



STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report

Relating to

Door-to-Door Retail Installment Sales Act

December 6, 2010

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the draft tentative report, please inform the Commission so that your approval can be considered along with other comments.

**COMMENTS SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN
January 14, 2011.**

Please send comments concerning this tentative report or direct any related inquiries, to:

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Introduction

In an effort to protect consumers from the “often unethical persuasion of certain door-to-door sellers,” the Legislature, in 1968, enacted the Door-to-Door Retail Installment Sales Act (DDRISA), *N.J.S.* 17:16C-61.1 to -61.9. One provision of the DDRISA mandates a “cooling-off period” during which the consumer has a statutory right to rescind a transaction made as result of a sale “entered into at a place other than the place of business” of the seller. *N.J.S.* 17:16C-61.5(a). The consumer exercises his or her right to rescind by furnishing the seller with notice of intent to rescind the sale or installment contract. *N.J.S.* 17:16C-61.5(a)(1). Such notice is to be provided by certified mail, postmarked “not later than 5 p.m. of the third business day” following the sale. *Id.* At the time of the transaction, it is the seller’s responsibility to give the buyer notice of the right to rescind and explain how it can be exercised, pursuant to *N.J.S.* 16:16C-61.6, which also specifies the form that the notice of the right to rescind shall take.

Federal regulations, promulgated by the Federal Trade Commission (FTC) similarly provide for a cooling-off period obligating sellers to provide buyers with notice of the right to cancel. 16 *C.F.R.* §§ 429.0 to 429.2. The federal rule differs, however, from the New Jersey provisions in its notice requirement of the right to rescind and length of the cooling-off period. The federal rule protects the consumer by providing that, pursuant to 16 *C.F.R.* § 429.1(a), the seller commits “an unfair and deceptive act or practice” if the seller fails to inform the consumer of the right to rescind the sale or installment contract. To rescind under the FTC rule, the consumer need only “mail or deliver . . . or send a telegram [of]” written notice to the seller. 16 *C.F.R.* § 429.1(b) (differing from certified mail requirement of New Jersey law). In addition, the FTC rule provides for a slightly longer cooling-off period, extending the consumer’s right to rescind up to midnight of the third business day after the sale. *Id.*

Cognizant that at the time of the formulation of its own rule thirty-three states had already adopted cooling-off provisions, the FTC included a section commenting on preemption. *See* 16 *C.F.R.* § 429.2(b). The section states that:

Such [state laws regulating door-to-door sales] which do not accord the buyer, with respect to the particular transaction, a right to cancel a door-to-door sale that is substantially the same or greater than that provided in this part, . . . or which do not provide for giving the buyer a notice of the right to cancel the transaction in substantially the same form and manner provided for in this part, are among those which will be considered directly inconsistent.

[Id.]

Pursuant to the Supremacy Clause of the United States Constitution, federal law or regulation may preempt conflicting state law. *R.F. v. Abbott Labs.*, 162 *N.J.* 596, 619 (2000). Here, under 16 *C.F.R.* 429.2(b), the FTC has made explicit its intention to preempt state laws that do not provide the buyer with protections that are “substantially the same or greater” than what the FTC rule provides in the regulation of door-to-door sales. But, when a state law favors the consumer, the FTC rule will not preempt.

In *United Consumer Financial Services v. Carbo*, the Appellate Division compared the different regulations and concluded that the FTC rule preempted both the duration of the DDRISA's cooling-off period and its requirement for cancellation by certified mail. 410 *N.J. Super.* 280 (App. Div. 2009). The court found the FTC rule to be "more favorable to the consumer" than the DDRISA's "shorter 'cooling-off period' and more burdensome method of cancellation." *Carbo, supra*, 410 *N.J. Super.* at 300. Because the DDRISA's protection was not "substantially the same or greater than that provided" by the FTC rule, sections 17:16C-61.5(a)(1) and -61.6(b) were preempted. *Id.*

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Based on the court's findings in *Carbo*, the Commission recommends the following revisions to New Jersey's DDRISA so that consumer protection in this area is in "substantially the same form and manner provided for" by federal regulations:

17:16C-61.5. Rescission; duties of buyer and seller; exception of certain sales; record of buyer's notice

a. Any retail installment sale of goods or retail installment contract for the sale of goods, other than a motor vehicle, a boat, and motor vehicle or boat accessories, for a purchase price in excess of \$ 25.00, which is entered into at a place other than the place of business of the retail seller may be rescinded by the retail buyer if the retail buyer:

(1) Furnishes to the retail seller a notice of intent to rescind the retail installment sale or retail installment contract by ~~certified mail~~, delivery, telegram or electronic communication ~~return receipt requested, postmarked not later than 5 p.m. prior to midnight~~ of the third business day following the day on which the retail installment sale or retail installment contract is executed; and

(2) Gives up possession of any goods, subject to such retail installment sale or retail installment contract, delivered to the retail buyer prior to receipt by the retail seller of such notice of intent to rescind.

b. Within 10 business days after receipt of such notice of intent to rescind the retail installment sale or retail installment contract, a retail seller shall:

(1) Pick up, at his own expense, any goods subject to such sale or contract, delivered to the retail buyer prior to receipt by the retail seller of such notice;

(2) Refund to the retail buyer all amounts of money paid by the retail buyer (less reasonable charges for any damage to such goods which occurred while in the possession of the retail buyer); and

(3) Redeliver to the retail buyer any goods traded-in to the retail seller on account of or in contemplation of the retail installment sale or retail installment contract (less any reasonable charges actually incurred in making the goods ready for sale).

c. This section does not apply to mail order sales, telephone sales, catalog sales where an order is placed by mail or telephone, or sales in which the retail buyer has requested the retail seller to enter into the sale at a place other than the retail seller's place of business,

but it does apply to sales in which the retail buyer has requested the retail seller to conduct a demonstration or exhibition at a place other than the retail seller's place of business and has not also requested to enter into a sale at that place at the same time he has requested such demonstration or exhibition.

d. Each retail seller shall maintain a record of the receipt of any retail buyer's notice of intent to rescind a sale under this act for at least 18 months after the receipt of such notice of intent to rescind.

COMMENT

Subsection a.(1) has been revised in alignment with the FTC rule, 16 *C.F.R.* 429.1(b). The revision deletes the requirement that the buyer's notice to rescind be sent by certified mail, and the duration of the cooling-off period has been extended to midnight of the third business day following the sale. *See Carbo, supra*, 410 *N.J. Super.* 280. The form of delivery has been broadened to include "telegram" and "electronic communication." While seemingly out of place in twenty-first century communications, the telegram, where available, serves a practical purpose in light of the duration of the cooling-off period. That is, to "mail" might mean that a consumer would need to send notice of rescission by 5 p.m. on the third business day, as post offices generally close at or before that time. A limitation of "mail" only would seem to frustrate the findings of *Carbo* and, in effect, perpetuate the preemption of the DDRISA by not allowing consumers in New Jersey the benefit of being able to rescind *up to* midnight as provided for by the FTC rule. Therefore, "delivery," "telegram" and "electronic communication" are included as options.

17:16C-61.6. Receipt; form and content

a. At the time of executing every retail installment sale or retail installment contract subject to the provisions of section 5 of this act, the retail seller shall deliver to the retail buyer two copies of a receipt which clearly and conspicuously sets forth:

(1) The retail seller's name and place of business;

(2) A description of the goods sold; and

(3) The amount of money paid by the retail buyer or the cash value of any goods delivered to the retail seller at the time the retail installment sale or retail installment contract was entered into.

b. The receipt required to be delivered to the retail buyer shall also clearly and conspicuously bear, in at least 10-point bold type, the following statement:

"NOTICE TO RETAIL BUYER: YOU MAY RESCIND THIS SALE PROVIDED THAT YOU NOTIFY THE RETAIL SELLER OF YOUR INTENT TO DO SO BY CERTIFIED-MAIL, DELIVERY, TELEGRAM OR ELECTRONIC COMMUNICATION ~~-RETURN RECEIPT REQUESTED, POSTMARKED NOT LATER THAN 5 P.M. PRIOR TO MIDNIGHT~~ OF THE THIRD BUSINESS DAY FOLLOWING THE SALE. FAILURE TO EXERCISE THIS OPTION, HOWEVER, WILL NOT INTERFERE WITH ANY OTHER REMEDIES AGAINST THE RETAIL SELLER YOU MAY POSSESS. IF YOU WISH, YOU MAY USE THIS PAGE AS NOTIFICATION BY WRITING 'I HEREBY RESCIND' AND ADDING YOUR NAME AND ADDRESS. A DUPLICATE OF THIS RECEIPT IS PROVIDED BY THE RETAIL SELLER FOR YOUR RECORDS."

c. No receipt required to be delivered to the retail buyer shall contain, or be accompanied by any document which contains, provisions by which the retail buyer waives his rights under this act.

d. A retail seller who in the ordinary course of business regularly uses a language other than English in any advertising or other solicitation of retail buyers, or in any printed forms for use by retail buyers, or in any face-to-face negotiations with retail buyers shall deliver the two copies of the receipt to a retail buyer whose principal language is such other language one in English and one in the other language.

~~e. The receipt required to be delivered to the retail buyer, other than the notice provision required under subsection (b) of this section, shall be in a type size less than 10 points high and in type other than bold.~~

COMMENT

Subsection b. has been revised to reflect compliance with both the FTC rule, 16 *C.F.R.* 429.1(b) and the proposed revision of *N.J.S.* 17:16C-61.5a.(1) above.

Subsection e. is deleted to correspond with the *Carbo* court's holding that the section is in "direct conflict" with federal regulation. 410 *N.J. Super.* at 304. As the court noted, both the FTC and the DDRISA require notice in ten point, bold font. *Ibid.* However, the FTC's "notice includes information not required by DDRISA—advice about the buyer's right to a refund and obligation to return the goods purchased." *Ibid.* As such, the court determined that a seller would not be able to provide the buyer with a receipt that complies with both the FTC rule and subsection e. *Ibid.* Finding that conflict, the court found subsection e. preempted. *Ibid.*