

The Practice of Consumer Law (2d ed. 2006)

Contents

CD-Rom Contents	xxv
Chapter 1	
Overview: The Practice of Consumer Law	
1.1 Overview	1
1.1.1 The Basics	1
1.1.2 Consumer Law Encompasses Many Areas of Law and Means Different Things to Different People.	1
1.1.3 Consumer Law Practices May Change from Year to Year.	2
1.2 The National Consumer Law Center's Legal Practice Series Gets You Started	2
1.3 NCLC Provides Case Consulting and Expert Witnesses for Many Consumer Cases	2
1.4 The Annual Consumer Rights Litigation Conference Boosts Your Consumer Practice.	2
1.5 Joining the National Association of Consumer Advocates (NACA) Puts You in the Center of the Network of Consumer Lawyers	2
1.6 Your Feedback to the Authors Is Welcomed	3
Chapter 2	
The Consumer Movement	
2.1 History and Dynamics of the Consumer Movement in the United States	5
2.1.1 Overview	5
2.1.2 The First Era: The Early 1900s	6
2.1.3 The Second Era: The 1930s.	7
2.1.4 The Third Era: The 1960s and 1970s	8
2.1.5 Recent Decades	12
2.1.6 Overarching Patterns.	13
2.1.6.1 General	13
2.1.6.2 Institutionalization	13
2.1.6.3 Specialization	13
2.1.6.4 Professionalization.	14
2.1.6.5 Changing Strategies	14
2.1.6.6 Internationalization	14
2.1.6.7 Persisting Tensions Within the Movement	15
2.1.7 Contributions.	16
2.2 Legal Services and the Consumer Movement	17
2.2.1 General.	17
2.2.2 Types of Legal Aid Programs.	18
2.2.3 History of Legal Aid.	18
2.3 The National Consumer Law Center, Inc.	19
2.4 National Association of Consumer Advocates, Inc. (NACA)	21

Chapter 3

Starting a Private Consumer Law Practice

3.1 The Discussion	23
3.2 Considerations Before Starting a Practice	24
3.3 Get Clear Fee Agreements and Keep Time Carefully	24
3.4 Choose a Specialty	25
3.5 Use Truth and Justice As Your Ally	25
3.6 Link Up with Others	25
3.7 Make Technology Work for You	26
3.8 Market Yourself and Your Practice	27
3.9 Practice Law But Have a Life	28
3.10 Conclusions	28

Chapter 4

Making Money on Small Consumer Claims

4.1 Introduction	29
4.2 Screening the Claim	29
4.2.1 The Expert's Report	29
4.2.2 The Chronology/Client File	29
4.3 The Initial Client Interview	30
4.3.1 Importance of Client Bringing Key Documents	30
4.3.2 Minimum Liability Facts—the “MLF”	30
4.3.3 Identify All Liability and Damage Issues	30
4.4 The Fee Agreement	30
4.4.1 General Considerations	30
4.4.1.1 Mandatory Agreements	30
4.4.1.2 The Fee Agreement Should Be Established at Once	31
4.4.1.3 Amending the Fee Agreement	31
4.4.1.4 Inequality of Bargaining Power	31
4.5 Contingent-Fee Contracts	31
4.5.1 Setting Forth All the Terms	31
4.5.2 Percentage of Recovery	31
4.5.3 The Hourly Recovery	32
4.5.4 Sanctions	32
4.5.5 Equitable Relief	32
4.5.6 Early Termination by the Client	32
4.5.7 Payment of Expenses by the Client	33
4.5.8 Disclaimer of Warranties or Solicitation	33
4.6 Addressing the Client's Damages	33
4.6.1 Communicating with Client	33
4.6.2 The Demand Letter	33
4.6.3 The Complaint	34
4.6.3.1 Getting It Right the First Time	34
4.6.3.2 Pleading the Facts	34
4.6.3.3 Pleading the Theories of Liability	34
4.6.3.4 Pleading Damages	34
4.6.3.5 Checklist of Statutory Causes of Action	34
4.6.3.6 Serving Discovery with the Pleadings	35
4.6.3.7 First Strike	35
4.7 The Early Summary Judgment Motion	36
4.8 Requests for Admissions	36
4.9 Choice of Court	36
4.10 Conclusion	37

Contents

Chapter 5

The Importance of Legal Services Consumer Law Specialization	39
5.1 The Importance of Consumer Protections to Low-Income Households.	39
5.2 The Special Role of Legal Services	40
5.3 Consumer Law and the Poor	40
5.4 Consumer Law As Income Protection	41
5.5 Consumer Law As Asset Protection	41
5.6 Consumer Law Guarantees a Fresh Start	42
5.7 Consumer Law As Access to Necessities of Life	42
5.8 Consumer Law As Crisis Mitigation	42
5.9 Cycles of Consumer Law	43
5.9.1 Overview	43
5.9.2 Consumer Law in the Last Decade	44
5.9.3 Deregulation: The Poor Paying More.	44
5.9.4 Equity Lending—Saving Homes	44
5.9.5 Government As Debt Collector.	45
5.9.6 Emerging Standards of Fairness	45
5.9.7 Ultimate Control—Ultimate Liability.	45
5.9.8 Deep Pockets and Personal Liability	45
5.9.9 Finding the Bad Apple	45
5.9.10 Dealing with Retailers' Inappropriate Use of Compulsory Arbitration . . .	46
5.9.11 Challenges Lay Ahead.	46
5.10 Seven Lessons of Consumer Law Practice in Legal Services	46
5.11 Tips for Starting a Consumer Law Specialty in Legal Services	47

Chapter 6

Consumer Advocacy in Government and Academics

6.1 Overview	49
6.2 State Government Consumer Protection	49
6.2.1 General	49
6.2.2 State Regulation of Consumer Practices Developed Many Years Ago . . .	49
6.2.3 State Attorney General Consumer Protection Authority	50
6.2.4 State Regulatory Board Consumer Protection	51
6.2.5 Cooperating with a State Consumer Protection Agency	51
6.3 Federal Government Consumer Protection	52
6.3.1 General	52
6.3.2 Cooperating with the FTC	52
6.4 Consumer Protection in Academia	53
6.5 Working in Government and Academia	53
6.6 Conclusion	54

Chapter 7

Ethical Issues in the Practice of Consumer Law

7.1 Introduction	55
7.2 Providing the Public Information About Your Consumer Law Practice	55
7.2.1 The ABA Ethical Rules on Lawyer Advertising and Outreach:	
Introduction	55
7.2.2 ABA Rule 7: "Information About Legal Services"	56
7.2.2.1 Overview	56
7.2.2.2 Rule 7.1: Communications Concerning a Lawyer's Services	56
7.2.2.3 Rule 7.2: Advertising	56
7.2.2.4 Rule 7.3: Personal Contact with Prospective Clients	56
7.2.2.5 Rule 7.4: Communication of Fields of Practice	57
7.2.2.6 Rule 7.5: Firm Names and Letterheads	57
7.2.3 Consumer Education Through Public Speaking, the Press, and the Radio . .	57

Practice of Consumer Law

7.4 Office Organization	58
7.4.1 General	58
7.4.2 The Sole Practitioner	58
7.4.3 Partnerships	58
7.4.4 Office Sharing or the “Professional Association”	58
7.5 Referrals	59
7.6 Fee Agreements and Disclosures	59
7.6.1 Fees Must Be Reasonable	59
7.6.2 Factors in Determining a “Reasonable Fee”	59
7.6.3 Agreement on Fees	59
7.6.4 Need for Written Agreement	60
7.6.5 Contingent Fees Must Be Reasonable	60
7.6.6 Fee Dispute Resolution	62
7.7 The Client’s Authorization to Sue as a Class Representative	62
7.8 Trial Publicity	63
7.9 Agreements Not to Represent Future Clients Against a Business Are Unethical	64
7.10 Communicating with a Defendant’s Employees	65
7.11 Taping Telephone Calls	66
7.12 Using Undercover Testers or Investigators	68
7.13 Conclusion	69

Chapter 8

Fifty Ways to Lose a Winner, or, “Kids! Don’t Try This at Home!”

8.1 Introduction	71
8.2 Triage: Mistakes to Avoid When Considering a Lawsuit	71
8.3 Trial: Mistakes to Avoid During a Lawsuit	73
8.4 Practical: Mistakes to Avoid Just About Any Time	75
8.5 Personal: Mistakes to Avoid All the Time	75

Chapter 9

Troublesome Businesses and Common Legal Approaches

9.1 Familiarity with Trade Practices Key to Successful Representation	77
9.2 Automobile Fraud	77
9.2.1 Introduction	77
9.2.2 Misrepresentation or Non-Disclosure of Vehicle’s Adverse History	77
9.2.3 Automobile Warranties and Repairs	78
9.2.4 Deceptive Pricing, Financing, and Sales Techniques	79
9.2.4.1 General	79
9.2.4.2 Dealer Add-Ons and Other Financing Deception	79
9.2.4.3 Yo-Yo Sales	79
9.2.4.4 Vehicle Leasing	80
9.2.4.5 Automobile Subleases and Brokerage	80
9.2.4.6 Credit Reports	80
9.2.4.7 Discrimination	80
9.2.5 Repossessions and Collection Activity	80
9.3 Sale and Rental of Housing; Home Improvements	81
9.3.1 Home Sales	81
9.3.2 Property Flipping Schemes	81
9.3.3 Manufactured Homes and Mobile Home Parks	81
9.3.4 Rental Housing	82
9.3.5 Home “Improvement” Scams	82
9.4 Sale of Other Goods and Services	82
9.4.1 Introduction	82
9.4.2 Telemarketing Fraud	82
9.4.3 Vocational Schools and Student Loans	83

Contents

9.4.4 Immigration Consultants or Assistants	83
9.4.5 Telephone Service	84
9.4.6 Timeshares, Resort Memberships, Health Spas	84
9.4.7 Nursing Homes, Assisted-Living Facilities	84
9.5 Debtors' Rights and Credit Reporting	84
9.5.1 Debt Collection Harassment	84
9.5.2 Consumer Credit Counseling	85
9.5.3 Debt Settlement, Debt Elimination	85
9.5.4 Credit Reporting	86
9.5.6 Credit Repair Organizations	87
9.5.7 Consumer Bankruptcy	87
9.6 Predatory Mortgage Lending and Home Defense	87
9.6.1 Predatory Mortgage Lending	87
9.6.2 Foreclosure Defense	89
9.6.3 Home Rescuer Foreclosure Rescue Scams	89
9.7 Non-Mortgage Credit and Fringe Lenders	90
9.7.1 Banks, Thrifts, Credit Unions, Finance Companies, and Retail Installment Sellers	90
9.7.2 Credit Cards	90
9.7.3 Payday Loans	91
9.7.4 Pawnbrokers and Title Pawn Lenders	92
9.7.5 Refund Anticipation Loans	92
9.7.6 Rent to Own (RTO)	92

Chapter 10

Analysis of Consumer Transactions

10.1 Consumer Law: Wide and Deep	95
10.2 A Map of Consumer Protection Legislation	95
10.3 Access to Credit	95
10.3.1 General	95
10.3.2 Equal Credit Opportunity Act	96
10.3.3 Fair Credit Reporting Act	96
10.4 Advertising and Inducement	97
10.4.1 FTC and Truth in Lending Requirements	97
10.4.2 State Unfair and Deceptive Acts and Practices (UDAP) Statutes	97
10.4.3 Common Law Fraud	97
10.4.4 Racketeer Influenced and Corrupt Organizations Act	97
10.4.5 Telemarketing Laws	98
10.4.6 Cancellation Rights	98
10.5 Are the Contract Terms Properly Disclosed and Do They Comply with Applicable Statutes and Regulations?	98
10.5.1 Disclosure Requirements of the Federal Truth in Lending Act	98
10.5.2 Home Ownership and Equity Protection Act (HOEPA)	98
10.5.3 State Credit Laws	98
10.5.4 Credit Practices Rule	99
10.5.5 Special State Laws Applicable to Particular Types of Transactions	99
10.6 Performance	99
10.6.1 Warranties	99
10.6.2 Odometer Law	100
10.6.3 FTC Used Car Rule	100
10.7 Collection	100
10.7.1 Fair Debt Collection Practices Statutes	100
10.7.2 Repossession	100
10.7.3 Foreclosure of Residential Property	100
10.7.3.1 State Foreclosure Laws	100

Practice of Consumer Law

10.7.3.2 Truth in Lending Rescission	101
10.7.3.3 State Credit Regulation Laws.	101
10.7.3.4 Cooling-Off Period.	101
10.7.4 Garnishment and Attachment	101
10.7.5 Bankruptcy	101
10.8 Conclusion	101

Chapter 11

Keeping America's Economy Strong: Enforcing Consumer Protection Laws as Congress Intended

11.1 Introduction	103
11.2 The Basic Problem: A Completely Unregulated Market Does Not Work	103
11.3 The Engines That Work Together to Create an Inefficient Market	104
11.3.1 Shameful Greed	104
11.3.2 Generally Accepted Procedures Instead of Honest Procedures	104
11.3.3 Debt Is the American Way	105
11.3.4 Advertising Works.	105
11.3.5 The Result of These Factors	105
11.4 The Controls Selected by Congress to Increase the Efficiency of the Market	105
11.5 Countering the Argument That a Consumer with Debts Is a Bad Person	106
11.6 Real Individual Harm Results from Violations of These Statutes.	108
11.7 Conclusion	108

Chapter 12

A Guide to Price Traps in Mortgage Loans

12.1 Introduction	109
12.2 Interest Rate (the “Note Rate”)	109
12.3 Variable Rates	110
12.4 Points (“Origination” Fees, “Discount” Fee, etc.)	110
12.5 Other Closing Costs/Junk Fees	110
12.6 Brokers’ Fees	111
12.7 Credit Insurance	111
12.8 Non-Credit Insurance and Other Ancillary Contracts	112
12.9 Balloon Loans	113
12.10 Accounting	113
12.11 Prepayment Penalties	113
12.12 Refinancing and “Flipping”	114
12.13 General Resource for Fair Lending Issues	114

Chapter 13

Saving a Client’s Home Through Bankruptcy

13.1 Overview	115
13.2 Curing Defaults Outside Bankruptcy	115
13.3 Pre-Filing Issues—Gathering the Necessary Information	115
13.4 Preparing the Chapter 13 Plan	116
13.5 Plans Involving “Strip Down” or “Strip Off”	116
13.6 Lien Avoidance	117
13.7 Requirements for Plan Confirmation	118
13.8 Automatic Stay Limitations Based on Repeat Filings	118
13.9 Post-Confirmation Defaults and Relief from Automatic Stay	119
13.10 Proper Crediting of Plan Payments	119
13.11 Liquidating Chapter 13 Plans	119
13.12 Asserting Non-Bankruptcy Claims and Defenses	120
13.13 Conclusion	120

Contents

Chapter 14

Is That Arbitration Clause Unconscionable? PROVE IT!

14.1 Factual Record Key to Fighting Unfair Arbitration Clauses	121
14.2 Proving Procedural Unconscionability	121
14.3 Substantive Unconscionability	122
14.3.1 Introduction	122
14.3.2 Five Points to Consider in Proving That an Arbitration Clause Imposes Excessive Fees	123
14.3.3 Challenging Arbitration Clauses That Prohibit Class Actions	124
14.4 Conclusion	124

Chapter 15

Car Cases 101: Creating the Interview Form

15.1 Introduction	125
15.2 Areas to Be Covered	125
15.3 Basic Information on Client	125
15.4 Basic Information on Vehicle	126
15.5 Now It Is Your Turn to Talk	126
15.6 The Possible Claims	127
15.7 The Attorney Fee Agreement	127

Chapter 16

Formal and Informal Discovery

16.1 Informal Pre-Suit Discovery	129
16.1.1 Client Documents, Witnesses, Public Records	129
16.1.2 The Consumer's Statutory Right to Obtain Information from Opposing Parties	129
16.1.2.1 Introduction	129
16.1.2.2 Qualified Written Requests Under RESPA	129
16.1.2.3 Finding Out What Entity Holds the Consumer's Obligation	130
16.1.2.4 Obtaining Information About Debts in Collection	130
16.1.2.5 Explanation of Amount Creditor Seeks as Deficiency After Selling Collateral	131
16.1.2.6 Identifying the Collateral for an Obligation	131
16.1.2.7 Determining the Balance on a Secured Obligation	131
16.1.2.8 Information About Charges on Monthly Statements for Credit Cards and Other Open-End Credit	132
16.1.2.9 Information About Payments Made Through Debit Cards and Other Electronic Fund Transfers	132
16.2 Items to Seek in Formal Discovery	132
16.2.1 Original Files and Documents	132
16.2.2 Pattern Evidence	133
16.2.3 Net Worth Discovery	133
16.3 Making the Most of Available Discovery Techniques	133
16.4 Cadillac Discovery on a Buick Budget	134
16.5 The Defendant's Deposition of the Consumer Plaintiff	135
16.6 Videotaping the Deposition of the Consumer	136
16.7 Dealing with Missing Documents	137

Chapter 17

Expert Witnesses

17.1 Selecting an Expert Witness	139
17.1.1 Is an Expert Witness Necessary?	139
17.1.2 Locating an Expert Witness	139
17.1.3 Affording Expert Witnesses in Legal Services or Pro Bono Cases	140

Practice of Consumer Law

17.1.4 Arranging for an Expert Inspection	140
17.1.5 Inspection by the Opposing Party	140
17.2 Admissibility of Expert Testimony Under <i>Daubert</i>	141
17.2.1 The <i>Daubert</i> Ruling	141
17.2.2 The <i>Daubert</i> Factors	142
17.2.3 Application of the <i>Daubert</i> Factors	143
17.2.4 Discovery of the Expert's Opinion	144
17.2.5 Timing of the Inquiry into Admissibility	145
17.3 Cross-Examining the Opponent's Expert Witness	145
17.3.1 General Rules	145
17.3.2 Bringing Out Testimony That Supports the Consumer	146
17.3.3 Discrediting the Opposing Expert on Cross-Examination	146
Chapter 18	
“Keep Your Hands Up!”—Trade Secrets, Protective Orders, and the Smoking Gun	
18.1 Importance of Defendant's Records in Consumer Litigation	147
18.2 How the Problem Arises	147
18.3 Rights Affected: Think Before You Stipulate	148
18.4 What Is the Court's Authority?	148
18.5 Requirements for Issuance of a Protective Order	149
18.5.1 General	149
18.5.2 Specific and Timely Objection	149
18.5.3 Timely Motion	149
18.5.4 Good Cause	150
18.6 Recommendations	151
18.7 Conclusion	151
Chapter 19	
Settling Consumer Cases	
19.1 Negotiation	153
19.1.1 Pre-Suit Preparation for Settlement	153
19.1.2 Framing the Initial Demand	153
19.1.3 Constructive Engagement with Defense Counsel	153
19.1.4 Settling with Financially Shaky Defendants	154
19.1.5 The Mechanics of Settlement	155
19.1.6 Documenting Settlement Efforts	155
19.2 Mediation	155
19.3 Settlement of Cases with Multiple Defendants	155
19.4 Attorney Fees and Settlements	156
19.4.1 Settlement Offers That Do Not Provide Sufficient Attorney Fees	156
19.4.2 Preserving the Right to Fees When Settling a Case	157
19.5 Settlement Terms	157
19.5.1 Prompt Payment	157
19.5.2 Confidentiality Agreements	158
19.5.3 Other Terms and Clauses	158
19.5.4 Court Costs and Financing Costs	158
19.6 Settlements of Consumer Disputes Should Address Consumer's Credit Report	159
19.6.1 Importance of Resolving Credit Reporting Issues	159
19.6.2 Selecting the Correct Settlement Language	159
19.6.3 Alternative I: Deleting All Mention of the Debt	161
19.6.4 Alternative II: Correcting the Status of an Account But Retaining Information About the Account	161
19.6.5 Obtaining Court Approval	162
19.6.6 Court Orders Should Cover Credit Reporting Issues	162

Contents

Chapter 20

Consumer Litigation's Tax Consequences for Prevailing Clients	
20.1 Introduction	163
20.2 Double Taxation of Attorney Fees	163
20.3 Contingent Fee Not Includable in Gross Income When Underlying Award Not Taxable	163
20.4 Inclusion of Fees in Gross Income May Not Trigger the AMT	163
20.5 <i>Banks</i> Does Not Address Tax Consequences of Statutory Attorney Fees.	164
20.6 Settlement Characterization of Attorney Fees As Statutory or Contingent Can Affect Client Tax Liability	165
20.7 Fees Are Never Taxable in "Civil Rights" Cases	165
20.8 Applicability of Banks to Class Actions	165
20.9 What Portion of a Consumer's Damage Recovery Is Taxable?	166
20.9.1 General	166
20.9.2 Damages in Personal Injury Cases Are Not Taxable	166
20.9.3 Treatment of "Pain and Suffering" Damages	166
20.9.4 Damages Relating to Overpayment for Goods, Services, and Related Charges Are Not Taxable	166
20.9.5 Taxability of Multiple and Statutory Damages	167
20.9.6 Distinguishing Non-Taxable Damages from Taxable Damages in Settlement Documents	167
20.10 Recovering As Actual Damages Any Excess Tax Obligations Created by the Need to Litigate.	167
20.11 Advantages of Characterizing a Recovery As Loan Forgiveness	167
20.11.1 Introduction	167
20.11.2 Four Exceptions When Loan Forgiveness Not Treated As Client Income	168
20.11.3 Bankruptcy	168
20.11.4 Insolvency	168
20.11.5 Disputed or Contingent Debts	168
20.11.6 Forgiveness of Interest and Fees Is Not Taxable; TIL Rescission As an Important Example	169
20.11.7 The Amount Saved in Interest and Fees Is Not Income	169
20.12 Implications of Client's Receipt of Form 1099-C, Evidencing Debt Cancellation	169
20.12.1 The Form 1099-C Reporting Requirement	169
20.12.2 Taxpayer Need Not Always Treat DOI Reported on 1099-C As Includable in Gross Income	169
20.12.3 Consequences of Creditor Filing an Improper 1099-C	170
20.13 Ten Tax Planning Tips	170

Chapter 21

Trial of Consumer Cases

21.1 Jury Trial	171
21.1.1 Right to Jury Trial	171
21.1.2 Demanding a Jury Trial	171
21.1.3 Preparing for Jury Trial	172
21.1.4 <i>Voir Dire</i>	172
21.2 Evidence	173
21.2.1 Use of Exhibits at Trial	173
21.2.2 Evidence of Other Bad Acts	173
21.3 Witnesses	175
21.3.1 Helping Fraud Victims Prepare for Testimony	175
21.3.2 Order of Witnesses	175
21.4 Counteracting Defense Arguments	176

Practice of Consumer Law

21.5 Jury Instructions and Special Verdict Sheets	177
21.5.1 Timing Issues	177
21.5.2 Drafting	177
21.5.3 Attorney Fee Awards Not for Jury to Determine	177

Chapter 22

Consumer Law Remedies in Individual Suits

22.1 Introduction	179
22.2 Compensatory Damages	179
22.2.1 General Principles	179
22.2.1.1 Assessing and Developing All Damage Claims	179
22.2.1.2 Maximizing Damage Awards Benefits the Community As Well As Clients	180
22.2.1.3 Interpreting the Remedy Provisions of Consumer Protection Statutes	180
22.2.1.4 Legal Labels for Damages May Have More Than One Meaning	181
22.2.2 Methods to Calculate Direct Damages	182
22.2.2.1 Liberal Interpretation for Consumer Cases	182
22.2.2.2 Loss-of-Bargain Damages	182
22.2.2.3 Cost-to-Repair Damages	183
22.2.2.4 Out-of-Pocket Damages or Restitution	183
22.2.3 Emotional Distress	183
22.2.3.1 History and Availability in Tort Actions	183
22.2.3.2 Emotional Distress Damages for Breach of Warranty	184
22.2.3.3 Emotional Distress Damages for Violations of Consumer Protection Statutes	184
22.2.3.4 Developing and Proving an Emotional Distress Damages Case	184
22.2.3.5 Damages for Aggravation and Inconvenience	185
22.2.4 Physical Injuries	186
22.2.5 Consequential Damages	186
22.2.5.1 General	186
22.2.5.2 Financing Costs As Consequential Damages	186
22.2.5.3 Damages Based on Consumer's Lost Time or Earnings	187
22.2.5.4 Lost Use of a Product or Service	187
22.2.5.5 Attorney Fees	188
22.2.5.6 Other Out-of-Pocket Losses	188
22.2.5.7 Damages to Personal Relationships	188
22.2.5.8 Injury to Credit Rating	188
22.2.5.9 Pre-Judgment Interest	189
22.2.6 Proving Actual Damages	189
22.2.6.1 General	189
22.2.6.2 Proving Physical Injury and Emotional Distress Damages	189
22.2.6.3 Causation	190
22.2.7 Contractual and Other Limitations on Damages	190
22.2.7.1 Contractual Limitations on Damages	190
22.2.7.2 Collateral Source Rule	190
22.2.7.3 Mitigation of Damages	191
22.2.7.4 Economic Loss Rule	191
22.2.7.5 Relationship of Actual Damages to Other Damages	191
22.3 Statutory and Multiple Damages	191
22.3.1 Minimum Statutory Damages	191
22.3.2 Multiple Awards of Statutory Damages	193
22.3.3 Statutory Damages Plus Actual Damages	193
22.3.4 Statutory Damages in Class Actions	194
22.3.5 Multiple Damages	194

Contents

22.4 Punitive Damages	194
22.4.1 The Importance of Punitive Damages.	194
22.4.2 Preparing to Handle Punitive Damages Cases	195
22.4.3 Availability of Punitive Damages.	195
22.4.3.1 Availability Under Common Law	195
22.4.3.2 Availability for Statutory Claims.	196
22.4.3.3 Common Law Fraud or Tort Punitive Damages When UDAP or Other Consumer Protection Statute Does Not Allow Punitive Damages.	196
22.4.4 Constitutional Limits on the Size of Punitive Damages Awards	196
22.4.4.1 Introduction.	196
22.4.4.2 Reprehensibility	196
22.4.4.3 Ratio to Compensatory Damages	197
22.4.4.4 Penalties for Comparable Misconduct	197
22.4.4.5 Practical Tips	198
22.4.5 State Statutory Caps on Punitive Damage Awards	198
22.4.6 Interrelation of Punitive Damages with Other Remedies	198
22.5 Rescinding or Voiding Contracts	199
22.5.1 Introduction	199
22.5.2 Cooling-Off Period for Door-to-Door and Other Off-Premises Sales	199
22.5.3 Statutory Right to Cancel Other Specific Types of Contracts	200
22.5.4 Truth in Lending Rescission for Home-Secured Loans	200
22.5.5 Right to Reject or Revoke Acceptance of Purchased Goods; Automobile Lemon Laws	200
22.5.6 Unconscionable Contracts	200
22.5.7 Rescission Under State UDAP Statutes.	201
22.5.8 Misrepresentation or Fraud	201
22.5.9 Contract Law Grounds for Voiding Contracts	202
22.5.9.1 Incapacity	202
22.5.9.2 Illegality	202
22.5.9.3 Duress and Undue Influence	202
22.5.9.4 Failure of Consideration	203
22.5.9.5 Mistake	203
22.5.10 Relationship of Rescission to Other Remedies	203
22.5.11 Negotiating Cancellation of a Debt in Settlement of a Damage Claim	204
22.6 Injunctions and Other Equitable Relief	204
22.6.1 Advantages of the Injunctive Remedy	204
22.6.2 Does a UDAP Statute Authorize Private Injunctive Relief?	204
22.6.2.1 Statutes That Explicitly Authorize Private Injunctive Relief	204
22.6.2.2 Implying an Injunctive Remedy in Other States	205
22.6.3 Injunctive Relief Under Other Consumer Protection Statutes	205
22.6.4 Preconditions for Private Injunctive Relief	206
22.6.4.1 Must the Plaintiff Be Injured?	206
22.6.4.2 Must the Plaintiff Benefit from the Injunction?	206
22.6.4.3 Does an Adequate Remedy at Law Prevent Injunctive Relief?	207
22.6.5 Other Equitable Relief	207
22.7 Declaratory Relief	208
22.8 Putting a Business Scam into Involuntary Bankruptcy	208
22.9 Consumers' Attorney Fees and Costs	209
22.9.1 Purpose of Fee-Shifting Provisions of Consumer Protection Statutes	209
22.9.2 Calculating the Amount of an Attorney Fee Award	209
22.9.3 Procedure for Seeking Fees	210

Chapter 23	Common Defenses and Defense Tactics	
23.1	Introduction	211
23.2	The Fly-by-Night Merchant: Thin Capitalization.	211
23.3	Discovery Abuse	212
23.3.1	General	212
23.3.2	Invalid Objections to Written Discovery	212
23.3.3	Inappropriate Objections at Depositions	212
23.3.4	Delay in Producing Documents or Making Witnesses Available	213
23.3.5	Late Discovery Supplementation	213
23.3.6	Destruction of Documents	213
23.3.7	Preparing for Discovery Battles.	214
23.4	Offers of Judgment	214
23.5	Stonewalling, Lying, and Attacking the Plaintiff's Character.	216
23.6	Arbitration	216
23.7	Counterclaims	216
23.7.1	General	216
23.7.2	Substantive Counterclaims	217
23.7.3	Procedural "Bad Faith" Counterclaims.	217
23.8	SLAPP Suits.	218
23.8.1	General	218
23.8.2	Court Responses to SLAPP Suits.	219
23.8.3	Legislative Responses to SLAPP Suits	219
23.8.4	Responding to a SLAPP Suit	221
23.9	Bona Fide Errors and Ignorance.	221
23.10	Preclusion of a Pending Consumer Claim Through a Class Settlement in Another Case	222
23.11	Removal of Case to Federal Court	222
Chapter 24	Consumer Class Actions	
24.1	Introduction	223
24.2	Initial Considerations: Case Selection and Formulation, Experience, and Capital	224
24.2.1	General	224
24.2.2	Consumer Adequacy	224
24.2.3	Evaluation of Claims.	224
24.2.4	Experience.	225
24.2.5	Co-Counsel	225
24.2.6	Capital	226
24.2.7	Balancing the Precepts.	226
24.3	Attorney Fees	226
24.4	Ethical Issues in Settlements	227
24.5	Summary	229
Chapter 25	Preparing Your First Appellate Argument	231
Chapter 26	Historical Development of Consumer Law: Usury Laws	
26.1	Introduction	235
26.2	Early Attitudes Toward Interest	235
26.3	General Usury Statutes in the United States.	236
26.4	Special Usury Laws.	237
26.4.1	General	237

Contents

Chapter 27	The Use of Testers and Investigators in Civil Litigation	
	27.1 Introduction	241
	27.1.1 Background	241
	27.1.2 Overview of the Ethical Issues	242
	27.1.3 The Impact of Choice of Law Makes Even the Clearest Rule Vague	242
	27.2 <i>Ex Parte</i> Contacts with Current Employees of an Opposing Party	243
	27.2.1 Model Code	243
	27.2.2 Model Rule 4.2	243
	27.2.3 The Federal Court “National Standard” of <i>Ex Parte</i> Contacts with Current Employees	244
	27.3 <i>Ex Parte</i> Contacts with Former Employees of an Opposing Party	244
	27.3.1 Model Code	244
	27.3.2 Model Rule 4.2	244
	27.3.3 The Federal Court “National Standard” of <i>Ex Parte</i> Contacts with Former Employees	245
	27.4 Even When <i>Ex Parte</i> Contact Is Proper, Model Rule 4.3 Establishes Ethical Duty of Disclosure	246
	27.4.1 General Duties to Unrepresented Persons	246
	27.4.2 The Ethical Duty Not to Solicit Privileged Information	246
	27.4.3 Sanctions and Other Restrictions Can Result from Improper <i>Ex Parte</i> Contacts	247
	27.5 Do Model Rules 4.2 or 4.3 Apply to Undercover Investigative Proceedings?	247
	27.5.1 General	247
	27.5.2 Whether Undercover Investigations Are Within Rule 4.2	248
	27.5.3 Whether Undercover Investigations Are Within Rule 4.3	250
	27.5.4 Model Rules 4.1 and 8.4: Is Dishonesty for Good Purposes Ethical?	251
	27.5.4.1 General	251
	27.5.4.2 Authority Holding White Lies are Acceptable	252
	27.5.4.3 Authorities Finding White Lies to Be Deceitful	253
	27.6 Conclusion	254
Appendix A	Client Retainer Forms and Co-Counseling Agreement	
	A.1 Retainer Agreement	257
	A.2 Sample Retainer Letter and Agreement	259
	A.3 Draft Co-Counseling Agreement	259
Appendix B	Intake and Investigation Practice Aids	
	B.1 Consumer Dispute Questionnaire	261
	B.2 Request to Postmaster for New Address or Boxholder Information Needed for Service of Legal Process	264
Appendix C	Sample Pleadings, Discovery and Memorandum of Law	267
Appendix D	Consumer Lawyers’ Brief Biographies	269

	<i>Practice of Consumer Law</i>	
Appendix E	Abbreviations and Consumer Lawyer Alphabet Soup	305
Appendix F	NACA Consumer Class Action Guidelines	309
Appendix G	Free Legal Resources on the Internet	323
	Index	329
	Quick Reference to Consumer Credit and Sales Legal Practice Series . . .	347
	About the Companion CD-Rom	369