

# THE ABA CONSUMER LAW GUIDE

## CHAPTER ONE

### Who, What, When and How

#### *How Consumer Law Fits into the Big Picture*

### Who Is a Consumer and When

“Progress through appliances” might be a tongue-in-cheek way to describe the idea of consumer satisfaction as a national aspiration. But while it is great to be able to enjoy the fruits of your labor, you probably want more out of life than guaranteed low prices, extended warranties and a PC in every room. Consumer goods, after all, are just things, and while most Americans are privileged to enjoy a lot of things, they aren’t the be-all and end-all of existence. “Consumerism” isn’t what this book is about.

This book *is* about helping you understand the everyday transactions that make up economic life, and to set out the basic rights and obligations of people playing the free-enterprise game. When you've better informed, your choices will be greater and you'll get the most for your money. And the better able you are to protect what you earn -- by spending or investing it wisely -- the more opportunity you'll have to enjoy the rewards of your hard work.

**Consumer law**, then, is the law of everyday contracts and transactions involving individual consumers. By consumers, we mean real people acting on their own behalf, as opposed to the same real people when they are working for a business or company. Consumer law usually deals with smaller amounts of money than business law, but sometimes hundreds of thousands are at stake, considering

that home-buying and even investing can be categorized as consumer transactions.

**ALL LAW IS NOT CREATED EQUAL**

What does the law have to do with everyday economic dealings? There is always some underlying set of rules that governs the way people deal with each other, especially when value (usually money, goods and services) is changing hands. When you buy bread at the grocery store, you and the grocer operate under a set of unspoken expectations, based on legal principles you may never have thought about: That the bread is really bread, it ' s fresh, it ' s tasty, and it ' s reasonably sanitary. The person behind the counter has a set of expectations, too -- mostly that the means of payment will prove to be valid (the check will clear, the credit card is authorized, or the cash is real, not something you ran off on your laser printer that morning).

Assuming that, like most purchases of bread, nothing goes wrong on either end, it ' s unlikely either of you will have to call on the law to set out whose expectations have been wrongly frustrated. But you depend on the law to guide the relationship of dealings like this, and to settle any disputes. The more complex the transaction, the more law is involved.

-----

-----Sidebar

**ALTERNATIVES TO LAW**

Many social groups don ' t rely on the kind of law we will talk about here to settle disputes to the extent that Americans do. In some countries, such as Japan, social pressure has historically been the main way disputes are resolved, rather than police, lawyers, and courts. Some social or ethnic groups have their own legal system parallel to the one we will be talking about, such as religious courts.

Where both parties agree to it, they are usually free to have their disputes settled by any private system. The vast majority of disputes are settled by negotiation, rather than a formal court finding.

**Mediation**, perhaps through a neighborhood justice center, is a process in which a third-party mediator assists the disputants to reach a voluntary negotiated settlement. There are other forms of **alternative dispute resolution**, such as **arbitration**, which we will discuss later.

**Small claims court** is a simplified civil court that exists in almost every state to resolve disputes under a certain dollar amount set by law. Strictly speaking, it's not an alternative to law, since it is governed by applicable laws and legal practices, but it is far more informal than regular court, as well as faster and less expensive.

Two exceptions to informal settlements: **illegal contracts** (discussed below) are illegal, regardless of what body tries to enforce them, and family-law disputes, such as divorces and child custody, are reserved for final decision by the state (though many jurisdictions encourage the parties to propose a settlement subject to court approval). Another exception is disputes that are "settled" by violence -- even if both sides agree to it. Dueling has been illegal in all 50 states for quite some time!

-----  
-----

**Areas of Law Affecting Consumers**

There are many different areas of law that affect consumers. It is mostly contract law that concerns us in this book, but consumers' rights and obligations may also be affected by other areas of law.

**Statutory and regulatory consumer protection.** This is the main area of non-contract law that we will address in this book. Many consumer transactions and relationships are the subjects of

special government laws and regulations. An important one is the Federal Trade Commission Act, which created (not surprisingly) the Federal Trade Commission (FTC). This government body regulates a wide variety of consumer transactions, focusing on deceptive practices such as false advertising, phony investment schemes, and bogus health claims. (The FTC also regulates the practices of many industries, though a good number of these regulations are concerned with business-to-business relations.) FTC trade regulation rules come about when FTC staff find evidence of unfair or deceptive practices in an entire industry and recommend that the Commission begin a rulemaking proceeding, which involves hearings and written comments. FTC rules include, among many others, the Funeral Rule, which requires funeral directors to disclose price and other information about goods and services; the Cooling-Off Rule, which gives consumers three days to cancel sales for \$25 or more made away from the seller's place of business; and the Used Car Rule, which requires dealers to post on each used car a "Buyers Guide" disclosing warranty and other important information. FTC regulators have the power to take court action to stop a deceptive practice, and also can use various administrative remedies to correct a problem. The FTC is also increasingly involved in the regulation of online transactions and Internet privacy.

Besides the FTC Act, there are federal laws such as the Consumer Credit Protection Act, which includes the Truth in Lending Act, the Fair Debt Collection Practices Act, the Consumer Leasing Act, the Equal Credit Opportunity Act, the Electronic Funds Transfer Act, and the Fair Credit Reporting Act, and the Children's Online Privacy Protection Act. You can tell what areas these laws regulate by their titles.

Many states have analogous laws, known as the "Little FTC Acts," by which many states have created their own versions of the FTC. One of the notable aspects of the Little FTC Acts, or the consumer fraud laws, is that private citizens are often authorized to recover **extra damages** (that is,

more than they lost) and attorney fees if they show that a deceptive practice by a merchant caused them a loss. We will discuss this more in the remedies section below.

While federal law may set the standard by which businesses are expected to operate, it is often the state and local agencies enforcing state and local laws that will provide relief for individuals. Because the state and local agencies are smaller, they may be more responsive to the "little person." Moreover, the remedies provided by state and local law are often stronger, and apply to more merchant practices, than those under federal law.

There are other areas of government regulation that, while not aimed at protecting consumers, do affect them. These are the regulatory schemes for industries such as insurance, banking and securities. We will address many of these issues as we come to them.

**Tort law.** A **tort** is a legal wrong done by one person to another, which is not based on a contractual relationship. A common example is an auto accident injuring someone caused by a driver's negligence. It is not based on a contract between the driver and injured party, but on a legally imposed duty of care (i.e., that we won't be negligent in dealing with others). You could conceivably be damaged beyond the scope of your contractual relationship with a seller if, for example, you tripped on a pothole in the store parking lot. In this example, though, the consumer-seller relationship is incidental to the accident. It is a general principle of contract law that the **contract** -- the terms of the transaction between to parties -- defines the whole relationship between them, and any dispute actually related to that contract (as opposed to out in the parking lot) will be decided under contract law only.

-----  
-----

Sidebar

## LAW IN "ACTION"

There are a number of ways to describe a court suit, a topic we will discuss in the Remedies section of chapter 15. One term is **lawsuit** and another is **action**, which has spawned such terms as **legal action** and **court action**. For all practical purposes, these mean the same thing: When you sue someone, you have begun an **adversary proceeding** -- a hearing pitting one party against another -- presided over by a judge, who decides all legal issues, and a fact-finder -- a jury or judge who decides all fact issues. The relatively few lawsuits that are not settled reach their ultimate conclusion at a trial, but there are technical proceedings (often many) that must take place before a case is tried. In non-criminal (**civil**) cases, if the people involved go through the whole trial, the party being sued is found **liable** or not liable. The terms **guilty** and **not guilty** do not apply to civil cases.

-----

-----

On the other hand, a consumer could have a tort claim if a merchant's actions are so outrageous that they go beyond any behavior that could possibly have been anticipated in the contractual relationship. Suppose the day before he was due to paint your house, and after he'd scraped off all the old paint, the housepainter cancels your contract with him, saying he can make more money on another job. Since you're having a graduation party at home next week, you want the house to be painted quickly, and end up paying a higher amount to get someone to come fast. As outrageous as the painter's actions sound, your damages would be limited to your additional cost for the second painter. If, however, the first painter not only cancelled but glued all the paint he had scraped off back onto the house -- gluing all your windows shut in the process -- you probably would have a tort action against the painter for damaging your house. Besides extreme examples such as these, in which there are

personal injuries or physical damage to property, tort law is not usually a source of relief for aggrieved consumers.

**Criminal law.** Some behavior involving consumer transactions can be **criminal**--that is, subject the person who does them to serious fines or prison. Fraud is a crime, although it is rarely prosecuted unless it affects many people or is very large in scope. There are also specialized areas of government regulation of concern to consumers, which can give rise to criminal liability, such as the sale of securities and insurance. A criminal prosecution might not benefit the consumer who was defrauded. Sometimes a person convicted of a crime is ordered by a court to make **restitution**, that is, to pay back the people who were harmed by his crimes, but often the money is long gone by then. Criminal law is beyond the scope of this book.

**Property law.** There are three kinds of property law. What lawyers generally mean when using the term is the law regarding **real property**, or real estate -- land and buildings. There are many specialties within property law, such as zoning and land use. But to the extent property law is relevant to consumers, property law is merely a species of contract law. We discuss this kind of property law in later chapters that discuss home-buying and residential leases.

The second kind of property law is the law regarding **personal property** (any tangible thing a person can own besides real estate). Much contract law, of course, is about transactions involving personal property. But there are other issues, too, such as what happens when you borrow or lend someone an object, or the law of lost and found objects. We will discuss these in chapter 8.

The third kind is what is known as **intellectual property**, which is really a type of personal property. Intellectual property is only owned in the abstract, because it only exists in the abstract. It includes **copyright**, the right to control the distribution and use of creative works such as books, movies and computer software; **trademarks**, the right to use a specific word, term, symbol or product

presentation that indicates a recognized source of goods or services; and **patents**, the right to sell or license unique inventions. Although intellectual property has historically not been of much concern to consumers, that has changed since the Internet has given almost everyone with a computer and a phone the capacity to be a "publisher" – or an infringer, someone who wrongfully copies materials protected by the intellectual property laws.

**Business and corporation law.** Business and corporation law is highly technical and usually does not touch on consumers' rights. Its main concern is with the formation of different kinds of business entities, transactions they engage in with each other, and finance. You should understand, however, that corporations and some other forms of businesses are fictional **persons** created by the law precisely to allow their owners (stockholders, limited to partners, etc.) to avoid personally liability, or legal responsibility, for the business's debts and actions. This makes it possible for people to invest in projects that may be too large for any one of them to finance, yet without exposing themselves to limitless liability.

Each state has strict laws concerning corporations, limited liability companies, real estate trusts, limited liability partnerships, and other business entities, including rules about how and when out-of-state entities may do business in that state. Your ability to get relief against an entity that has injured you or your rights may depend on its form, its place of business, and, in a contract, what the contract says about when and how you may sue the entity. We will discuss these issues as we get to them throughout the book.

**Constitutional and civil-rights law.** There are many legal doctrines that protect people from unlawful discrimination, even in consumer transactions. Gone are the days when public accommodations such as eateries and transportation were segregated by race. You have the right not to be discriminated against in consumer transactions on the basis of sex, marital status, race or national origin. The same

goes for equal opportunity in employment. But this highly technical area is beyond the scope of consumer law *per se* and is best handled by a lawyer.

Now that we have a sense of what kind of law consumer law is, we will spend a couple of chapters on the main part of it, contract law, and learn some of the basics.

[Click here to go to Chapter 2](#)