason a salesman should receive 5% of the purchase price of the goods sold or $25 simply for delivering a sales pitch. SB 123 which passed out of this committee contained no such provisions and our proposed amendments would delete this cancellation fee proposal from the bill.

Lastly, we are disappointed that the class action provisions of Senate Bill 50 so carefully considered by this committee were not included in HB 3037. Passage of such a provision in the house appears impossible.

In spite of these deficiencies, we believe this bill does provide us with a strong basis of consumer protection legislation upon which we can build in future sessions. We urge the prompt and speedy passage of HB 3037.

PROPOSED AMENDMENTS

TO

HOUSE BILL 3037

On page 3 of the printed bill, line 14, delete "$500" and insert "$1,500".

On page 3, line 21, delete "$500" and insert "$1,500".

On page 3, line 30, after "price" insert "and the goods or motor vehicles are not subject to levy, attachment, sale or other proceeding in execution of the judgment".

on page 4, line 7, delete "$500" and insert "$1,500".

On page 4, line 15, delete "$500" and insert "$1,500".

On page 4, line 24, after "obligation" insert "and the goods or motor vehicles are not subject to levy, attachment, sale or other proceeding in execution of the judgment".

On page 14, delete lines 28 through 30.

On page 15, delete lines 22 through 28.

On page 16, line 13, delete "except the cancellation fee provided in this section".

FACT SHEET ON DEFICIENCY JUDGMENTS WITH REGARD TO HOUSE BILL 3037

The following information was compiled by Edward Jackson Fyfe, a student at the University of Oregon Law School, in connection with an article for the U of O Law Review. These facts have been uncovered by Mr. Fyfe's study of the records of the Lane County Courthouse.

1. The average amount of a deficiency judgment sought in Lane County is $432. Attorney's fees and court costs bring the average amount of the judgment granted to approximately $520.

2. The total average contract price of goods which were repossessed subsequently resulting in a deficiency judgment was $1,921.

3. The average defaulter paid only 19.8% on his contract before repossession occurred.

4. The average amount due at the time of repossession was approximately $1,541.

5. 85% of the deficiency judgments recovered in Lane County in 1970 resulted from repossessions of automobiles.

COMMENT:

It seems plain that the provision regarding deficiency judgments in House Bill 3037 will have little effect on the most serious abuses of deficiency judgments. Presently House Bill 3037 only outlaws deficiency judgments where the balance due at the time of repossession is less than $500. This would apply to only a very small amount of consumer transactions, approximately 15% according to Mr. Fyfe's figures. It is strongly urged that the $500 limitation in House Bill 3037 be raised to at least $1,000 in order for the bill to have a significant impact in the deficiency judgments area.

Respectfully,
Charles R. Williamson

STATEMENT BEFORE SENATE CONSUMER AFFAIRS COMMITTEE
Regarding HB 3037 May 12, 1971

My name is Gretchen Kafoury and I represent Demoforum. I come to give my support to HB 3037. A great deal of hard work and thought has gone in to the preparation of this composite bill, and its passage would insure the Oregon consumer much more adequate protection under the law. Thus, we urge for the sake of expediency that you pass the bill out "as is", so that this very important legislation will not get lost in the last minute rush of the legislature.

If, however, this committee chooses to amend the bill in any way which would require a reprinting and a re-consideration by the House, we would urge one additional change.

The bulk of the work that I personally have done regarding consumer legislation concerns deficiency judgments. I am extremely delighted that the concept has been included in the composite bill. However, I am distressed by the fact that the balance limit at the time of default has been set at $500. From the intensive investigation that I have done into this subject, I find the evidence overwhelmingly suggests that this low amount would affect only a small percentage of those who are victimized by deficiency judgments. It would certainly help those who are charged with deficiencies on major appliances, and very old cars, but because the bulk of deficiencies are used regarding automobile loans/will not be protected. these consumers Where studies have been done (not in Oregon yet) the average balance due at the time of repossession was in the neighborhood of $1500. Our original bill which was introduced at the beginning of the session asked for a $2500 limit. Realizing that political pressure and the realities of legislative politics might make this ideal figure un-obtainable, we would hope very strongly that you would raise the figure at least to something above its present low amount.

For those of you who haven't followed this particular aspect of the consumer legislation too closely, I want to mention that the only opposition at any public hearing on this subject came from various automobile dealers, and as I have mentioned, their interest in this subject is understandable. It was interesting that in the House Judiciary's hearing on the composite bill, a representative of the Associated Oregon Industries stated that he knew of no reason why the AOI and other industry and credit groups would be particularly opposed to this concept of limiting deficiency judgments. Also, when the composite bill came out in rough draft form, the limit was set at $1000, and for some reason unknown to us, it was lowered in the final bill to $500. This is hard to understand in view of the fact that the testimony was heavily in favor of a higher limit.

I would therefore urge this committee, if any changes are made in the bill, to consider raising the figure on deficiency judgments. I realize that your time in these final days of the legislature is extremely limited, I have not attempted to fill your baskets with reams of articles on why I feel this should be done - including statistics, etc. I would be happy to answer any questions that you might have, and would be pleased to send copies of any information you would like on this subject. Thank you for your time and consideration.

Gretchen Kafoury
Consumer Protection Legislation
Chairman for Demoforum
1508 NE Stanton, Portland, Oregon 97212

DEFICIENCY JUDGMENTS

EXAMPLES OF ABUSES:

AUTOMOBILE REPOSSESSION AND RESALE

One of the most obvious areas where abolition of deficiency judgments is needed is in automobile sales. Automobile credit contracts represent 38% of all consumer retail-installment indebtedness. Half of all American families spend 22% or more of their disposable income on new cars purchased on credit.

What happens to consumers who default on their car payments and have their cars repossessed, and how the repossessing dealers and financers make out financially, were the subjects of an in-depth study by Philip A. Schuchman, a law professor at the University of Connecticut.[1] A representative sample of 83 litigated cases in Connecticut was used to determine the circumstances and economic consequences of repossession and resale.

As is well known, most automobile consumer paper is carried by banks and finance companies, although some dealers carry their own contracts. Depending upon the nature of the agreement between financer and dealer, one or the other has the right of repossession in the event of default. In either case the repossessing party resells the car, applies the proceeds (less cost of repossession, resale, attorney fees, etc.) to the outstanding balance of the contract, and sues the consumer for the difference in a deficiency suit. The higher the amount the car brings at resale, thelower will be the amount of the deficiency judgment. Conversely, the lower the resale price, the greater the amount the defaulting consumer will be required to make up.

With these basic relationships in mind, it seems clear that the circumstances of the resale process are crucial tothe interests of consumers. In an ethical business climate it would seem reasonable to expect that the repossessor would attempt to obtain a fair price for the automobile, and that the sale would be conducted in an above-board fashion.

As Professor Schuchman discovered, however, such is not the case. In the absence of legal restraints or economic incentives to maximize the resale price, most such transactions are conducted in an exceedingly casual and inefficient manner. The Connecticut study revealed, for instance, that in 35% of the cases the purchaser of the repossessed automobile at resale was the original dealer. In some cases the original dealer both repossessed the car and repurchased the car from himself, while in the balance of the cases the purchaser of the vehicle was a second dealer. In no case was there any incentive to maximize the resale price.

As a result, the resale prices brought by repossessed cars are far from being fair or just. The wholesale book value would seem to be a reasonable price, yet the average price brought by the 83 cars in the study was only 71% of the list wholesale value. The average difference between book wholesale value and price brought at resale was $246.

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[1] Schuchman, Philip, "Profit on Default: An Archival Study of Automobile Repossession and Resale", Stanford Law Review, Vol. 22 (November, 1969).

Some may suggest that $246 is not an unreasonable penalty for defaulting on a contract. This might be true if it were the only penalty imposed; but as a matter of fact the average dericiency judgment in the study was nothing like $246, but rather $610.

The average price brought by the wholesale resale covered only 51% of the total claim sought by the repossessing dealer or financer. (The total claim is the contract balance plus repossession and resale expenses.) If the car had been promptly sold at retail, however, the survey shows it would have brought in an average of 108% of the total claim. In at least half the cases an efficient retail resale would have completely eliminated t the need for any deficiency claim.

It seems clear that under present practices of repossession and resale, the defaulting consumer is being fleeced by dealers who not only are able to secure a court judgment against the consumer to secure the total claim, but also gain additional profits from the eventual retail resale of the automobile. Two basic remedies are possible: Either regulate the conditions of theresale in such a way that the resale price is maximized and the deficiency is minimized; or abolish the deficiency judgment in cases where the property is repossessed. The latter alternative, which requires less governmental intervention in the marketplace, and relieves the courts of the burdens of deficiency suits, seems clearly preferable. As Professor Schuchman, author of the study, comments:

> The choice between greater regulation of the disposition of collateral and elimination of the deficiency judgment may reduce itself to a choice between the effectiveness of the consumer as an adversary in the judicial process and the effectiveness of therepossessor as a seller in his marketplace. The latter alternative has the incidental benefit of freeing a bit more of our limited judicial resources.

One common argument against abolition of deficiency judgments (and other consumer credit reforms) is that such regulation of credit practices tends to decrease profits of financial institutions, drive interest rates up, and in general make it more difficult for the consumer to obtain credit. There is factual data, however, to indicate that such arguments are groundless. Four Canadian provinces have abolished deficinecy claims arising out of retail-installment sales, and the experience of these provinces indicates that, as Professor Schuchman says, there is little or no difference from other provinces with respect to per-capita consumer credit actually extended.

Denied the opportunity to increase their profits by inefficient resale and by securing deficiency judgments, automobile dealers and other retailers would undoubtedly use the same enthusiasm and efficiency in reselling repossessed cars that they use in the original sale. The Connecticut data show that under these circumstances dealers would wind up with the same profit they originally contracted for. And consumers would be spared the cost of providing extra profits for dealers at the expense of wage assignments, property execution, and other ways our society has devised of securing debts.

STATEMENT TO HOUSE COMMITTEE ON STATE AND FEDERAL AFFAIRS regarding HB 1251
February 15, 1971

My name is Gretchen Kafoury. I live at 1508 N.E. Stanton, Portland, Oregon 97212, and I am representing Demoforum.

For the past several months I have been doing research on some consumer bills, among them HB 1251 which relates to deficiency judgments. I have found that some of the most flagrant abuses of the rights of the consumer result from the usage of this particular procedure. During this time I have had occasion to talk with many people who deal with deficiency judgments - both enforcing them and having them taken against them - and have found that a substantial number of people favor the complete abolishment of these judgments.

Among the most notable of my conversations was with Estes Snedecor who has recently retired from Oregon's Bankruptcy Court after serving as a judge for 33 years. He feels quite frankly that, "One of the chief causes of bankruptcy in this state is our law regarding deficiency judgments." In his opinion, many people are forced into bankruptcy when "merciless collection agencies" resort immediately to repossession and deficiency judgments, rather than working out an arrangement which is equitable to both parties. He reminded me that during World War II when credit was not so easy and there was a 20% down on all retail credit transactions, there was no bankruptcy court. Now Oregon is one the leading states in the number of bankruptcies filed every year. From the remarks made to me by Mr. Snedecor and numerous others, abolition of deficiency judgments could not help but have a significant affect on the number of bankruptcies.

In addition to this, I think mention should be made of the conditions that arise when the law favors the creditor over the debtor. The most usual manner of dealing with these matters is in terms of the effect any change in the law would have on the business climate. This can be measured to a degree, but it is impossible to measure whether people living in a state where deficiency judgments are outlawed might lose fewer jobs and have fewer bankruptcies, thus providing a more stable family life with fewer divorces and fewer people on welfare. I suggest that this might possibly be true.

In researching deficiency judgments I have talked at length with not only lawyers and judges, but also with people who are directly involved with financing. I have been interested to find that many credit agencies are not opposed to this legislation as long as there are provisions for recourse against the consumer when repossessed merchandise is seriously damaged. HB 1251 does provide a safeguard for "wrongfully damaged goods." Among several of the local credit unions I have found active support for this legislation. (Unfortunately the several people I have been dealing with were unable to come to testify today, but they did give me permission to use their names and to paraphrase our conversations.)

Mr. Orin Freerkson who works at the Oregon Credit Union League feels that the long range benefits to the consumer outweigh the disadvantage to the credit unions in the few cases when they might want to take a deficiency judgment. He questioned how many deficiency judgments were actually collected, and voiced a common opinion that without this recourse creditors would be more careful about the credit arrangements they make. To extend this thought I would like to read from a letter which was written to me by Mr. John Almeter from the Portland Postal Employees Credit Union. (see attachment)

As I have mentioned, many people who share my concern for the enactment of HB 1251 were unable to come today because of the short notice we had of the hearing, but we are pleased that Mr. Charles Atkins was able to come from Pendleton to give you a first person account of just how serious a deficiency judgment can be, and how inadequaltely protected we are under the present law. Mr. Atkins was referred to me by the District Attorney of Pendleton, Joe Smith, who strongly supports this bill and had hoped to come personally and testify. (A copy of Mr. Atkin's testimony is attached.)

In closing I would like to submit to you a summary made by one of our Demoforum members of the most widely cited article on deficiency judgments. The article by Philip Schuchman is entitled, "Profit on Default: An Archical Study of Automobile Repossession and Resale." There are some very interesting statistics given in this article, including the fact that in 35% of the cases in his Connecticut study showed that the original dealer purchased the repossessed automobile, and in some of these cases the dealer actually bought the car from himself. This certainly cannot in any way assure the consumer that a fair price is being gotten for his merchandise. In line with this he concludes that the answer is not to regulate the conditions of resale but rather to abolish the deficiency judgment altogether. (See quote on p.2, paragraph 4)

I would also like to point out that he states very clearly that the effect of anti-deficiency legislation on business, which I mentioned earlier, is not harmful. And he disputes the most often given criticism against this legislation - that it would have a negative effect on the business climate by decreasing profits in the financial institutions, making credit more difficult to obtain, etc. -

Demoforum joins with many other groups concerned about consumer legislation in support of HB 1251.

Thank you.

who can handle the work more economically than the state. Only one bid for tort liability insurance has been received in the past and it therefore appears that most insurance companies are not interested in this type of insurance.

Representative Hansell moved that House Bill 1957 be amended as contained in the engrossed bill submitted.

Senator Boe asked whether an estimate was made as to increased costs which will be incurred by the Attorney General's office in administering this Act. Representative Hansell said he had not asked for any additional limitation and should be within the capabilities of his existing budget.

Senator Boe thought this would, in effect, be putting the state into the insurance business. Representative Hansell said it now is through the Restoration Fund.

Representative Hansell's motion to amend carried unanimously.

Representative Hansell moved that House Bill 1957 be reported out "Do pass as amended." Motion carried, with Representative Gwinn and Senator Boe voting "no" and Representative Lang not present for roll call vote.

Non-budget bills considered by Subcommittee and now before Full Committee:

House Bill 3037--Relating to consumer protection; creating new provisions; amending ORS 646.605 and 646.990; repealing ORS 646.210, 646.220, 646.230 and others; providing penalties; and declaring an emergency.

Senator Eivers reported that this bill was amended by Subcommittee No. 5 to provide for the creation of a Consumer Protection Division within the Department of Justice. It is designed to strengthen the rights of the consumer against persons doing business in a fraudulent or unfair manner. The Governor's budget recommended $219,000 for this program, and the Subcommittee reduced this to $200,000 with the idea that the program would be phasing in about 50 percent on July 1, 1971, and the remaining 50 percent on January 1, 1972. The Justice Department is expected to provide leadership and coordination of consumer protection activities carried out by district attorneys. The approved budget will not necessarily cover more than a part of the total assistance which may be required by groups and individuals during 1971-73, but this is a new program and the approved budget represents a commitment to the principle of consumer protection and its financing on a trial basis for its initial biennium.

Senator Eivers pointed out that probably one of the most controversial parts of the bill is the section relating to deficiency judgments. The bill passed the House 57-1. The amount on which a deficiency judgment would apply was $500 in the bill, and this amount was amended to $1,000 by the Senate Consumer Affairs Committee. Subcommittee No. 5 decided to leave it at the last figure.

Senator Eivers moved that House Bill 3037 be amended as set out on the printed agenda.

Senator Holmstrom moved to reduce the amount of unpaid balance on which deficiency judgments would apply to $400 and to provide that any proceedings must be commenced within 90 days after the return of the goods or merchandise.

Senator Holmstrom felt that unwarranted deficiencies should be curtailed, but that most deficiencies under $400 are bothersome. However, he noted that in the automobile business in which he is personally involved, although it is extremely difficult to prove it appears persons who are about to have their cars repossessed in many instances will literally ruin their car radios or parts will be missing, and these persons should not be granted immunity from paying their debts. The second part of the amendment would strengthen the bill considerably as testimony in the House indicated that some of the deficiencies occur four and five years later. If there is a deficiency, the person is entitled to know there is a deficiency, and action should be taken within 90 days or there will be no liability thereafter.

Representative Stevenson thought the principle reason for the bill being referred to Ways and Means was for funding and wondered what justification there was for moving into a substantive area. Senator Holmstrom said there was no hearing in the Senate Consumer Affairs Committee on the $1,000 figure where he and others would have testified had they had an opportunity. He pointed out that the law could be changed in two years if his proposal needed change, but that it is his understanding that most of the nuisance deficiencies are in the $200 to $300 range, and $400 is a reasonable amount. The 90-day clause, he feels, strengthens the bill.

Senator Roberts said she strenuously opposes the motion, both on the grounds that the motion is a substantive change with no fiscal implications and because the Consumer Affairs Committee held hearings on the entire bill. Testimony was received favoring raising the amount to as much as $2,500, which was the original amount in the bill when introduced. The reason for using the $1,000 figure was that information was presented to the Consumer Affairs Committee indicating the average deficiency judgment was $1,500. In one county where a study was conducted, 85 percent of the deficiency judgments were on automobiles. The intent is to get people to make larger down payments on merchandise so people have a vested interest in what they are acquiring. Many people buying automobiles, for instance, with a small down payment feel they have very little to lose if it is repossessed because they as a rule do not understand deficiency judgments. She said she had handled cases in which the person had not been informed of resales which is required by law. The reason for the $1,000 is to make the seller responsible for checking out the credit rating of people he is selling to and try to get them to require larger down payments.

Senator Eivers said he would prefer the $1,000 amount but his primary interest is getting the consumer protection legislation enacted. He favored the 90-day amendment and suggested it be placed as a separate amendment.

Senator Holmstrom said he had not intended to infer that the Consumer Affairs Committee had not held hearings on the bill, but that no hearings were held after the bill was amended to include the $1,000 amount. Senator Holmstrom said his experience with deficiencies has been somewhat different from that of Senator Roberts in that it is not the so-called $10 down person that gets involved in deficiencies but usually the person who gets involved in a divorce, or loses his job or has other personal problems. He felt his amendments reasonable.

Senator Holmstrom's motion to amend carried, with Representatives Hansell, McGilvra, Stevenson and McKenzie and Senators Roberts and Fadeley voting "no" on roll call vote.

Senator Eivers' motion to amend carried unanimously.

Senator Eivers moved that House Bill 3037 be reported out to the Senate with the recommendation that it "Do pass as amended." Motion carried, with Senator Roberts voting "no" on roll call vote.

Senate Bill 68--Relating to circuit courts; creating new provisions; amending ORS 3.011; and declaring an emergency.

Senator Eivers explained that this bill, as amended by Subcommittee No. 1, will create three new circuit court judges--one each in Lane and Clackamas Counties on July 1, 1971, and one in Marion County on January 1, 1973. It will add a district court judge in Douglas County and create a district court in Columbia County effective January 1, 1973. The Subcommittee had intended to phase in some of the judges on July 1, 1972, but because this is election year it would create some conflicts between the primary and general elections. Testimony was heard as to the necessity of judges in not only these but other counties, but a decision had to be made as to the number which could properly be funded.

Senator Eivers moved that Senate Bill 68 be amended as set out on the printed agenda.

Senator Roberts moved to amend Senator Eivers' motion by adding a circuit court judge in Multnomah County on January 1, 1973.

Senator Roberts said there had been a request for two additional judges for Multnomah County, one in the trial division and one in the domestic relations department. The judges then got together and decided that they could not get two so would defer to the domestic relations division. Senator Roberts said she has information from Judge Lewis that the workload in the domestic relations division is such that they are unable to handle many of the serious problems, having to delay them for two weeks or more including child custody problems. By 1973, another judge should be added.

Senator Eivers said Judge Lewis had presented a very strong case for the addition of a domestic relations judge, and he would support the motion to phase in another judge on January 1, 1973.

Enrolled
1088 - House Fed.
50 - Senate Fed.

JOINT WAYS AND MEANS COMMITTEE

Record of Subcommittee Proceedings

Bill No.: HB 3037 Date of Hearings: _____

Agency Name or Bill Description: Revises laws relating to deceptive trade practices.

Analysts Assigned to Budget: Leg. Fiscal _____ F & A _____

Comments and Action: _____

Subcommittee Chairman Hayl McGilvra

Designated to Carry: Full Com. Senator Evans House Hayl McGilvra Senate Senator Evans

HOUSE BILL 3037

House Bill 3037, as amended, provides for creation of a Consumer Protection Division within the Department of Justice. It also makes various changes in Chapter 83 of the Oregon Revised Statutes designed to strengthen rights of the consumer as against persons doing business in a fraudulent or unfair manner. The bill is aimed at protecting individual consumers and is not designed to particularly aid commercial purchasers.

The Governor's budget originally recommended a General Fund budget of $219,947. The Subcommittee recommends this be approved at $200,000, reflecting a direction that the program be phased in at about 50 percent level on July 1, 1971, and the remaining 50 percent be brought on line January 1, 1972. This will allow assignment initially of two investigators and the equivalent of approximately one attorney. Later, when the program is brought to the full authorized level, it will involve a total of four investigators and the equivalent of approximately two attorneys.

The Department of Justice is expected to provide leadership and coordination of consumer protection activities carried out by District Attorneys, and also to provide some primary consumer protection capability. It is clear that the approved budget for the Department of Justice will not necessarily cover more than a part of the total consumer protection assistance which may be requested by groups and individuals during 1971-73. This is, however, a new program, and legislatively approved budget represents a commitment to the principle of consumer protection and its financing on a trial basis for its initial biennium.

Amendments accomplished by the full Ways and Means Committee reduced the amount of unpaid balance on obligation specially protected under the law to $400. It was also provided that the lender must commence action for deficiency judgment within 90 days of the date the lender repossessed or obtained voluntary surrender of the goods or vehicle for which the loan was made.

ROLL CALL

Date May 25, 1971 Subject HB 3037

REPRESENTATIVE	Yes	No
Hansell	✓	
McGilvra	✓	
Lang	✓	
Stevenson	✓	
Gwinn	✓	
McKenzie	✓	
Pynn		

SENATOR	Yes	No
Roberts	1	✓
Potts	✓	
Eivers	✓	
Boe	✓	
Fadeley	✓	
Holmstrom	✓	
Presiding Chairman	✓	
TOTAL	13	1

ROLL CALL

Date March 2, 1971

Subject HB 3037 Motion to Concur

REPRESENTATIVE	Yes	No
Hansell		✓
McGilvra		✓
Lang	✓	
Stevenson		✓
Gwinn	✓	
McKenzie		✓
Pynn	✓	

SENATOR	Yes	No
Roberts		✓
Potts	✓	
Eivers	✓	
Boe	✓	
Fadeley		✓
Holmstrom	✓	
Presiding Chairman	✓	
TOTAL	8	6

Amended 5/27 4/.
House amendments 5/4
Senate amendments 5/15

OREGON LEGISLATIVE ASSEMBLY—1971 REGULAR SESSION

House Bill 3037

Sponsord by COMMITTEE ON JUDICIARY

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Revises laws relating to deceptive trade practices. Permits buyer to assert defenses against holders in due course of evidence of indebtedness on consumer goods purchases. Allows attorney fees in certain breach of warranty actions and allows private suits for damages for deceptive trade practices. Declares consumer paper to be nonnegotiable except regarding governmental units. Authorizes assessment of punitive damages for unlawful trade practices except against security interest assignee. Denies deficiency judgments after repossession if time balance is less than $500. Denies repossession where deficiency judgment for less than $500 is obtained. Authorizes Attorney General (in addition to district attorneys) to sue to enforce laws against or to restrain deceptive trade practices. Establishes procedure for court-supervised assurance of voluntary compliance by seller and declares violation of assurance provisions to be contempt of court. Grants right to cancel to home solicitation buyers and requires notice of right in home solicitation sales. Provides civil and criminal penalties.

Declares an emergency.

NOTE: Matter in **bold face** in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted; complete new sections begin with **SECTION.**

A BILL FOR AN ACT

Relating to consumer protection; creating new provisions; amending ORS 646.605 and 646.990; repealing ORS 646.210, 646.220, 646.230, 646.615, 646.625, 646.635, 646.645, 646.655, 646.810, 646.820, 646.830 and 646.840; providing penalties; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Sections 2 to 4 of this Act are added to and made a part of ORS chapter 83.

SECTION 2. (1) In any contract for the sale or lease of consumer goods or services on credit entered into between a retail seller and a retail buyer, such contract, note or any instrument or evidence of indebtedness of the buyer shall have printed on the face thereof the words "consumer paper", and such contract, note, instrument or evidence of indebtedness with the words "consumer paper" printed thereon shall not be a negotiable instrument within the meaning of the Uniform Commercial Code-Commercial Paper. However, this section shall have no force or effect on the negotiability of any contract, promissory note, instrument or other evidence of indebtedness owned or guaranteed or insured by any state or federal governmental agency even though said contract, note, instrument or other evidence of indebtedness shall contain the wording required by this subsection.

(2) Notwithstanding the absence of such notice on a contract, note, instrument or evidence of indebtedness arising out of a consumer credit sale or consumer lease as described in this section, an assignee of the rights of the seller or lessor is subject to all claims and defenses of the buyer or lessee against the seller or lessor arising out of the sale or lease. Any agreement to the contrary shall be of no force or effect in limiting the rights of a consumer under this section. The assignee's liability under this section may not exceed the amount owing to the assignee at the time the claim or defense is asserted against the assignee. The restrictions imposed hereby shall not apply with respect to any promissory note, contract, instrument or other evidence of indebtedness owned or guaranteed or insured by any state or federal governmental agency even though said

note, contract, instrument or other evidence of indebtedness shall contain the words required by subsection (1) of this section.

(3) An assignee of "consumer paper" who in good faith enforces a security interest in property held by the buyer or lessee shall not be liable to such buyer or lessee for punitive damages in an action for wrongful repossession. The fact that a seller or lessor has broken his warranties with regard to the property sold or leased shall not, of itself, make an assignee's repossession wrongful.

SECTION 3. (1) Notwithstanding any other provision of law:

(a) If the buyer defaults in the performance of a retail instalment contract or retail charge agreement subject to ORS 83.010 to 83.190 or 83.510 to 83.680, and if the seller repossesses or voluntarily accepts surrender of the goods or motor vehicles, and if at the time of default the unpaid time balance or time sale price is less than ~~$500~~ $1000, the buyer shall not be personally liable to the seller for any deficiency between the amount of his unpaid obligation and the amount realized by the seller on resale or other disposition of the goods or motor vehicles. However, the buyer is liable in damages to the seller for any repossessed or surrendered goods or motor vehicles that have been wrongfully damaged.

(b) If the unpaid time balance or time sale price at the time of default is ~~$500~~ $1000 or more, the seller may recover from the buyer any deficiency that results from deducting the fair market value of the goods or motor vehicles from the unpaid time balance or time sale price.

(c) If the seller brings an action and obtains judgment against the buyer for the unpaid time balance or time sale price without having first repossessed or voluntarily accepted surrender of the goods or motor vehicles, and if under the provisions of paragraph (a) of this subsection the seller would not be entitled to a deficiency judgment, the seller may not repossess the goods or motor vehicles after obtaining judgment for the unpaid time balance or time sale price.

(2) As used in this section:

(a) "Unpaid time balance or time sale price" means that amount the buyer would have been required to pay if the buyer's obligation had been paid in full at the time of default.

(b) "Seller" includes the assignee of the seller.

SECTION 4. (1) Notwithstanding any other provision of law:

(a) If the borrower defaults in the repayment of a loan that was made for the purchase of goods or motor vehicles, and if the lender repossesses or voluntarily accepts surrender of the goods or motor vehicles, and if the unpaid balance of the loan obligation at the time of default is less than ~~$500~~ $1000, the borrower shall not be personally liable to the lender for any deficiency between the amount of his unpaid loan obligation and the amount realized by the lender on resale or other disposition of the goods or motor vehicles. However, the borrower is liable in damages to the lender for any repossessed or surrendered goods or motor vehicles that have been wrongfully damaged.

(b) If the amount of the borrower's unpaid loan obligation at the time of default in the repayment of a loan made for the purchase of goods or motor vehicles is ~~$500~~ $1000 or more, the lender may recover from the borrower any deficiency that results from deducting the fair market value of the goods or motor vehicles from the amount of the unpaid loan obligation.

(c) If the lender brings an action and obtains judgment against the borrower for the amount of the unpaid loan obligation without having first repossessed or voluntarily accepted surrender of the goods or motor vehicles, and if under the provisions of paragraph (a) of this subsection the lender would not be entitled to a deficiency judgment, the lender may not repossess the goods or motor vehicles after obtaining judgment for the unpaid loan obligation.

(2) As used in this section:

(a) "Goods" has the meaning for that term provided in ORS 83.010.

(b) "Motor vehicles" has the meaning for that term provided in ORS 83.510.

(c) "Lender" includes the assignee of the lender.

Section 5. ORS 646.605 is amended to read:

646.605. As used in [*ORS 646.605 to 646.645*] **sections 5 to 19 of this 1971 Act:**

(1) [*"Seller" means any person or his agent who sells or offers for sale any product, property or service.*] **"Trade" and "commerce" mean the**

advertising, offering for sale, sale or distribution of any services or any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this state.

(2) [*"Purchaser" means any person who purchases or is solicited to purchase any product, property or service.*] **"Documentary material" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.**

(3) [*"Product" means any goods or merchandise.*] **"Examination" of documentary material shall include the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgment in respect of any such documentary material or copy thereof.**

[*(4) "Equipment" means any household furnishings, appliance or fixture and any machinery, mechanical device or vehicle.*]

[*(5)*] **(4)** "Person" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity except bodies or officers acting under statutory authority of this state or of the United States.

[*(6)*] **(5)** "Prosecuting [*officer*] **attorney"** means the **Attorney General or the** district attorney of any county in which a violation of [*ORS 646.605 to 646.645*] **sections 5 to 19 of this 1971 Act** is alleged to have occurred.

[*(7)*] **(6)** "Appropriate court" means the **district or** circuit court of a county:

(a) Where one or more of the defendants reside; or

(b) Where one or more of the defendants maintain a principal place of business; or

(c) Where one or more of the defendants are alleged to have committed an act prohibited by [*ORS 646.605 to 646.645*] **sections 5 to 19 of this 1971 Act** ; or

(d) With the defendant's consent, where the prosecuting officer maintains his office.

(7) "Goods or services" means those which are used or bought primarily for personal, family or household purposes, but does not include insurance.

(8) A wilful violation occurs when the person committing the violation knew or should have known that his conduct was a violation.

SECTION 6. ORS 646.615 is repealed and section 7 of this Act is enacted in lieu thereof.

SECTION 7. (1) A person engages in a practice hereby declared to be unlawful when in the course of his business, vocation or occupation he:

(a) Passes off goods or services as those of another;

(b) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(c) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;

(d) Uses deceptive representations or designations of geographic origin in connection with goods or services;

(e) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has a sponsorship, approval, status, qualification, affiliation, or connection that he does not have;

(f) Represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used or second-hand;

(g) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(h) Disparages the goods, services, property or business of the buyer or another by false or misleading representations of fact;

(i) Advertises goods and services with intent not to sell them as advertised or with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(j) Makes false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions;

(k) Makes false or misleading representations concerning the availability of credit or the nature of the transaction or obligation incurred;

(L) Makes false or misleading representations relating to commissions or other compensation to be paid in exchange for permitting property to be used for model or demonstration purposes or in exchange for submitting names of other purchasers to the seller;

(m) Performs service on or dismantles any household furnishings, appliance or fixture or any machinery, mechanical device or vehicle at a residence when not authorized by the owner or apparent owner;

(n) Solicits by telephone or door to door as a seller unless the seller, within 30 seconds after beginning the conversation, identifies himself, whom he represents and the purpose of his call;

(o) In a sale of goods or services, gives or offers to give a rebate or discount or otherwise pays or offers to pay value to the buyer in consideration of the buyer giving to the seller the names of prospective purchasers, lessees, or borrowers, or otherwise aiding the seller in making a sale, lease, or loan to another person, if the earning of the rebate, discount or other value is contingent upon the occurrence of an event subsequent to the time the buyer enters into the transaction;

(p) Makes any false or misleading statement about a prize, contest or promotion used to publicize a product, business or service;

(q) Promises to deliver goods or services within a certain period of time with intent not to deliver them as promised;

(r) Engages in any other conduct which similarly creates a likelihood of confusion.

(2) A representation under subsection (1) of this section may be any manifestation of any assertion by words or conduct, including, but not limited to, a failure to disclose a fact.

(3) In order to prevail in an action or suit under sections 5 to 19 of this 1971 Act, a prosecuting attorney need not prove competition between the parties or actual confusion or misunderstanding.

(4) No action or suit shall be brought under paragraph (r) of subsection (1) of this section unless the Attorney General has first established a rule in accordance with the provisions of ORS chapter 183 declaring the conduct to be confusing to the consumer.

SECTION 8. Sections 9 to 19 of this Act are added to and made a part of ORS 646.605 to 646.645.

Note: Section 9 was deleted by amendment.

~~**SECTION 9.** Violation of paragraph (m), (n), (o) or (p) of subsection (1) of section 7 of this 1971 Act is a misdemeanor.~~

SECTION 10. The provisions of section 7 of this 1971 Act do not apply to:

(1) Conduct in compliance with the orders or rules of, or a statute administered by a federal, state or local governmental agency.

(2) Acts done by the publisher, owner, agent or employe of a newspaper, periodical or radio or television station in the publication or dissemination of an advertisement, when the publisher, owner, agent or employe did not have knowledge of the false, misleading or deceptive character of the advertisement.

SECTION 11. (1) Whenever the prosecuting attorney has probable cause to believe that a person is engaging in, has engaged in, or is about to engage in an unlawful trade practice, he may bring suit in the name of the State of Oregon in the appropriate court to restrain such person from engaging in the alleged unlawful trade practice.

(2) Before filing a suit under subsection (1) of this section, the prosecuting attorney shall in writing notify the person charged of the alleged unlawful trade practice and the relief to be sought. Such notice shall be served in the manner set forth in section 15 of this 1971 Act for the service of investigative demands. The person charged thereupon shall have 10 days within which to execute and deliver to the prosecuting attorney an assurance of voluntary compliance. Such assurance shall set forth what actions, if any, the person charged intends to take with respect to the alleged unlawful trade practice. The assurance of voluntary compliance shall not be considered an admission of a violation for any purpose. If the prosecuting attorney is satisfied with the assurance of voluntary compliance, it may be submitted to an appropriate court for approval and if approved shall thereafter be filed with the clerk of the court. Violation of an assurance of voluntary compliance which has been approved by and filed with the court shall constitute a contempt of court. The notice of the

prosecuting attorney under this subsection shall not be deemed a public record until the expiration of 10 days from the service of the notice.

(3) Notwithstanding subsection (2) of this section, where the prosecuting attorney alleges that he has reason to believe that the delay caused by complying with the provisions of subsection (2) of this section would cause immediate harm to the public health, safety or welfare, the prosecuting attorney may immediately institute a suit under subsection (1) of this section.

(4) A temporary restraining order may be granted without prior notice to the person if the court finds there is a threat of immediate harm to the public health, safety or welfare. Such a temporary restraining order shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the person restrained consents that it may be extended for a longer period.

(5) The court may award reasonable attorney fees to the prevailing party in a suit brought under this section. If the defendant prevails in such suit and the court finds that the defendant had in good faith submitted to the prosecuting attorney a satisfactory assurance of voluntary compliance prior to the institution of the suit or that the prosecuting attorney, in a suit brought under subsection (3) of this section, did not have reasonable grounds to proceed under that subsection, the court shall award reasonable attorney fees to the defendant. If the state prevails, the reasonable expenses of investigation, preparation and prosecution shall be taxed against the defendant, upon application of the prosecuting attorney, in the same manner as costs are taxed and shall be in addition thereto.

SECTION 12. The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, of which he was deprived by means of any practice declared to be unlawful in section 7 of this 1971 Act, or as may be necessary to insure cessation of unlawful trade practices.

SECTION 13. (1) Any person who purchases or leases goods or services and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the wilful use or employment by another person

of a method, act or practice declared unlawful by section 7 of this 1971 Act, may bring an individual action in an appropriate court to recover actual damages or $200, whichever is greater. The court or the jury, as the case may be, may award punitive damages and the court may provide such equitable relief as it deems necessary or proper.

(2) Upon commencement of any action brought under subsection (1) of this section the clerk of the court shall mail a copy of the complaint or other initial pleading to the Attorney General and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the Attorney General.

(3) In any action brought by a person under this section, the court may award, in addition to the relief provided in this section, reasonable attorney fees and costs.

(4) Any permanent injunction or final judgment or order of the court made under section 11 or 12 of this 1971 Act shall be prima facie evidence in an action brought under this section that the respondent used or employed a method, act or practice declared unlawful by section 7 of this 1971 Act, but an assurance of voluntary compliance, whether or not approved by the court, shall not be evidence of such violation.

(5) Actions brought under this section shall be commenced within one year from the discovery of the unlawful method, act or practice. However, whenever any complaint is filed by a prosecuting attorney to prevent, restrain or punish violations of section 7 of this 1971 Act, the running of the statute of limitations with respect to every private right of action under this section and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof.

(6) Notwithstanding subsection (5) of this section, in any action brought by a seller or lessor against a purchaser or lessee of goods or services, such purchaser or lessee may assert any counterclaim he has arising out of a violation of sections 5 to 19 of this 1971 Act.

SECTION 14. (1) When it appears to the prosecuting attorney that a person has engaged in, is engaging in, or is about to engage in any act

or practice declared to be unlawful by section 7 of this 1971 Act, he may execute in writing and cause to be served an investigative demand upon any person who is believed to have information, documentary material or physical evidence relevant to the alleged or suspected violation. The investigative demand shall require such person, under oath or otherwise, to appear and testify or to produce relevant documentary material or physical evidence for examination, at such reasonable time and place as may be stated in the investigative demand, or to do any of the foregoing, concerning the advertisement, sale or offering for sale of any goods or services or the conduct of any trade or commerce which is the subject matter of the investigation.

(2) At any time before the return date specified in an investigative demand, or within 20 days after the demand has been served, whichever period is shorter, a petition to extend the return date, or to modify or set aside the demand, stating good cause, including privileged materials may be filed in the appropriate court.

~~(3) No person, otherwise competent as a witness under the laws of this state, shall be disqualified from testifying in response to an investigative demand on the ground that his testimony may incriminate him. If a witness claims that testimony he is called upon to give may incriminate him, such testimony shall be reduced to writing, and no indictment or criminal prosecution shall afterwards be brought against him for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in obedience to an investigative demand under this section.~~

SECTION 15. Service of any investigative demand under section 14 of this 1971 Act shall be made personally within this state. If personal service cannot be made, substituted service therefor may be made in the following manner:

(1) Personal service thereof without this state;

(2) The mailing thereof by registered or certified mail to the last-known place of business, residence or abode within or without this state of such person for whom the same is intended;

(3) As to any person other than a natural person, in the manner provided for service of summons in an action or suit; or

(4) Such service as the court may direct in lieu of personal service within this state.

SECTION 16. (1) If any person after being served with an investigative demand under section 15 of this 1971 Act, fails or refuses to obey an investigative demand issued by the prosecuting attorney, the prosecuting attorney may, after notice, apply to an appropriate court and, after hearing thereon, request an order:

(a) Granting injunctive relief to restrain the person from engaging in the advertising or sale of any merchandise or the conduct of any trade or commerce that is involved in the alleged or suspected violation;

(b) Granting such other relief as may be required, until the person obeys the investigative demand.

(2) Any disobedience of any final order of a court under this section shall be punished as a contempt of court.

SECTION 17. (1) Any person who wilfully violates the terms of an injunction issued under section 11 of this 1971 Act shall forfeit and pay to the state a civil penalty of not more than $25,000 per violation. For the purposes of this section, the court issuing the injunction shall retain jurisdiction and the cause shall be continued, and in such cases the prosecuting attorney acting in the name of the state may petition for recovery of civil penalties.

(2) Any person who by an assurance of voluntary compliance submitted under section 11 of this 1971 Act agrees not to engage in a particular act, method or practice made unlawful by section 7 of this 1971 Act and thereafter wilfully violates such assurance, shall forfeit and pay to the state a civil penalty of not more than $25,000 per violation. The prosecuting attorney may apply to an appropriate court for recovery of such civil penalty.

(3) In any suit brought under section 11 of this 1971 Act, if the court finds that a person is wilfully using or has wilfully used a method, act or practice declared unlawful by section 7 of this 1971 Act, the prosecuting attorney, upon petition to the court, may recover, on behalf of the state, a civil penalty of not exceeding $2,000 per violation.

SECTION 18. Upon petition by the prosecuting attorney, the court may, in its discretion, order the dissolution or suspension or forfeiture

of the license or franchise of any person who violates the terms of any injunction issued under section 11 of this 1971 Act.

SECTION 19. A district attorney shall make a full report to the Attorney General of any action, suit, or proceeding prosecuted by such district attorney under sections 5 to 19 of this 1971 Act, including the final disposition of the matter, and shall file with the Attorney General copies of all assurances of voluntary compliance accepted under section 11 of this 1971 Act.

SECTION 20. Section 21 of this Act is added to and made a part of ORS chapter 83.

SECTION 21. (1) "Home solicitation sale" means a sale of goods or services as defined in ORS 83.010 other than insurance, farm equipment, or motor vehicles in which the seller or a person acting for him engages in a personal solicitation of the sale at a residence other than that of the seller and the buyer's agreement or offer to purchase is there given to the seller or a person acting for him. It does not include a sale made pursuant to a preexisting revolving charge account, a contract in writing for the sale or lease of a house or business property or the construction of a new house or business property, a sale made pursuant to prior business negotiations relevant to such sale between the parties at a business establishment at a fixed location where goods or services are offered or exhibited for sale, or a sale for cash or check in the amount of $50 or less.

(2) (a) Except as provided in paragraph (e) of this subsection, in addition to any other right to revoke an offer or rescind a transaction which the buyer may have, the buyer has the right to cancel a home solicitation sale until 12 midnight of the third business day after the day on which the buyer signs an agreement or offer to purchase which complies with this section or pays by cash or check.

(b) Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address stated in the agreement or offer to purchase.

(c) Notice of cancellation, if given by mail, is given when it is deposited in a mailbox properly addressed and postage prepaid.

(d) Notice of cancellation given by the buyer need not take a particular form and is sufficient if it indicates by a form of written expression the intention of the buyer not to be bound by the home solicitation sale.

(e) The buyer may not cancel a home solicitation sale if the buyer in a separate signed writing not furnished by the seller requests the seller to provide goods or services without delay because of an emergency, and

(A) The seller in good faith makes a substantial beginning of performance of the contract before the buyer gives notice of cancellation, and

(B) In case of goods, the goods cannot be returned to the seller in substantially as good condition as when received by the buyer.

(3) (a) In a home solicitation sale the seller must present to the buyer and obtain his signature to a written agreement or offer to purchase which designates as the date of the transaction the date on which the buyer actually signs and contains a statement of the buyer's right which complies with paragraph (b) of this subsection.

(b) The statement must be in conspicuous type, 8-point or larger, and must read as follows:

BUYER'S RIGHT TO CANCEL

If this agreement was solicited at ~~your~~ a residence other than that of the seller and you do not want the goods or services, you may cancel this agreement by mailing a notice to the seller. The notice must say that you do not want the goods or services and must be mailed before 12 midnight of the third business day after you sign this agreement. The notice must be mailed to: _____

_____

(insert name and mailing address of seller)

IF YOU CANCEL, THE SELLER MAY RETAIN AS A CANCELLATION FEE 5 PERCENT OF THE CASH PRICE, BUT NOT EXCEEDING YOUR CASH DOWN PAYMENT, OR ~~$25~~ $10, WHICHEVER IS THE LESSER.

However: You may not cancel if you have requested the seller to provide goods or services without delay because of an emergency, and

(1) The seller in good faith makes a substantial beginning of performance of the contract before you give notice of cancellation, and

(2) In the case of goods, the goods cannot be returned to the seller in substantially as good condition as when received by the buyer.

(c) If disclosure is made in accordance with the provisions of ORS 83.810, then in addition thereto the seller must give the portion of the statement required by paragraph (b) of this subsection which advises that if the buyer cancels the seller may retain as a cancellation fee five percent of the cash price, but not exceeding the cash down payment, or ~~$25~~ $10, whichever is the lesser.

(d) Until the seller has complied with this subsection the buyer may cancel the home solicitation sale by notifying the seller in any manner and by any means of his intention to cancel.

(4) (a) Except as provided in this subsection, the seller must tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness within 10 days after a home solicitation sale has been canceled or an offer to purchase has been revoked.

(b) 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 as provided by this subsection, the buyer may elect to recover an amount equal to the trade-in allowance stated in the agreement.

(c) The seller may retain as a cancellation fee five percent of the cash price but not exceeding the amount of the cash down payment, or ~~$25~~ $10, whichever is the lesser. If the seller fails to comply with an obligation imposed by this subsection, or if the buyer avoids the sale on any ground independent of his right to cancel pursuant to paragraph (a) of subsection (2) of this section, or revokes his offer to purchase prior to acceptance thereof by the seller, the seller is not entitled to retain a cancellation fee.

(d) The buyer may retain possession of goods delivered to him by the seller, and has a lien on the goods in his possession or control for any recovery to which he is entitled, until the seller has complied with the obligations imposed by this subsection.

(5) (a) Except as provided by paragraph (d) of subsection (4) of this section, within a reasonable time after a home solicitation sale has been

canceled or an offer to purchase revoked, the buyer must tender to the seller upon demand any goods delivered by the seller pursuant to the sale, but he is not obliged to tender at any place other than his residence. If the seller fails to demand possession of goods within a reasonable time after cancellation or revocation, the goods become the property of the buyer without obligation to pay for them. For the purpose of this subsection, 20 days is presumed to be a reasonable time.

(b) The buyer has a duty to take reasonable care of the goods in his possession before cancellation or revocation and for a reasonable time thereafter, during which time the goods are otherwise at the seller's risk.

(c) If the seller has performed any services pursuant to a home solicitation sale prior to its canecllation, the seller is entitled to no compensation except the cancellation fee provided in this section.

SECTION ~~21~~ 21a. The remedies provided in sections ~~6 to 20~~ 5 to 19 of this 1971 Act are in addition to all other remedies, civil or criminal, existing at common law or under the laws of this state.

SECTION 22. Section 23 of this Act is added to and made a part of ORS 20.010 to 20.180.

SECTION 23. (1) In any action for damages for breach of an express or implied warranty in a sale of consumer goods or services where the amount pleaded is $1,000 or less and the plaintiff prevails in the action, there shall be taxed and allowed to the plaintiff, as part of the costs of the action, a reasonable amount to be fixed by the court as attorney fees for the prosecution of the action, if the court finds that written demand for the payment of such claim was made on the defendant not less than 30 days before commencement of the action and that the defendant was allowed within said 30 days reasonable opportunity to inspect any property pertaining to the claim; provided, that no attorney fees shall be allowed to the plaintiff if the court finds that the defendant tendered to the plaintiff, prior to the commencement of the action, an amount not less than the damages awarded to the plaintiff.

~~(2) If the defendant pleads a counterclaim, not to exceed $1,000 and the defendant prevails in the action, there shall be taxed and allowed to the defendant, as part of the costs of the action, a reasonable amount to be~~

~~fixed by the court as attorney fees for the prosecution of the counter-claim.~~

(2) If the defendant prevails in an action in which the plantiff requests attorney fees under subsection (1) of this subsection, the court may in its discretion allow reasonable attorney fees to the defendant if it finds the action to have been frivolous.

Section 24. ORS 646.990 is amended to read:

646.990. (1) Each violation of any of the provisions of ORS 646.010 to 646.180 by any person, firm or corporation, whether as principal, agent, officer or director, for himself or itself, or for another person, or for any firm or corporation, is punishable, upon conviction, by a fine of not less than $100 nor more than $500, or by imprisonment in the county jail not exceeding six months, or by both.

[*(2) Violation of ORS 646.220 and each separate offense under ORS 646.230 is punishable, upon conviction, by a fine not exceeding $500 or by imprisonment in the county jail not exceeding six months, or by both.*]

[*(3)*] **(2)** Violation of ORS 646.260 is punishable, upon conviction, by a fine of not less than $500 nor more than $5,000, or by imprisonment in the county jail not exceeding one year, or by both.

[*(4)*] **(3)** Violation of ORS 646.460 is punishable, upon conviction, by a fine of not more than $5,000 or by imprisonment in the penitentiary for not more than five years or in the county jail for not more than one year, or by both such fine and imprisonment.

[*(5) Violation of ORS 646.810 is punishable, upon conviction, by a fine of not more than $100 or by imprisonment in the county jail not exceeding 30 days.*]

[*(6) Violation of ORS 646.820 or 646.830 is punishable, upon conviction, by a fine of not more than $5,000 or by imprisonment in the county jail for not more than one year, or by both.*]

[*(7) Violation of ORS 646.840 is punishable, upon conviction, by a fine of not less than $50 nor more than $250, or by imprisonment in the county jail for not less than 20 nor more than 90 days, or by both.*]

[*(8)*] **(4)** Violation of ORS 646.860 is a misdemeanor.

SECTION 25. ORS 646.210, 646.220, 646.230, 646.625, 646.635, 646.645, 646.655, 646.810, 646.820, 646.830 and 646.840 are repealed.

SECTION 26. This Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this Act shall take effect on July 1, 1971.

PREVIOUS AMENDMENTS

By House May 4

SENATE AMENDMENTS TO HOUSE BILL 3037

By COMMITTEE ON CONSUMER AFFAIRS

May 15

On page 3 of the printed bill, line 14, delete "$500" and insert "$1,000".

In line 21, delete "$500" and insert "$1,000".

On page 4, line 7, delete "$500" and insert "$1,000".

In line 15, delete "$500" and insert "$1,000".

On page 8, delete lines 3 and 4 and insert:

"**Note:** Section 9 was deleted by amendment.".

On page 11, line 15, after "cause" insert "including privileged material".

Delete lines 16 through 24.

On page 14, line 21, delete "your" and insert "a" and after "residence" insert "other than that of the seller".

In line 30, delete "$25" and insert "$10".

On page 15, line 8, delete "$25" and insert "$10".

In line 23, delete "$25" and insert "$10".

On page 16, delete lines 32 through 34.

On page 17, delete lines 1 and 2.

In line 3, delete "(3)" and insert "(2)".