Recent Developments in Business Law

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INTRODUCTION

Writing a survey article in business law is an almost impossible task. Much of the law affecting business is relatively fixed. The Uniform Partnership Act, the Uniform Commercial Code and the Model Corporation Act, for example, have remained relatively intact in recent years. Other areas of business law, however, have been going through an upheaval since 1970. The increasing breadth and complexity of business transactions, as well as criticism of existing business practices have resulted in countless new statutes and regulations being passed each year.

Since the restraints of time and space precluded covering all the new developments in business law, we decided to concentrate this article on the area we feel has had the most significant effect on business people in recent years: consumer law. The recent developments in consumer law have redefined the bargaining power of consumers and, as a result, have totally changed the way business people conduct themselves in the area.

Since both the federal government and the State of Montana have enacted significant legislation in the area of consumer law, this article has accordingly been divided into two parts. Part I, will cover the major federal developments; Part II, the major Montana developments.1 Part II will also include a brief discussion of several new state laws strengthening the rights of employees since it was felt that these laws have also had a significant effect on Montana business law.

The article has been limited principally to a discussion of statutes. A few important administrative regulations implementing the statutes have also been included. There is no case law discussion since most of the statutes are so new that there are no significant court interpretations of the developments yet in existence.


1. Part I was written by Jack Morton, Assistant Professor of Business Law at the School of Business Administration, University of Montana. Part II was written by Roger Barber, Assistant Professor of Business Law at the School of Business Administration, University of Montana. The authors would like to thank Susan Lacosta, the Montana Law Review member who was assigned to help us with the preparation of this article; Susan wrote the section on Equal Credit Opportunity Act.
I. FEDERAL DEVELOPMENTS

A. Antitrust Acts

Several recent antitrust developments have significantly affected consumer law. In 1975, Congress passed the Consumer Goods Pricing Act, putting an end to the costly, inefficient practice of allowing manufacturers to establish retail prices for their goods, otherwise called "fair trading." The Consumer Goods Pricing Act repealed both the 1937 Miller-Tydings Act and the 1952 McGuire Act. The Miller-Tydings Act had exempted state laws on fair trading from the provisions of the Sherman Antitrust Act, while the McGuire Act had allowed the states to pass fair trade laws which were controlling even over non-cooperative merchants.

The 94th Congress also made a substantial change in the enforcement of the Sherman Antitrust Act. The Hart-Scott-Rodino Antitrust Improvement Act of 1976 extended to each state attorney general the authority to:

bring a civil action in the name of such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of the Sherman Act.

The Act does not require the attorney general to give actual notice to the consumers or to get their consent before bringing an action, but he is required to give reasonable constructive notice by publication to all affected consumers. The court has the authority to determine the method of publication as well as to determine whether any additional notice to the consumers is necessary. The Act also allows the attorney general to recover attorney's fees and treble damages. The court can deny damages and grant reasonable attorney's fees.

4. Congress had passed the McGuire Act in response to Schwegman Bros. v. Calvert Distillers Corp., 314 U.S. 384 (1951), which has held that manufacturers could not enforce fair trading upon non-cooperative merchants.
6. Id. § 15(C)(a)(1).
8. 15 U.S.C. § 15 (Supp. VI 1976). The various state attorneys general have shown little hesitancy to utilize this new enforcement tool. Among suits brought under the act are actions by attorneys general in Arizona, California, Connecticut, Florida, Kansas, Oregon and Washington against various major oil companies.
to a "prevailing defendant upon a finding that the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." (emphasis added).

B. Fair Credit Reporting Act

With the widespread use of consumer credit reports, concern about the individual's right of privacy resulted in Congress adopting the Fair Credit Reporting Act in 1970. Since the Federal Fair Credit Reporting Act and the Montana Fair Credit Reporting Act are virtually identical, a discussion of the Act has been left to Part II.

C. The Magnuson-Moss Warranty-Federal Trade Improvement Act

Finding the state laws on warranty protection to be inadequate, Congress entered the consumer warranty field in 1975 with the Magnuson-Moss Warranty Act. The legislation deals only with written warranties and attempts to insure that written warranties are clear, complete, understandable, and equitable.

The Magnuson-Moss Warranty Act applies to any transaction involving the purchase of a consumer product, other than for purposes of resale. A consumer product is broadly defined as "any tangible personal property which is normally used for personal, family, or household purposes (including any property to be attached to or installed in any real property without regard to whether it is so attached or installed.)"

Any written warranty on a consumer product costing the buyer more than fifteen dollars must clearly and conspicuously disclose the following: (1) the identity of the parties to whom the warranty

13. H.R. REP. No. 93-1107, 93rd Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG., & AD. NEWS, 7702-54. From the legislative history of the Act making repeated reference to the manufacturer's tactic of concealing an implied warranty disclaimer within an expressed warranty statement, it is apparent that Congress was particularly concerned with eliminating this practice.
14. 15 U.S.C. § 2301(1) (Supp. V 1975). Thus, the type of product rather than the identity of the purchaser determines whether the Act applies. Businesses buying goods for office or plant use will be protected under the Act as long as the goods are of the type which are normally used for personal, family or household purposes.
15. Although 15 U.S.C. § 2302(e) (Supp. V 1975) provides for such disclosure on items costing over five dollars, the FTC chose to include only items costing more than fifteen dollars. 16 C.F.R. § 701.3(a) (1977).
is extended;\(^\text{16}\) (2) the products, parts, characteristics, or components covered by the warranty;\(^\text{17}\) (3) a statement of what the warrantor will do if the warranty is breached;\(^\text{18}\) (4) the duration of the warranty;\(^\text{19}\) and (5) a step-by-step description of the process that the consumer should follow in obtaining satisfaction in a warranty dispute.\(^\text{20}\) In addition, the disclosure statement must include the following language: “This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.”\(^\text{21}\)

Most consumers have faced the problem of buying a packaged item marked “guaranteed,” but being unable to read the details of the packaged warranty until after the purchase. The Act requires the Federal Trade Commission (FTC) to adopt regulations insuring that the written warranties be available to the consumer prior to the sale.\(^\text{22}\) The FTC pre-sale availability regulations apply only to consumer products costing more than fifteen dollars.\(^\text{23}\) The seller must conspicuously display the warranty\(^\text{24}\) or a text of the warranty\(^\text{25}\) by maintaining readily accessible binders containing the warranties near the product.\(^\text{26}\) He may make the warranty material available in photographic form on either microfiche or ultrachrome viewing machines.\(^\text{27}\) Catalog, mail order firms, and door-to-door sellers must notify buyers that copies of the warranties are available for inspection upon the buyer’s request.\(^\text{28}\)

The Act also requires written warranties on consumer products to be designated as either full warranties or limited warranties.\(^\text{29}\) In order to be labeled a full warranty, the warrantor must agree to repair or replace the product, or provide the buyer with a refund of the purchase price less reasonable depreciation, if the product does not meet the warranty specifications.\(^\text{30}\) A full warranty cannot limit the duration of any implied warranties on the product,\(^\text{31}\) but it may

\(^{17}\) 16 C.F.R. § 701.3(a)(2) (1977).
\(^{19}\) 16 C.F.R. § 701.3(a)(4) (1977).
\(^{20}\) 16 C.F.R. § 701.3(a)(5) (1977). The statement must include the warrantor’s mailing address, the name or title and address of the employee or department of the warrantor responsible for warranty obligations, or a toll-free phone number which the consumer may use to obtain this information.
\(^{23}\) 16 C.F.R. § 702.3 (1977).
\(^{28}\) 16 C.F.R. § 702.3(c) (1977).
limit the consequential damages if such limitation appears conspicuously on the face of the warranty. Any written warranty which fails to meet these standards must be conspicuously designated a limited warranty. While no person granting a written warranty on a consumer product is allowed to disclaim any of the implied warranties, a person giving a limited warranty may limit the duration of the implied warranties.

The Act also encourages, but does not require, warrantors to establish informal warranty dispute settlement procedures as an alternative to court action. If a warrantor or group of warrantors has established such a complaint procedure, no civil action, other than class actions, can be initiated against the warrantor unless the buyer has first complied with the informal procedures.

D. The Equal Credit Opportunity Act

Recognizing credit's growing economic importance, the 1972 National Commission on Consumer Finance requested legislation to insure that every consumer should have equal access to the credit market. The commission's investigations had shown that many consumers, particularly women, were being denied credit because of their membership in a class rather than because of any individual lack of credit worthiness. Congress, in response, passed the Equal Credit Opportunity Act in 1974. It amended the Act in 1976.

35. 15 U.S.C. § 2308(b) (Supp. V 1975). It appears obvious, however, from the proliferation of limited warranties that Congress greatly underestimated the ability of American businesses to sell products which have the dubious distinction of carrying the label "limited warranty."
37. 15 U.S.C. § 2310(a)(3) (Supp. V 1975). However, the FTC has set such elaborate standards for informal warranty complaint procedures that warrantors will find them too expensive to set up.
39. The problems of women identified by the Commission included the following:
   (a) Single women had more trouble obtaining credit than single men.
   (b) Married women were required to reapply for credit.
   (c) Married women were unable to establish credit in their own names.
   (d) The wife’s income would not be counted when a married couple applied for credit.
   (e) Divorced, separated and widowed women were unable to establish credit because prior accounts were in the husband’s name.
40. See Nat’l Comm’n on Consumer Finance, supra note 38, at 152-53. These problems first received nationwide attention after a hearing held by the Commission in May 1972. See id. at 151-60. Congressional committees reporting later on proposed legislation voiced similar concerns. See, e.g., S. REP. No. 93-278, 93d Cong., 1st Sess. 19 (1973).

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The Equal Credit Opportunity Act of 1974 was the first comprehensive legislative attempt to prevent credit discrimination. It prohibits discrimination by a creditor “against any applicant on the basis of sex or marital status with respect to any aspect of a credit transaction.” The 1976 amendments expanded the scope of prohibited discriminations to include race, color, religion, national origin, age and receipt of public assistance. Discrimination based upon the good faith exercise of rights under the Consumer Credit Act is also forbidden.

The Act authorizes the Federal Reserve Board to make any regulations necessary to carry out the purpose of the legislation. The regulations are collectively known as Regulation B. To eliminate discrimination on the basis of sex or marital status, Regulation B prohibits the consideration of certain factors in decisions by creditors to extend credit. Creditors generally may not make inquiries as to the applicant’s marital status. They cannot make inquiries about or consider the applicant’s birth control practices or child bearing intentions.

Regulation B also requires creditors to determine whether the account is one for which both spouses will be contractually liable and, if so, to designate the account to reflect the participation of

(Supp. V 1975)).

44. Pub. L. No. 94-239, 90 Stat. 251 (to be codified at 15 U.S.C. § 1691(a) (1)).
49. Reg. B, § 202.4(c)(1). The provision states that a creditor shall not ask marital status if the applicant applies for an unsecured separate account except in a community property status or as required to comply with state law governing permissible finance charges or loan ceilings. In inquiring as to marital status, only the use of the three terms: “married,” “unmarried,” or “separated,” is permissible. Reg. B, § 202.4(c)(2). If the applicant uses terms such as Mr. or Mrs., the creditor must state “conspicuously” that such terms are only optional. Reg. B, § 202.4(c)(4).
both spouses. To alleviate the problem of married women with no credit history of their own, the creditor is allowed to utilize previous joint accounts in evaluating the application of one spouse, provided he takes cognizance of any special information provided by the applicant.

With respect to sex and marital status, certain practices not actually a part of the determination of creditworthiness are recognized and prohibited by the regulations. A creditor, for example, may not refuse to use an applicant’s maiden name. Likewise, the signature of the other spouse may not be required unless necessary to preserve or protect the creditor’s rights. Where the need for a signature is questionable, the creditor is authorized to request it. Where there has been a change in name or marital status, the creditor may not require reapplication, change the terms, or terminate the account, unless there is evidence of an inability or unwillingness to repay. Where prohibited information is retained in a creditor’s files, but is not used by the creditor, no violation will exist provided the information was obtained from any source prior to June 30, 1976, or at any time from a credit reporting agency. It is also not a violation if the information was obtained at any time from the applicant or others without a specific request by the creditor.

Unless application is made by telephone or orally for an extension of an existing open-ended credit plan, the applicant must be provided with a written statement informing him that discrimination is prohibited and of the appropriate agency charged with enforcing the Act. Where adverse action is taken on an application, the creditor must furnish the applicant with a written statement of the reasons for credit denial. This obligation is satisfied by providing a written statement of reasons or by giving written notice of adverse action which advises the applicant that he has the right to know why the action was taken and where that information may be obtained.

Regulation B requires a creditor to preserve a copy of each application and any notations used in the evaluation process for a

55. Reg. B, § 202.7(b)(c). Creditors’ rights which would involve the spouse are the rights to create a valid lien, pass clear title, waive inchoate rights to property or assign earnings, for example.
period of 25 months after action is taken on the application.\textsuperscript{62} Notification of adverse action and any statement alleging discrimination, submitted in writing by the applicant, must be retained for the same period of time.\textsuperscript{63} Where a creditor has notice that he is under investigation, his records must be preserved until a final disposition of the matter is made.\textsuperscript{64}

Congress gave the Federal Trade Commission (FTC) the major responsibility for enforcement of the Act,\textsuperscript{65} subject to the jurisdiction of other agencies in certain specialized areas.\textsuperscript{66} A violation of the Act is considered a violation of the Federal Trade Commission Act.\textsuperscript{67} The FTC can issue cease and desist orders for violations of the Act.\textsuperscript{68} The United States Attorney General can also enforce the Act, and is authorized to seek injunctive or other appropriate relief,\textsuperscript{69} and to commence civil actions in "pattern and practice" cases on his own initiative\textsuperscript{70} or on referral from the administrative agencies responsible for enforcement.\textsuperscript{71}

Additionally, an aggrieved applicant himself may institute proceedings for preventive relief in the form of an injunction or a restraining order.\textsuperscript{72} The applicant may also institute proceedings to recover actual and punitive damages in an individual capacity or as the representative of a class.\textsuperscript{73} The 1976 amendments raised the ceiling of potential recovery of punitive damages in a class action to the "lesser of $500,000 or one per centum of the net worth of the

\textsuperscript{62} 42 Fed. Reg. 1261 (1977) (to be codified at 12 C.F.R. § 202.12(b)).
\textsuperscript{63} Reg. B, § 202.4.
\textsuperscript{64} Id.
\textsuperscript{66} 15 U.S.C. § 1691c(a)(1)-(9). Administrative enforcement of the Act with respect to certain creditors is assigned to the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Board of Directors of the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and Administrator of the National Credit Union Administration, the Interstate Commerce Commission, the Civil Aeronautics Board, the Secretary of Agriculture, the Farm Credit Administration, the Securities and Exchange Commission and the Small Business Administration. 15 U.S.C. § 1691c(a)(1)-(9). It was necessary to delegate parallel authority to these institutions because the FTC does not have jurisdiction over banking institutions. 15 U.S.C. § 45 (1970). See also 15 U.S.C. § 1691c(b) (Supp. V 1975). Any violation of the regulations of the agencies is deemed to be a violation of the Act itself.
\textsuperscript{68} 15 U.S.C. § 45(b). In the case of noncompliance with an order of the Commission, violators are subject to a civil penalty of not more than $5,000. 15 U.S.C. § 45(1). Other agencies entrusted with administrative enforcement powers have the same problem. See, e.g., 12 U.S.C. § 1818(b) (1970).
\textsuperscript{69} Pub. L. No. 94-239, § 6, 90 Stat. 253 (to be codified at 15 U.S.C. § 1691e(h)).
\textsuperscript{70} Id. "Pattern and practice" suits refer to those cases in which a creditor discriminates against certain kinds of applicants on a regular basis.
\textsuperscript{71} Pub. L. No. 94-239, § 6, 90 Stat. 253 (to be codified at 15 U.S.C. § 1691e(g)).
\textsuperscript{72} Id.
\textsuperscript{73} Pub. L. No. 94-239, § 6, 90 Stat. 253 (to be codified at 15 U.S.C. § 1691e(d)).
creditor." Court costs and reasonable attorney fees are to be a part of any damages awarded. The Act, as amended, provides for a two year statute of limitations period, running from the time the violation occurs. It also provides that where the responsible agency or the attorney general commences an action under the Act, the limitation period for civil actions pertaining to those violations starts to run with the commencement of such action.

E. Federal Trade Commission

One of the more significant administrative regulations to appear in recent years is the Federal Trade Commission's (FTC) ruling involving the preservation of consumer defenses. The FTC had recognized that in all too many situations, the consumer's obligation to pay for goods or services had been separated from the merchant's obligations to deliver those goods or services. Two independent but similar legal principles have been responsible for this separation. The first involves the holder in due course concept which was first elaborated in Miller v. Race. The case held that the purchaser of a negotiable instrument did not insure performance of the seller's underlying obligation. This concept formed the foundation of the English Bills of Exchange Act (1882), the Uniform Negotiable Instruments Law (1896), and the present Uniform Commercial Code's article on commercial paper. Under these statutes, the assignee of a negotiable instrument would invariably qualify as a holder in due course. As a holder in due course, the assignee was immune from all defenses which the consumer may have had, except for infancy, illegality, and fraud in the execution.

The second principle which protected the assignee from any claims of the consumer was the waiver of defenses clause commonly found in many installment contracts. The following is an example of such a clause: "Buyer hereby waives and agrees not to assert against the Assignee any defenses to the enforcement of this con-

77. Id.
78. Id.
80. Nat'L COMM'N ON CONSUMER FINANCE, supra note 38 at 16-17. The occurrence of such transactions should not be underestimated; installment payments claim nearly one-seventieth of the monthly disposable budgets of half the families in America.
82. U.C.C. §§ 3-302, 3-305.
83. U.C.C. § 3-302.
84. U.C.C. § 3-305(2).
tract now existing or which hereafter may arise."

In states where the courts or legislatures had restricted the use in consumer transactions of the holder in due course concept and the waiver of defenses clause, sellers had found vendor-related financing, or "body dragging," to be a satisfactory alternative. Sellers merely arranged for a direct loan between the consumer and a financial institution. The financial institution was thus insulated from any complaints which the consumer may have had against the seller.

These principles resulted in the holder in due course of a consumer's note, the assignee of a contract containing the waiver of defenses clause, and the financial institution which had loaned the money to the consumer, being able to collect from the consumer before the original seller could. The effect was to separate the consumer's obligation to pay from the seller's obligation to deliver the proper goods or perform certain services.

The FTC rule regarding the preservation of consumer defenses became effective on May 15, 1976. The purpose of the rule is to subject all creditors to any defenses which the consumer may have. The rule requires all consumer credit contracts to contain a clear statement that any holder of the contract is subject to all claims and defenses which the consumer could assert against the seller of the goods or services.85 While the final version of the rule does not attempt to distinguish between negotiable instruments and contracts which contain waivers, the statement that the holder is subject to all defenses which are available to the consumer is sufficient to cover both situations.

The rule protects only consumers who are natural persons and who purchase the goods or services for personal, family, or household use.86 It does not protect such consumers as partnerships, corporations, and governmental bodies, nor does it include real estate transactions. The rule specifically exempts transactions involving credit cards.87

Although the new rule does much to provide needed consumer protection, it fails to solve the "body-dragging" or referral loan situation in which the seller simply refers the consumer to a lending institution which makes the loan. It appears that this failure was an oversight since the original rule was apparently intended to cover the vendor-related financing problem. The definitions support this conclusion since they define both purchase money loans and credi-
tors who lend purchase money or finance sales of goods or services.\textsuperscript{88}

To correct this deficiency, the FTC, on November 14, 1975, issued a notice of its intention to extend the coverage of the present rule to include sellers as well as creditors.\textsuperscript{89} The proposed modification, if adopted, would make it an unfair trade practice for either a seller or a creditor to accept a consumer contract which does not include a notice statement eliminating the waiver clause and the holder in due course concept.

\section*{II. Montana Developments}

\textbf{A. Montana Unfair Trade Practices and Consumer Protection Act}

The federal government has had the authority to protect consumers for more than 60 years. Congress passed the Federal Trade Commission Act in 1914,\textsuperscript{90} creating the Federal Trade Commission and giving it the power to prevent unfair trade practices.\textsuperscript{90} A parallel authority did not exist in Montana until 1973 when the Montana Unfair Practices and Consumer Protection Act was passed.\textsuperscript{91} Before 1973, Montana consumers had been protected only by the traditional contract or warranty enforcement remedies.

The Montana legislation declares that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" are illegal.\textsuperscript{92} The language is taken almost verbatim from the Federal Trade Commission Act.\textsuperscript{93} Since the federal government has had several decades to interpret its language, Montana consumers and lawyers are told, by statute, to draw on that background by giving "due consideration and weight" to the interpretations of the Federal Trade Commission and the federal courts.\textsuperscript{94}

The Department of Business Regulation is authorized to adopt rules and regulations for enforcement of the Montana Act,\textsuperscript{95} and has

\begin{itemize}
\item \textsuperscript{88} 16 C.F.R. § 433.1(c), (d), (e).
\item \textsuperscript{89} 40 Fed. Reg. 53, 506 (1975).
\item \textsuperscript{91} Ch. 275, Laws of Montana (1973) (codified in \textit{Revised Codes of Montana} [hereinafter cited as R.C.M. 1947], § 85-401 to 418 (Supp. 1977)).
\item \textsuperscript{92} R.C.M. 1947, § 85-402 (Supp. 1977).
\item \textsuperscript{93} Section 5(a)(1) of the Federal Trade Commission Act states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared illegal." 15 U.S.C. § 45(a)(1) (1970).
\item \textsuperscript{94} R.C.M. 1947, § 85-403 (Supp. 1977). The FTC and the Federal courts have used Section 5 language to prohibit false and misleading advertising, deceptive pricing practices, mislabeling of products, agreements not to compete, games of chance, false testimonials, buying clubs and distortions of competitors' products. For more precise information of the
\end{itemize}
promulgated some administrative regulations on the subject since 1975. It is unfair and deceptive to misrepresent an item's brand, manufacturer or place of manufacture, or to claim that secondhand or restored goods are new. When merchandise is advertised for sale, the seller must have reasonable amounts of the item, or disclose that he only has a limited supply. The seller cannot play the old "bait and switch" game, drawing the consumer into the store for a bargain, and then disparaging the bargain item or refusing to sell it according to the terms advertised. If a product is "free," all terms and conditions attached to the offer must be revealed at the outset to indicate to the consumer how "free" an item really is. If an item is offered at a "bargain" price, then it must be sold for less than its regular price, and it must be sold for less than the price at which substantial sales of the article are being made in the area.

The department has also promulgated regulations governing the motor vehicle repair business. The regulations define charging a consumer for parts and repairs that have not been expressly authorized by him, or alleging that certain parts and repairs are necessary, when in fact they are not, as unfair and deceptive practices. The regulations establish a procedure for estimating and performing repairs and services on motor vehicles. If the customer requests one, a written estimate of the repairs, maintenance or service on a motor vehicle must be provided, but the repairs or services must cost more than $50 before the request must be honored. If given, the estimate is valid for five days, or for a lesser period, if so specified in the written estimate. The estimate should include the costs of all parts, labor and storage, and the approximate date of completion of the work. If actual labor and parts cost ten percent or $25 more than the estimated price (whichever is greater), the consumer must consent to the additional charge before the work is performed.
All repair work must be recorded on an invoice, and if any reconditioned or rebuilt parts are used, that fact must also be noted on the invoice. Replaced parts must be returned to the customer, if he requests them. However, it is not necessary to comply with the return request if the parts must be returned to a manufacturer under a warranty arrangement, or if their return is impracticable because of size and weight, for example. The department has also adopted regulations to limit deception in the sale of motor vehicles and to monitor and license proprietary schools.

To enforce the Act, the Department of Business Regulation has the authority to seek injunctive relief to restrain unfair and deceptive acts. A court, granting an injunction, can assess a civil penalty of $500 per violation against the offender if it finds that he has willfully used unfair or deceptive trade practices. If it finds that the businessperson’s conduct involves fraud, the offender can be fined up to $2,000, imprisoned for more than a year, or both. The courts may also make any additional orders or judgments that seem appropriate, including appointment of receivers, restoration of property to the proper person, and revocation of business licenses or professional certification. Any businessperson who ignores an injunction is subject to a civil penalty of not more than $10,000 per violation, and to suspension or forfeiture of any corporate franchise he may have.

Additionally, the Department of Business Regulation can utilize the traditional administrative remedy of voluntary compliance. The accused’s statement of compliance must be written and filed with the appropriate state district court. It is not treated as an admission of wrongdoing.

County attorneys can assist the Department of Business Regu-

charge for additional necessary parts and labor up to $275. Above that price, the mechanic must receive permission from the consumer before the work can be performed.

118. R.C.M. 1947, §§ 85-405, 85-509 (Supp. 1977). The appropriate district court is the district where the alleged violator resides or has his principal place of business, or the Lewis and Clark County Court, if the Department and the violator consent to that court’s jurisdiction.
lation in the enforcement of the Act, or they can commence and prosecute actions on their own behalf. By a 1977 amendment to the Act, the Attorney General of the State of Montana is also authorized to assist in or initiate enforcement of the Act, but his participation is conditioned upon the Department of Business Regulation or a county attorney requesting his assistance.

While class actions are specifically prohibited by the Act, a consumer can bring a private suit for any damages caused by any unfair or deceptive trade practice. The unfair practice must have been part of a purchase or lease transaction for personal, family or household goods or services. The consumer can recover actual damages, or $200, whichever is greater. In its discretion, the court can award the consumer treble damages.

The Department of Business Regulation is granted broad investigative powers to investigate alleged violations of the Act. The department can demand written information or physical evidence, obtain oral evidence under oath, issue a subpoena, and conduct a hearing. If a person fails to cooperate with the investigative process, the department can obtain an injunction preventing the sale or advertisement of goods, or the conduct of any business involved in the alleged violation. The department can also ask that a corporation's charter be suspended, or that its certificate of authority be revoked or suspended.

To oversee the enforcement of the Act, the Department of Business Regulation has created a consumer affairs division. It has an administrator, an attorney, and a compliance officer.

**B. Door-To-Door Sales Act**

Both the federal government and the State of Montana have

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120. R.C.M. 1947, § 85-416 (Supp. 1977). The Missoula County Attorney's office is the only county attorney's office with a full-time staff member specializing in consumer complaints.
121. R.C.M. 1947, § 85-416 (Supp. 1977). Attorney General Greeley has designated a member of his staff to handle consumers, so he is apparently ready for the cry for help.
123. R.C.M. 1947, § 85-408 (Supp. 1977). This definition is the typical definition of a consumer transaction.
126. From 1973 to 1975, the division received 1,391 complaints, but in about half of the cases (671), the consumer never followed up on the initial contact with the division. Most of the complaints were settled without legal action; apparently the involvement of the consumer affairs division was enough to remedy the situation. During that two-year period, the division did initiate nine investigative demands on business, entered into three voluntary compliance agreements, and obtained two permanent injunctions against offending businesses. Be an Open-Eyed Consumer, A Handbook on Consumer Fraud and Protection (prepared by the
attempted to protect consumers from door-to-door sales contracts since they are usually the most spontaneous, least mindful agreements made by consumers. To protect consumers from such contracts, the Montana legislature adopted the Door-to-Door Sales Act in 1973.\footnote{Consumer Affairs Division, Department of Business Regulation, 29 (1976). The division also participated in an extensive consumer education program, addressing numerous groups and appearing on several television programs. Id. at 33.}

The Act was amended in 1977 to apply not only to door-to-door salespersons, but also to sellers who contact consumers by phone, and sellers who make consumer contacts at a place other than their place of business.\footnote{R.C.M. 1947, § 85-502.1(2) (Supp. 1977). A magazine salesperson who stops a pedestrian on the street would fall under the law's purview.} It does not apply, however, to all door-to-door and telephone sales. The sale of insurance policies or newspaper subscriptions are not covered by the Act, for example.\footnote{R.C.M. 1947, § 85-501 (Supp. 1977).} It covers only goods and services purchased for personal, family and household use,\footnote{R.C.M. 1947, § 85-502(a)(b) (Supp. 1977).} and costing more than $25.\footnote{R.C.M. 1947, § 85-402(2)(c)(d) (Supp. 1977).}

The Act protects the consumer by granting him a "cooling-off" period.\footnote{R.C.M. 1947, § 85-502.1(2) (Supp. 1977).} The buyer is given three days to think about his purchase. He has until midnight of the third business day to cancel. Purchasers who have entered into a contract over the telephone can also cancel; they can cancel any time prior to signing a contract relating to the sale.\footnote{R.C.M. 1947, § 85-503(1) (Supp. 1977).} But where the buyer initiates the sales situation, or personally knows the seller, his business and the goods or services he sells, the "cooling-off" remedy is not available.\footnote{R.C.M. 1947, § 85-502(a)(b) (Supp. 1977).}

The salesperson is required to supply a cancellation statement to the buyer, following the form suggested by the Federal Trade Commission or the form requirements given by Montana law.\footnote{R.C.M. 1947, § 85-501 (Supp. 1977).} If a proper form is supplied, the consumer who wants to cancel must return the form by certified mail.\footnote{R.C.M. 1947, § 85-503(1) (Supp. 1977).} If the salesperson does not pro-
YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE: OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO [Name of seller], AT [address of seller's place of business] NOT LATER THAN MIDNIGHT OF (date).

I HEREBY CANCEL THIS TRANSACTION.

(Date)

(Buyer's signature)


The Montana law specifies that the seller:

shall furnish the buyer a notice which contains the statement set forth in subsection (a) or a statement as prescribed by federal trade commission rule governing door-to-door sales, and printed in capital and lowercase letters of not less than 10-point boldfaced type with the seller's name and business address and the statement set forth in subsection (b):

(a) YOU MAY CANCEL THIS SALE WITHIN THREE BUSINESS DAYS. If you decide within 3 days that you want to cancel the sale, tear off and mail the bottom of this card. To cancel, the card must be mailed BY CERTIFIED MAIL within 3 days after you sign the contract.

(date)

(b) CONTRACT CANCELED

I hereby cancel this sale.

(Buyer's signature)

vide the required cancellation form, the consumer can use any means of notification, as long as it is in writing and establishes his intent to cancel. The writing does not have to be sent by certified mail, and is considered good notice the minute it is deposited in the mail with the proper address and postage.

If the buyer cancels properly, then the seller has ten days to return any payments made by the buyer, along with any evidence of indebtedness. If the buyer has traded other goods as a kind of payment, those goods must be returned in substantially the same condition. Otherwise, the buyer is entitled to their trade-in value. If the seller does not return the above-described payments and money, the buyer can sue for their return, and if successful, can also recover $100 plus attorney's fees and costs. The consumer is also given a lien on the goods purchased from the salesperson, and can keep them until the seller returns the consideration paid by the consumer.

If the seller hands over the consideration, the consumer must return the goods received under the contract. If the goods cannot be returned in substantially the same condition as when they were received, the seller can ignore the cancellation and the consumer loses all rights under the law. The consumer is not required to deliver the goods to the seller; it is the seller's responsibility to pick them up at the buyer's residence. If the seller does not do so within 40 days of cancellation, the goods become the property of the consumer, without obligation to pay for them.

To insure that consumers know with whom they are dealing, and to give them an opportunity to take down the information needed for cancellation, the salesperson is required to tell the consumer his name, the name of the company he represents, the kind of goods or services he sells, and a statement that he wishes to sell to the consumer. If the sales contact is in person, the salesperson must also show the consumer a business card. These disclosures must be made before the salesperson launches into his salespitch. Most of the information will be provided to the consumer again, if

the salesperson supplies a cancellation card.

If a salesperson fails to follow the provisions of the law, he can be charged with a violation of the Montana Unfair Trade Practices and Consumer Protection Act.\(^{150}\)

**C. Consumer Reporting Agency Act**

As noted earlier in this article, the federal government has been in the business of regulating consumer reporting agencies since the passage of the Fair Credit Reporting Act in 1970. Since many reporting agencies did not fall under the "interstate" jurisdiction of that act, however, the State of Montana developed its own regulatory scheme. The state law, practically a carbon copy of the Fair Credit Reporting Act, was passed in 1975.\(^{151}\)

Consumer reporting agencies in Montana are permitted to collect data for two general purposes: (1) the preparation of credit, insurance and job histories,\(^{152}\) and (2) the preparation of "investigative consumer reports," which are assembled by interviewing neighbors, friends and associates about the consumer's character, reputation, personal characteristics and living habits.\(^{153}\)

The law prohibits the use of these reports except: in response to a court order; in response to written instructions from the consumer; in response to a customer who wants the information for credit, employment, insurance underwriting, or governmental licensing purposes; and in response to a customer who has a legitimate business need for the information.\(^{154}\) To insure that the consumer information will be used properly, persons who request the information from a reporting agency must identify themselves, and certify that the data will be used for a defined purpose only.\(^{155}\) The reporting agencies must also keep a record of all persons who use their information.\(^{156}\)

The kind of information that can be assembled and distributed is also limited. Bankruptcies more than 14 years old and court judgments, paid tax liens, accounts placed for collection or any other adverse information more than seven years old cannot be included in the report.\(^{157}\) If adverse information is collected during the investigative consumer report process, that information must be verified

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or confirmed before it can be used in a consumer report, except when the information is a matter of public record.\(^{158}\)

If the information from a consumer reporting agency is used to deny credit, insurance or employment to a consumer, or is used to increase the charge for credit or insurance, the consumer must be told.\(^{159}\) The consumer must also be supplied with the name and address of the reporting agency that supplied the information.\(^{160}\) This disclosure must be made by the person who requested and used the information. The consumer then has the right to go to the reporting agency to find out the nature and substance of all information on file about him.\(^{161}\) The sources of that information must also be revealed.\(^{162}\) The agency is not required to disclose medical information on file, however.\(^{163}\)

Information collected by the "investigative consumer report" method is more closely regulated than credit, insurance and job history information. If such information is requested for other than employment purposes, the consumer must be notified by mail within three days of the request. The person asking for the information, not the reporting agency, must make the notification. The consumer must be told that he can ask for additional information on the nature, scope, and substance of the investigation.\(^{164}\) If the consumer asks for that additional disclosure,\(^{165}\) it must be supplied to him in writing within five days.\(^{166}\)

The reporting agency must disclose its information, without charge to the consumer, if disclosure is being made after denial of credit, employment, or insurance. In all other instances of disclosure, the agency can charge the consumer up to three dollars for such service.\(^{167}\)

If a consumer challenges the completeness or accuracy of information on file with an agency, the reporting agency must make a reinvestigation. If the information cannot be verified, the agency must correct the error or delete the information. The agency must


\(^{159}\) R.C.M. 1947, § 18-515 (Supp. 1977). The consumer can also request disclosure, even though the information has not been used adversely. R.C.M. 1947, § 18-510(1). A diligent consumer can constantly monitor the information kept on file, to insure its accuracy, and does not have to wait until some damage is done to him to discover the content of that information.


\(^{165}\) He must do so within a reasonable time of receiving the first request. R.C.M. 1947, § 18-506 (Supp. 1977).

also notify everyone who has received the information and tell them
of the error or change.\textsuperscript{168} If the reinvestigation does not resolve the
challenge, the consumer can file a brief statement setting out his
side of the dispute.\textsuperscript{169} The statement must be kept in the consumer's
file, and must be included as part of the agency's report on the
consumer.\textsuperscript{170}

If the provisions of the consumer reporting act are not followed,
the consumer can sue for defamation, invasion of privacy, or negli-
gence.\textsuperscript{171} If the noncompliance is willful, the consumer can sue for
actual damages, punitive damages, court costs and attorney's
fees.\textsuperscript{172} The consumer can also bring a damage suit against anyone
who furnishes false information to a reporting agency, if the person
was acting with malice or willful intent.\textsuperscript{173}

\section{D. Interest Rates}

The usury rate in Montana was set at ten percent per annum
in 1919. Ten percent then seemed an unattainable figure. In the
early 1970's, however, when primary interest rates hovered around
9-9.5 percent, the usury limit was no longer so distant. Many banks
and lending institutions were unable to loan money to consumers
because profit margins no longer existed in such transactions.

To remedy the situation, the Montana legislature changed the
usury rate in 1975.\textsuperscript{174} The legislature retained the old ten percent
limit, but it also set up an alternative test to be used when the ten
percent rate is too restrictive.

The new usury limitations are as follows:

\begin{itemize}
  \item[a)] on loans of up to $150,000, the rate is 10 percent per annum or
         no more than 4 percentage points in excess of the discount rate on
         90-day commercial paper in effect at the federal reserve bank in
         the ninth reserve district, whichever is greater;
  \item[b)] on loans up to $300,000, the rate is 10 percent or 5 percentage
         points in excess of the discount rate on 90-day paper, whichever is
         greater;
  \item[c)] on amounts in excess of $300,000, the parties can agree to any
         rate of interest, without limitation.\textsuperscript{175}
\end{itemize}

\textsuperscript{167.} A.R.M. § 8-2.4(1)-S4500 (1976). In both circumstances, the consumer has the right
\textsuperscript{168.} R.C.M. 1947, § 18-512 (Supp. 1977).
\textsuperscript{169.} R.C.M. 1947, § 18-512(2) (Supp. 1977).
\textsuperscript{170.} R.C.M. 1947, § 18-512(3) (Supp. 1977).
\textsuperscript{172.} R.C.M. 1947, § 18-517 (Supp. 1977).
\textsuperscript{174.} Ch. 503, Laws of Montana (1975) (codified at R.C.M. 1947, § 47-125 (Supp. 1977)).
The 1977 legislature modified the law governing finance charges on retail charge accounts.\(^{176}\) That law now permits the seller to apply a charge of not more than one and one-half percent per billing period to the greatest of either:

a) the average daily balance in the account during the period, or

b) the ending balance in the account, less the purchases charged during the billing period,\(^{177}\) or

c) the median amount within a $10 range within which such average daily balance or beginning balance falls.\(^{178}\)

E. Minimum Wage Law

The United States Congress established a minimum wage and hour law in 1938 with passage of the Fair Labor Standards Act (FLSA).\(^{179}\) The law applied principally to workers employed by interstate businesses. The FLSA protected some Montana workers, particularly persons working for the larger businesses, but most of those persons belonged to unions and were already guaranteed a minimum wage by union contracts with employers. The employees who most needed wage protection - employees of small businesses or local Montana corporations - however, were not assured of a minimum wage until the Montana legislature passed a minimum wage law in 1971.\(^{180}\) The law was amended in 1975 to further increase employee protections.\(^{181}\)

Besides establishing a minimum wage, the act also established an overtime provision for workers. Employees who work more than 40 hours in a work week must be paid one and one-half times their hourly wage.\(^{182}\) If an employee is not paid the proper minimum or overtime wage, he can sue the employer under Montana's wage claim statutes\(^{183}\) to recover the higher salary.\(^{184}\)

The wage law does not cover all intrastate workers. The following are exempt: students participating in a distributive education program.


\(^{177}\) Subsection (b) is the new addition to the statute.


\(^{180}\) R.C.M. 1947, §§ 41-2301 to 2307 (Supp. 1977). When it was first passed the minimum wage for employees was $1.20 an hour; it is now $2.00 an hour. While the Montana legislature has increased the wage standard by 40% since the enactment of the wage law, it is still well below the federal minimum wage which is presently $2.35 and will soon become $2.65 an hour.

\(^{181}\) Ch. 421, Laws of Montana (1975) (codified at R.C.M. 1947, § 41-2303 (Supp. 1977)).

\(^{182}\) R.C.M. 1947, § 41-2303(b) (Supp. 1977).

program; persons performing menial chores in a private home, babysitting or yardwork, for example; immediate members of a family, who are dependent on a family member/employer for half or more of their support; executive, administrative and professional persons; apprentices and learners for 30 days, if the Commissioner of Labor and Industry exempts them; handicapped persons who perform work as part of a training or evaluation program, or who cannot work competitively because of their impairment; and anyone employed by the United States government.  

The provisions of the act also do not cover employees whose wages are determined by special statutory procedures authorized by the Montana legislature. This exemption was established by the Montana supreme court in *Billings v. Smith*, in involving a state statute that authorized county commissioners to fix the salaries of deputy sheriffs. The supreme court held that the Montana law did not require a minimum or overtime wage payment to deputies because the wage of those employees was determined by a special law which prevailed over the general provisions of the minimum wage act.

Some farm workers are also treated differently under the act. If the farm employee works for a full calendar year, the wage law apparently covers him. But, if the employee works only for part of a calendar year, the employer must compensate the worker at the minimum rate multiplied by the total number of hours worked during the part of the year, or at a rate of $460 a month.

**F. Wage Payments**

Montana has long had rather specific laws requiring employers to make wage payments in a timely manner, and providing penalties if the employer fails to do so. In recent years, the legislature has modified those laws slightly to protect both employees and employers.

Before 1975, employers in Montana had to pay their employees at least twice a month. That requirement was deleted by the 1975 legislature, and now any payment schedule established by the employment contract is proper. The earned wages must be paid within 10 business days after they become due and payable. Prior to 1975,
the wages had to be paid within five business days of their due date.

If the wages are not paid within the statutory period, the employee can collect a penalty payment, assessed at the rate of 5 percent of the unpaid wages for every day the wage is unpaid. The employee can only collect the penalty for 20 days, since the 20 day period results in the employee collecting a double wage. Before 1973, the employee had six months from the date of default to collect the penalty payments. The collection period was extended to eighteen months by the 1973 legislation.

The 1977 legislature adopted a reciprocal wage collection law to assist Montana residents in collecting wages from out-of-state employers. The employee must assign his claim to the Department of Labor and Industry before the wage can be recovered, and the defaulting employer must also reside in a state that has entered into a reciprocity agreement for collection of wages with Montana. Such an agreement also permits employers of a cooperating state to collect wages against Montana employers. The specific action taken to collect the wages will depend on the content of the reciprocity agreement itself.

G. Maternity Leave Law

One of the more controversial and unpopular decisions handed down by the United States Supreme Court last term was General Electric Co. v. Gilbert. The case held that employers did not discriminate against their women employees if maternity benefits were not included in a health program. The decision brought an immediate outcry from women's groups and many members of Congress. As a result, Congress is presently considering legislation to nullify the effect of the Supreme Court's ruling.

Some employment protections are given to Montana women by a maternity leave law the state legislature passed in 1975. The law declares that no employer, public or private, can terminate a woman's employment because of her pregnancy. The employer
also cannot refuse to grant the woman a reasonable leave of absence,201 deny her any compensation if she is disabled by the pregnancy,202 or require her to take an unreasonably long maternity leave.203 After maternity leave, the employer must reinstate the woman to her original job without interruption of seniority and benefits, unless he is a private employer and can prove that circumstances have changed so that reinstatement is impossible or unreasonable.204

The Commissioner of Labor and Industry is charged with enforcement of the act.205 If an employer violates a provision of the act, the mistreated employee can file a complaint with the commissioner. After an investigation, the commissioner can order reinstatement of the employee and payment of damages growing out of the violation.206 If an aggrieved employee does not want to go through the commissioner, she can initiate a private action in district court asking for reinstatement and damages.207

H. Miscellaneous Statutes

Subcontractors' Bonds

Subcontractors are required to obtain a surety bond or other security to guarantee the payment of their employees' wages.208 Subcontractors can obtain one bond per year, and file it with the Commissioner of Labor and Industry.209 The bond must be equal to the subcontractor's average monthly payroll.210 If someone hires a subcontractor without a proper bond, the principal contractor becomes liable for the wages and benefits of the subcontractor's employees.211

206. R.C.M. 1947, § 41-2603 (Supp. 1977). The Department of Labor and Industry recently promulgated new regulations on the maternity leave law, and is presently considering several claims against Montana employers. In announcing the new regulation, the Department also released its decision in a claim against Mountain Bell. The decision declared that women are entitled to benefits during the entire gestation period, and a reasonable time after birth to permit recovery. Mountain Bell has a health plan for its employees, and the decision was apparently referring to those company benefits, but the ruling is still a major victory for supporters of maternity leave and benefit plans for women workers.
The bond requirement does not apply to resident subcontractors with a net worth of more than $50,000.\textsuperscript{212}

**Professional Strikebreakers**

Since 1975, it has been a crime in Montana to hire a professional strikebreaker to take the place of an employee involved in a labor dispute.\textsuperscript{213} It is also a crime to recruit, refer or supply such a professional to an employer.\textsuperscript{214} A professional strikebreaker is someone who customarily and repeatedly offers himself for employment in a labor dispute.\textsuperscript{215} Employers can hire workers during a strike, but they must advertise that a strike is in progress and that the employment offered is in place of employees involved in the labor dispute.\textsuperscript{216}

**Employment of Aliens**

The 1977 Montana Legislature prohibited the employment of aliens who are not authorized under their visitation status to accept employment.\textsuperscript{217} Any employer who *knowingly* hires such an alien is guilty of a crime, and can be fined up to $300.\textsuperscript{218}

**Product Safety**

Montana has had a Consumer Product Safety Act since 1975.\textsuperscript{219} The law is not nearly as comprehensive as the federal law, which tries to monitor and regulate every product on the interstate market that is dangerous or unsafe.\textsuperscript{220} The Montana law is limited to the control of hazardous substances in intrastate commerce.\textsuperscript{221} Hazardous substances include those defined as toxic, corrosive, irritating, flammable or combustible, or radioactive.\textsuperscript{222} Any toy or other children's article that presents an electrical, mechanical or thermal

\begin{footnotes}
\footnote{211. R.C.M. 1947, § 41-2702(2) (Supp. 1977).}
\footnote{212. R.C.M. 1947, § 41-2704(1) (Supp. 1977).}
\footnote{213. R.C.M. 1947, § 41-2502 (Supp. 1977).}
\footnote{214. R.C.M. 1947, § 41-2501 (Supp. 1977).}
\footnote{215. R.C.M. 1947, § 41-2502(2) (Supp. 1977).}
\footnote{216. R.C.M. 1947, § 41-2504 (Supp. 1977).}
\footnote{218. R.C.M. 1947, § 41-121(2) (Supp. 1977).}
\footnote{221. The Montana law appears to be patterned after the Federal Hazardous Substance Act which was passed by Congress in 1960. Pub. L. No. 86-613, 74 Stat. 372 (codified at 15 U.S.C. §§ 1261 to 1274 (1970)). That act was also narrow in scope, covering only substances used in the household. Its provisions are still important, however, and the Consumer Product Safety Commission has assumed responsibility for enforcement of the acts. See, 15 U.S.C. §§ 1261-62 (Supp. V 1975).}
\end{footnotes}
danger is also hazardous. The Department of Health and Environmental Sciences also has authority, under its rule-making powers, to declare a substance hazardous. If a substance is hazardous, the department can regulate its use, labeling and storage, or ban the product from intrastate commerce.