

SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

This case is drawn from *McCarthy v. Quirk Nissan*, 2009 Mass.App.Div. 159, 2009 WL 3004563, which affirmed an award of damages plus attorney fees to the buyer based on the state Lemon Law and the state Consumer Protection Act.

The best place to start in this case is the state lemon law. The specifics of such laws vary from state to state, but in general they permit the buyer to return the car for a refund if it is truly a "lemon." Standards vary, but the common standard is whether or not there is a "substantial impairment" of the vehicle's value, and the dealer has been unable to repair the car after a reasonable opportunity to do so.

It is questionable in this case whether or not there is a substantial impairment. On the one hand, the car is still driveable. However, the fluctuating RPM and tendency to stall would affect the safety of the car, and thus would substantially impair its value. Also, the dealer has had several opportunities to repair the car and seems unable to do so. The cases that we read range from a very consumer-friendly standard (*MucCullogh*) to one that imposes a much higher threshold (*Gasque*) before the consumer is able to take advantage of the remedies under the lemon law.

Another approach would be to revoke acceptance of the vehicle. The UCC permits revocation of acceptance where the goods are non-conforming. However, there would be little advantage to this approach if the lemon law provides essentially the same remedy.

We should also explore whether or not the state UDAP or consumer protection statute applies to this case. One difficulty might be establishing that there was an unfair or deceptive act or practice. The failure to repair to the consumer's satisfaction would be difficult to classify as either "unfair" or "deceptive." However, many CPA statutes incorporate other statutes to create a "per se" violation (e.g., odometer rollback or insurance law violations). If that applies, the CPA would offer treble damages and attorney fees.

Even if the CPA doesn't apply, the lemon law will typically allow for a recovery of the attorney fees in addition to the right of rescission. In calculating attorney fee awards, judges have a great deal of discretion. Some pay a lot of attention to the ratio between the amount at stake and the amount of the fee request -- expecting the latter to be proportionate to the former. Other judges recognize that a large fee award may be the only way to permit a consumer to get a meaningful remedy.

QUESTION 2

This question reflects the issue raised in *Lavie v. Procter & Gamble Co.*, 105 Cal.App.4th 496, 129 Cal.Rptr.2d 486 (2003), in which the court decided to adopt a standard based upon the reasonable consumer rather than the least sophisticated consumer.

The AG must decide whether it would be beneficial to influence the choice of the standard for what constitutes an "unfair or deceptive act or practice." The original standard adopted by the FTC in the *Charles of the Ritz* decision was to protect the credulous and the gullible -- the "least sophisticated consumer." This standard was later replaced by the *Cliffdale Associates* standard that requires the plaintiff to show that an advertisement is likely to deceive a reasonable consumer. But states are not bound by the federal law; they can choose to retain the standard that may already be part of the state law. In support of this would be the adoption of the "least sophisticated consumer" test in cases involving the Fair Debt Collection Practices Act. This suggests that different standards might be appropriate in different contexts. Moreover, in the health context a more consumer-friendly standard might be desirable.

Weighing on the other side would be the argument that consumers in the medical context already have a more serious approach, and regulation by the FDA might be sufficient to protect them from misleading advertising. Moreover, the standard of the "reasonable consumer" is consistent with other aspects of the law that set a standard of reasonable behavior.

QUESTION 3

The facts of this case were drawn from *Rand Corp. v. Yer Song Moua*, 559 F.3d 842 (C.A.8 (Minn.) 2009). In that case the appeals court reversed a summary judgment for the lender, finding that the borrowers were denied the 3-day "cooling off" period required by TILA and HOEPA.

This case raises primarily the issue of whether or not the borrowers were given their 3-day right to rescind. The lender will claim that the borrowers waived their right to rescind, but the evidence may support the borrowers' claim.

Background of TILA / HOEPA

The Truth in Lending Act (TILA) was adopted in order to insure that borrowers had reliable and easily understood information about the terms of a loan. The Home Ownership and Equity Protection Act (HOEPA) imposed additional requirements on lenders and provides additional consumer safeguards. A common feature to both acts is the requirement that the lender give the borrower a 3-day waiting period, after the consummation of the loan, to rescind the transaction.

There must be notice of the existence of the 3-day waiting period, typically documented by the borrower's signature that they have received notice of their right to rescind, and then the funding of the loan only takes place after the three days have passed.

Here the facts suggest that the borrowers were never given a right to rescind. The escrow agent had them write in their own handwriting that the "review period be waived."

Waiver based on Emergency. A consumer may waive the right to rescind in the case of a bona fide personal financial emergency.¹ However, there must be a genuine emergency that is spelled out by the consumer, and it doesn't appear that this case qualifies. Even though there was concern about making the payments, it isn't like a repair to a critical component of the home that can't be postponed for 3 days. Moreover, the document that the escrow agent had the Mouas sign was confusing. On the one hand, it talks about three days to "review" the documents -- suggesting that there was indeed a right to rescind. On the other hand, it states that the consumer is waiving the right to rescind based upon an emergency. Reg. Z requires that the request for the waiver set forth the facts constituting the emergency, and while this form describes the situation with the county, there is no explanation of why the 3-day waiting period shouldn't be available to the borrower. It also talks about having a 3-day "recession" period "to review all the final documents." The point is that the statement is so confused and so confusing that it fails either to constitute a valid waiver nor to give the consumer the proper notice of the right to rescind.

If in fact there was never any proper notice, then the borrower has three years in which to rescind the transaction. Of course, this would not mean that the borrower gets to keep the money; it has to be paid back. On the other hand, it would mean that JumboLoans couldn't foreclose on the property, which is one of the main things that the borrowers want.

In addition, if it turns out to be a violation of TILA / HOEPA, then the borrowers are entitled to recover statutory damages plus attorney fees. And if this is a relatively common practice, it might be worth looking into the potential for a class action on behalf of similarly situated consumers. Finally, JumboLoans might be an additional defendant. In order to be liable for violations of TILA / HOEPA as a purchaser of non-compliant loans, the lack of compliance must be apparent from the face of the loans. If the non-compliant waiver was part of the package of paper that JumboLoans purchased at the time the loan was sold (which seems likely), JumboLoans might also be liable.

¹Reg. Z, 12 C.F.R. § 226.31(c)(1)(iii):

Consumer's waiver of waiting period before consummation. The consumer may, after receiving the disclosures required by paragraph (c)(1) of this section, modify or waive the three-day waiting period between delivery of those disclosures and consummation if the consumer determines that the extension of credit is needed to meet a bona fide personal financial emergency. To modify or waive the right, the consumer shall give the creditor a dated written statement that describes the emergency, specifically modifies or waives the waiting period, and bears the signature of all the consumers entitled to the waiting period. Printed forms for this purpose are prohibited, except when creditors are permitted to use printed forms pursuant to § 226.23(e)(2).

CONSUMER LAW FINAL, Spring 2010 CHECKLIST

QUESTION 1

- | | |
|---|--|
| <input type="checkbox"/> Lemon Law | <input type="checkbox"/> Can M revoke acceptance |
| <input type="checkbox"/> State variations | <input type="checkbox"/> UCC requires non-conformity |
| <input type="checkbox"/> What is a " Lemon "? | <input type="checkbox"/> Lemon law remedies supersede |
| <input type="checkbox"/> reasonable opportunity to reapair | <input type="checkbox"/> Use of the UDAP / CPA |
| <input type="checkbox"/> " substantial impairment " standard | <input type="checkbox"/> Was there an Unfair or Deceptive Act or Practice? |
| <input type="checkbox"/> Would car be considered driveable ? | <input type="checkbox"/> Would Lemon Law = " per se "? |
| <input type="checkbox"/> No loss of use for an extended period | <input type="checkbox"/> Can M get treble damages |
| <input type="checkbox"/> | <input type="checkbox"/> Will use value offset award? |
| <input type="checkbox"/> Consumer-favorable std (<i>McCullough</i>) | <input type="checkbox"/> |
| <input type="checkbox"/> Dealer-favorable (<i>Gasque</i>) | <input type="checkbox"/> Attorney fee award |
| <input type="checkbox"/> Which does jx. follow? | <input type="checkbox"/> How generous will judge be? |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | |
| <input type="checkbox"/> | |

QUESTION 2

- | | |
|--|--|
| <input type="checkbox"/> <i>Charles/Ritz</i> used "least sophisticated" | <input type="checkbox"/> Health products ---> higher standard? |
| <input type="checkbox"/> <i>Cliffdale</i> ---> "reasonable" consumer | <input type="checkbox"/> Will consumers use more care ? |
| <input type="checkbox"/> states have option to use diff. standard | <input type="checkbox"/> Is regulation by FDA adequate? |
| <input type="checkbox"/> "least sophisticated" is in FDCPA | <input type="checkbox"/> "Reasonable" standard is familiar in law |
| <input type="checkbox"/> Should standards vary? | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |
| | <input type="checkbox"/> |

QUESTION 3

- | | |
|---|---|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Obviously untrue statement |
| <input type="checkbox"/> TILA / HOEPA | <input type="checkbox"/> Form became meaningless |
| <input type="checkbox"/> History and purpose of TILA / HOEPA | <input type="checkbox"/> |
| <input type="checkbox"/> 3-day waiting period / right to rescind | <input type="checkbox"/> If notice failed, borrowers can rescind |
| <input type="checkbox"/> Unless notice is given ---> 3 years | <input type="checkbox"/> Recovery of statutory damages |
| <input type="checkbox"/> | |
| <input type="checkbox"/> Waiver of right to rescind | <input type="checkbox"/> Suit v. JumboLoans as well as Rand |
| <input type="checkbox"/> Can be done if emergency exists | <input type="checkbox"/> Borrowers must still return \$\$ received |
| <input type="checkbox"/> Can even be a financial emergency | <input type="checkbox"/> But Mortgage no longer valid |
| <input type="checkbox"/> Would facts support emergency finding? | <input type="checkbox"/> Thus, no foreclosure |
| <input type="checkbox"/> | <input type="checkbox"/> Recovery of attorney fees |
| <input type="checkbox"/> Did notices confuse borrowers? | <input type="checkbox"/> Class action? |
| <input type="checkbox"/> Three days to " review " -- what then? | <input type="checkbox"/> |
| <input type="checkbox"/> Consumers said 3 days had passed | <input type="checkbox"/> |

Exam # _____