

Preface. A few years ago, the Young Lawyers Section of the Arkansas Bar Association took on the responsibility of producing the First Edition of the Consumer Law Handbook. Since that time, over 30,000 copies of the Handbook have been distributed to the people of Arkansas to aid them in understanding the laws controlling many of their consumer transactions. In the Summer of 1999, it was decided that the Handbook should be revised and updated. This Second Edition has new information and provides citations to assist the public as well as the Bar in the use of this valuable reference tool.

The information contained in this Handbook is derived from the laws of the State of Arkansas and of the United States Government. We have attempted to address many issues that face Arkansans on a daily basis. The information is current and will help many people find answers to questions they may have about their rights as consumers. However, this Handbook is provided merely as a public service. It is not a complete explanation of the innumerable laws affecting consumers. We encourage readers to consult an attorney or the appropriate government agency for specific legal information.

Many Young Lawyers Section members donated their time, talents and energies to author various sections of this Handbook. Their contributions were in the best spirit of public service and reflect the ideals for which the Arkansas Bar Association stands. I would like to thank the following individuals:

Colette Honorable

Arkansas Attorney General's Office,
Little Rock, Arkansas

Kevin Orr

Orr, Scholtens & Willhite
Jonesboro, Arkansas

Justin T. Allen

Wright, Lindsey, & Jennings
Little Rock, Arkansas

David P. Glover

Little Rock, Arkansas

Vince O. Chadick

Bassett Law Firm
Fayetteville, Arkansas

Rebecca Hattabaugh

Ledbetter, Cogbill, Arnold & Harrison
Fort Smith, Arkansas

Lee Harrod

Harrod Law Firm
Heber Springs, Arkansas

Dustin McDaniel, Chair

Arkansas Consumer Law Handbook Committee

McDaniel & Wells, P.A., Jonesboro, Arkansas

Chris Gardner, Co-Chair

Arkansas Consumer Law Handbook Committee

Womack, Landis, Phelps, McNeill & McDaniel, Jonesboro, Arkansas

CONSUMER LEASING ARRANGEMENT

Suppose you have been temporarily transferred to another city by your employer. You've leased an apartment but unfortunately it is not furnished. You really have no personal desire, or financial inclination, to purchase hundreds (or, maybe, thousands) of dollars of furniture to properly furnish the apartment, but you want to be comfortable during your stay. What are you to do?

Fortunately, there exists an ever increasingly popular alternative to purchasing property: Leasing. Leasing gives you temporary use of property in return for periodic payments. In the past decades, it has become quite a popular alternative to buying, depending on the circumstances. For instance, in the situation above, you might seriously consider furnishing an apartment or house with leased furniture you'll only use for a short period of time. Although the list of the types of property that can be leased is endless, the more popular types of personal property to lease include home furniture, television and stereophonic equipment, appliances and automobiles.

Perhaps the most important thing to understand about consumer leasing arrangements is that, in a normal lease arrangement, the person leasing does not build up equity in the property. Equity is the value of something that exceeds the money owed on that thing. For example, when you purchase something on credit, the amount you pay on the property increases your personal "stake" in that property until, at the end of the payment period, you own the entire piece of property. However, in a lease arrangement, you make regular lease payments, but at the end of the payment period you have nothing (other than the past "use" of the property) to show for your expenditures. This is an important factor to weigh when you consider whether to purchase or lease property.

The Consumer Leasing law requires leasing companies to give you the facts about the cost and terms of their contracts, to help you decide whether leasing is a good idea.

The law applies to personal property leased to you for more than four months for personal, family or household use.¹ It covers, for example, long-term rentals of cars, furniture and appliances, but not daily car rentals or leases on apartments.

Before you agree to a lease, the leasing company must give you a written statement of cost, including the amount of any security deposit, the amount of your monthly payments, and the amount you must pay for licensing, registration, taxes, and maintenance. The company must also give you a written statement about terms, including any insurance you need, any guarantees made by the company, information about who is responsible for the property, and any standards for its wear and tear.

Additionally, the company must give you a written statement about whether you have an option to buy the property. An option to buy program simply means that, at the end of the lease agreement, you may be entitled to purchase the property for little or no additional payments. There are many option to buy plans and programs, and the best thing to do is to examine all plans to see which, if any, will be the best for you.

Simply put, common sense dictates that no matter what you are considering leasing, how long you intend to lease it or what type of lease is involved, you should inform yourself as to the terms of the lease contract.

Open-End Leases and Balloon Payments

Your costs will depend on whether you choose an open-end lease or a closed-end lease. Open-end leases usually mean lower monthly payments than closed-end leases, but you may owe a large extra payment - often called a balloon payment - based on the value of the property when you return it. (Caution: Regardless of whether it is called "balloon payment" or anything else, find

out if you will be liable for depreciation or damage to the property before you enter into any lease agreement.)

To illustrate the so-called "balloon payment" situation, suppose you lease a car under a three-year open-end lease. The leasing company estimates the car will be worth \$4,000 after three years of normal use. If you bring back the car in a condition that makes it worth only \$3,500, you may owe a balloon payment of \$500.

The leasing company must tell you whether you may owe a balloon payment and how it will be calculated.

You have the right to an independent appraisal of the property's worth at the end of the lease. You must pay the appraiser's fee, however.

A balloon payment is usually limited to no more than three times the average monthly payment. If your monthly payment is \$100, your balloon payment wouldn't be more than \$300 - unless, for example, the property has received more than average wear and tear (for instance, if you drove a car more than average mileage).

Closed-end leases usually have a higher monthly payment than open-end leases, but there is no balloon payment at the end of the lease.

ENDNOTES

1. Ark. Code Ann. § 4-24-103 (1) (e).

CREDIT PROTECTION UNDER THE FAIR CREDIT BILLING ACT

Your new sofa and recliner are perfect for your living room. Thanks to the easy payment terms extended by XYZ, your local furniture store, you can enjoy the new furniture while you pay for it. Then it happens. The first bill comes. Instead of a \$500 bargain, you've been billed for \$5,000! Can the law help? What should you do?

Never fear. The Fair Credit Billing Act (FCB Act), a law passed by Congress to protect folks who buy on credit, offers a way to solve your problems.

The first thing you should do is notify the XYZ store in writing about the problem within sixty days of receiving the bill. You should include the following information: (1) name; (2) account number; (3) date; and (4) amount of the billing error. Explain what you believe to be the billing problem. If you also owe XYZ for a T.V. set and that part of the bill is correct, pay the store for the undisputed part of the bill with your letter pointing out the other billing problem. Keep a copy of your letter and wait to hear from the XYZ store.

The store, or any other creditor, must acknowledge your letter within 30 days. The XYZ store then has two billing cycles, or 90 days, to correct the error or explain why you owe the full amount billed. If the XYZ store did make a mistake, you owe no finance charges on the disputed amount - in this case the \$4,500 extra billed to you. If the XYZ store maintains you owe all \$5,000, they must explain to you exactly why you owe the full amount billed.

The FCB Act also protects you from other credit problems besides getting billed for more than you owe. If your recliner falls apart the first time you sit in it, you are not obligated to pay for it. To complain about defective goods, go through the same steps outlined above and try to resolve the problem with the XYZ store. You are also protected if you return the sofa, but it continues to show up on your bill. Again, notify the XYZ store in writing and explain that you're entitled to a credit. Simple mathematical errors, a failure to credit payments you've made, and unidentified charges on your bill can all be corrected by following the FCB Act procedures.

The FCB Act also limits what the XYZ store can do to you while you are resolving credit

disputes. The store cannot turn the debt over to a collection agency as long as you are trying to solve the problem. The XYZ store cannot threaten your credit rating either. These protections, however, only last while you are fulfilling your obligations under the Act and until the XYZ store has responded to your inquiry.

If the XYZ store fails to fulfill its duties under the FCB Act, you have a right to sue. Even if the bill was correct, if the store didn't respond to your letter, turned the bill over to a collection agency immediately, or otherwise violated the FCB Act, the XYZ store must forfeit up to \$50 of what you owed them. If you file a lawsuit, you can collect for actual damages you have suffered up to \$1,000. If you win, the XYZ store will also have to pay the court costs and your lawyer's fee.

No one, however, wants to end up in court over a mistake in a bill. The FCB Act provides a way to resolve billing disputes before they get to court. To maintain a good credit rating, pay all of your bills on time. And if you are confronted with a billing error, follow the procedures of the FCB Act and you will be entitled to the Act's protection. Enjoy your new sofa and recliner.

ENDNOTES

1. P.L. 93-495 was enacted on October 28, 1974 and consists of six titles. Title III Fair Credit Billing amended various provisions of the Act and added to it, as Chapter 4 Credit Billing sections 161 through 171 (15 U.S.C. ss 1666-1666 (j)). While the name "Fair Credit Billing Act" is in fact the short title for all of Title III of P.L. 93-495, it is the name popularly given to Chapter 4 of the Truth in Lending Act. (See Historical Notes following text of s 1666 in 15 U.S.C.S.). See, *Koefner v. American Express Co.*, 444 F.Supp. 334 (E.D. La. 1977).

ENFORCING JUDGMENTS

In many lawsuits, one party will obtain a "judgment" against another party. This means that the party who "loses" the lawsuit is obligated to pay the "winner" the amount of the judgment. While a lawsuit "loser," also known as a judgment debtor, may voluntarily pay the judgment, some judgment debtors do not. If that happens, the lawsuit "winner", also known as the judgment creditor, has the ability to enforce the judgment.

Once entered, a judgment creditor has ten years within which he can enforce the judgment. However, this period can be extended an additional ten years by complying with the procedures set forth by law. There are two procedures through which the judgment creditor can enforce the judgment: (1) Execution and (2) Garnishment.

Execution

Execution is a procedure that enables the judgment creditor to seize property of the judgment debtor and have it sold in order to satisfy the judgment. In order to simplify this process, the judgment debtor is required to supply the court with a list of all of his real and personal property, including that which he claims as exempt, within 45 days of the entry of the judgment. Judgment creditors are required by law to wait ten days after the entry of a judgment before taking any action to enforce the judgment. After that waiting period, the judgment creditor may ask for a writ of execution. This document is given to the sheriff of the county in which the judgment debtor's property is located. The writ tells the sheriff to seize the debtor's property so that it can be sold to satisfy the judgment.

Once a judgment is entered, it attaches as a lien on all of the judgment debtor's real property located in the county where the judgment is filed. When the sheriff receives the writ, the execution attaches as a lien on the judgment debtor's personal property. The date and time the

writ is received is recorded in order to determine the order judgment creditors line up in their respective claims to the judgment debtor's property. Once the debtor receives notice of the writ, he has 20 days within which to claim any exemptions with the Court.

It is important to know what property is exempt from execution under both state and federal law. Most of these exemptions are clearly set out in the Arkansas Code. Most importantly, a debtor's homestead is subject to an exemption. If the debtor is in bankruptcy, other exemptions may be claimed.

There are also procedures under Arkansas law that enable a judgment debtor to temporarily stop the execution process. For instance, the debtor may be able to delay execution for six months by posting a bond with the clerk of the court in an amount equal to that due under the judgment. Otherwise, the sheriff may seize the debtor's non-exempt property and have it sold to satisfy the judgment.

Garnishment

Garnishment is a special form of execution that enables the judgment creditor to seize property that belongs to the debtor but is in the hands of a third party, known as the garnishee. Typical garnishees include the debtor's employer and any bank or other financial institution where the debtor has an account.

As with the writ of execution, writs of garnishment are issued by the clerk of the court. The law governing the contents of a writ of garnishment and the notices that must accompany the writ is very specific, and the judgment creditor must strictly comply with it. Once the writ is issued by the clerk, it is delivered to the garnishee, who must identify any property he or she holds which belongs to the judgment debtor. After the writ is returned, the court will direct the garnishee to surrender all or part of the debtor's property that he holds in order to pay the judgment. Once the garnishee surrenders the debtor's property, he will be relieved of any further obligations. When a garnishee is served with a writ, he has 20 days within which he must answer. A garnishee who fails to properly answer the writ may be brought before the court and held liable in an amount up to that which he owed the debtor at the time of service of the writ, plus attorney's fees and other reasonable costs.

At the time the writ is issued, Arkansas law requires that a judgment debtor be notified of his or her right to claim certain property as exempt from garnishment. The debtor must also be advised of his right to request a prompt hearing so that he may claim those exemptions. State and Federal law provides that property which can be exempt from garnishment. Most importantly, there is a limit on the amount of a debtor's wages that can be garnished from his employer. There are also exemptions for social security, unemployment benefits, worker's compensation benefits, and the proceeds of any life, health, accident or disability insurance contracts. Please keep in mind, however, that this list does not cover every exemption that can be claimed.

FAIR DEBT COLLECTION UNDER THE FAIR DEBT COLLECTION PRACTICES ACT

Recently, it was determined that credit-card carrying Americans were indebted in the average amount of \$2,000 per card. Most of us are paying on home mortgages, automobiles, medical-cost debts, and other types of "consumer loans", as well. Fortunately, should we fail to meet our obligations on those debts, becoming in "default", The Fair Debt Collection Practices Act has

restricted the actions which may be taken by a "creditor" (person to whom the debt is owed) or any other person attempting to collect a debt on a creditor's behalf, i.e. a "collector".¹ The Fair Debt Collection Practices Act also applies to attorneys who collect debts on a regular basis.²

Contacting the Debtor

For instance, the Act prohibits collectors from contacting debtors at inconvenient times, or at a debtor's place of business, if the debt collector has reason to know that such contact may jeopardize the debtor's employment in any way.³ Additionally, a debt collector may not contact a debtor by postcard.⁴

Within five (5) days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing (i) the amount of the debt, (ii) the name of the creditor to whom the debt is owed, (iii) a statement that unless the consumer within thirty (30) days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector, (iv) a statement that if the consumer notifies the debt collector in writing within a 30-day period the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer, and a copy of such verification or judgment will be mailed to the consumer by the debt collector, (v) and a statement that, upon the consumer's written request within a 30-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.⁵

If the consumer notifies the debt collector in writing within the 30-day period described above that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or any name and address of the original creditor, is mailed to the consumer by the debt collector.⁶

A debtor can notify the debt collector, in writing, that he does not want any further contact. In that case, the debt collector must stop all communication with the debtor, except to say that some specific action will be taken, if the creditor intends to take such action.⁷ Of course, the debt collector may not contact anyone else concerning the debt, other than the actual debtor or his attorney. One caveat: a debt collector may begin collection activities again if he is able to produce proof of the debt, such as a copy of the bill or receipt.

Harassment

Debt Collectors may not harass, oppress or abuse any person. For example, they may not use threats or obscene language; may not make repeated telephone calls or call without identifying themselves; and may not publish, advertise or otherwise make known a debtor's financial situation or amount owed (except to a credit bureau).⁸

False Statements

Naturally, a debt collector is not allowed to make false statements or misrepresentations of any kind, such as to imply that he or she is a lawyer, credit-bureau employee or governmental official (if he or she is not); to imply that the debtor has committed a crime; or to misrepresent the amount owed on the debt.⁹

A debt collector may not represent any documents to be legal papers if they are not or indicate that a paper is not a legal document if it is.¹⁰

Implied Threats

Similarly, debt collectors may not make express or implied threats of legal action, such as seizure, attachment, or garnishment of wages or property, unless the debt collector or creditor actually intends and has the legal ability to take such action.¹¹ A debtor may not be jailed for nonpayment of a debt, and any threats to that effect are obvious violations of the Act. (Fortunately, the Debtor's Prison may now be found only in Dickens' novels.)

Unfair Practices

There are certain less obvious collection practices that Congress considered unfair or harmful enough to warrant prohibition under the Act. Among these are depositing or threatening to deposit a post-dated check before the date shown, acceptance by the debt collector from any person of a check or other payment instrument post-dated by more than five (5) days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten (10) nor less than three (3) business days prior to such deposit, or the collection of an amount greater than that owed (unless the debt collector has a legal right to do so).¹² Furthermore, a debt collector may not require a debtor to accept collect phone calls or pay for telegrams.¹³

What Can A Debtor Do In Case of A Collector's Violation of the Act?

The state Attorney General's office can provide information and assistance in determining the debtor's rights and whether there has been a violation of the Act or the state's own debt collection laws. Also you may report the company to the State Collections Agency Board, P.O. Box 585, Jacksonville, AR 72076 or telephone (501) 982-2778.

Additionally, you may file a lawsuit against a wrongful debt-collector, in state and federal court, within one year from the date the law was violated. If you prevail, you will recover damages, court costs, and, attorney's fees.¹⁴ Or a group of people may sue a debt collector and recover money for damages up to \$500,000, or one percent of the collector's net worth, whichever is less.¹⁵ If the lawsuit involves an interest in real estate securing the obligation, the action must be brought in the judicial district in which the real property is located. All other causes of action may be brought in the judicial district where you sign the contract sued upon or where you reside at the commencement of the action.¹⁶

For more information, contact the Federal Trade Commission at the locations listed in the References and Information section of this handbook.

ENDNOTES

1. 15 U.S.C. §1692 et seq. (1994).
2. Heintz v. Jenkins, 115 S. Ct. 1489 (1995).
3. 15 U.S.C. §1692c(a).
4. 15 U.S.C. §1692f(7).
5. 15 U.S.C. §1692g(a).
6. 15 U.S.C. §1692g(b).
7. 15 U.S.C. §1692c(c).
8. 15 U.S.C. §1692d.
9. 15 U.S.C. §1692e.
10. 15 U.S.C. §1692e(15).
11. 15 U.S.C. §1692e(4).
12. 15 U.S.C. §1692f.
13. 15 U.S.C. §1692f(5).
14. 15 U.S.C. §1692k(a)(1,3).

15. 15 U.S.C. §1692(a)(2).

16. 15 U.S.C. §1692i(a).

GUARDIANSHIP

Guardianship is a legal procedure whereby one person, "a guardian", petitions a probate court to act on behalf of another person referred to as an "incapacitated person" or "ward". An incapacitated person is one who is impaired by reason of a disability such as mental or physical illness, drug or alcohol dependence, or minority, to the extent that they lack the ability to make essential decisions concerning their health or safety, or to manage their property.

Any person may file a petition for the appointment of himself or herself or some other qualified person as guardian of an incapacitated person. The petition must include, among other things, the name and address of the incapacitated person and the person seeking the appointment, a description of the property owned by the incapacitated person and its value, the reason the appointment is sought and the interest of the petitioner in the appointment. An evaluation of the incapacitated person by a doctor or other qualified professional will be required by the Court. There are two basic types of guardianship: guardianship of the person and guardianship of the estate. The Court may appoint a guardian to serve in either or both capacities, depending on the circumstances.

A guardian of the person may be appointed to care for and maintain the incapacitated person. This type of guardianship is particularly useful when a person is unable to make decisions concerning health care due to a disabling disease.

A guardian of the estate may be appointed to protect and preserve an incapacitated person's property, to invest it, and to use it for the benefit of the incapacitated person. In this type of guardianship, the guardian must make periodic accountings for all assets and how those assets are used. Likewise, the Court will require that the guardian give a bond to assure that the affairs of the incapacitated person are properly administered.

Arkansas law also provides for the appointment of a "temporary" guardian in certain instances.

Such a guardian may be appointed where there is imminent danger to the life or health of an incapacitated person or where his property is subject to loss, damage or waste due to the person's incapacity. A temporary guardianship is of short duration, no more than 90 days.

Finally, the Court may appoint a "limited" guardian. Such guardian's authority is limited to those specific powers and duties set by the Court in the order of appointment.

LANDLORD TENANT RELATIONS

At the outset, it should be pointed out that the law governing the landlord/tenant relationship is vast. It is governed both by statute and case law handed down by the appellate courts of Arkansas. Please keep in mind that the law provided in this section is very general and is only intended to provide the basic law governing the landlord/tenant relationship. Whether a landlord or a tenant, one with a problem or question in this area should consult an attorney.

Generally, a landlord/tenant relationship arises from an agreement, or lease, under which the tenant or lessee takes possession of property belonging to the landlord or lessor. This agreement can be either express or implied. In exchange for the use of the landlord's land, the tenant usually pays the landlord money in the form of rent.

Not all leases or agreements creating a landlord/tenant relationship need to be in writing. In fact,

many are not. It is only those leases that will last a year or longer that must be in writing. A lease for a year or longer is not enforceable unless it is in writing.

Once an agreement is formed, the tenant is said to have a "tenancy". There are three major types of tenancies. As will be seen, the primary difference among the three turns on how long they last and what kind of notice is needed to terminate the tenancy.

First, there is a tenancy for years. The primary feature of this tenancy is that it contains a fixed period of time. A definite beginning and end is set for the tenancy. It may be for a week, month or years. Once the ending date for the tenancy arrives, it is automatically terminated. No notice need be given to the tenant that the lease is going to expire. Keep in mind, however, that it must be in writing if it is equal to a year or longer.

Second, there is a periodic tenancy. This type of tenancy goes on from period to period until proper notice to terminate is given. For example, "A" may agree to rent "B's" land on a monthly basis. "A" would then pay "B" every month for the use of the land. This would be a month to month periodic tenancy. Year to year, week to week, or day to day tenancies can be created as well.

In order to terminate a periodic tenancy, the terminating party must notify the other party no later than one full period prior to the termination date. If the tenancy is month to month, one month's notice must be given prior to termination. If week to week, one week's notice must be given.

However, in no event must one give notice in excess of six months prior to termination; thus, if it is a year to year lease, six month's notice will be sufficient.

Finally, there is a tenancy at will. This is a tenancy that either party can terminate at any time without notice. Keep in mind, however, these are usually transformed into a periodic tenancy based upon how often the rent is paid. As a result, it is best to give notice when terminating what started out as a tenancy at will.

Before entering into any lease agreement, both parties should clarify what type of tenancy is being created. Once the type of tenancy is ascertained, each party will know what type of notice he or she is entitled to in the event termination is sought.

One should be aware that failure to vacate the premises by the termination date can result in liability on the part of the tenant. Whether it is the landlord or the tenant that terminates the tenancy, the tenant must be off the premises by the date given in the notice. Therefore, do not give the landlord notice of termination unless you are sure you will be able to vacate the premises on time. A tenant remaining after the termination date can be held responsible for double rent.

Duties

When a landlord/tenant relationship is created, each party becomes obligated to perform certain duties as well as entitled to certain rights. It is very important that all parties in such a relationship have a basic idea of these duties and rights. Listed below are some of the duties of the tenant and landlord.

Duties of the Tenant

- Pay rent on time.

- Keep apartment clean; dispose of garbage.

- Refrain from deliberately destroying or damaging the structure.

- Refrain from unreasonable use of the premises.

- Give notice before leaving in a periodic tenancy.

- Inspect the premises before leasing them to make sure they will fit your needs.

- Surrender the premises at the end of the lease.

Duties of the Landlord

See that the tenant has the right to possession as against third parties.

Refrain from locking tenant out or preventing tenant from entering or leaving the premises.

Refrain from raising rent during term of formal lease or without giving 30 days notice on month-to-month tenancy.

Maintain apartment and public areas in substantial compliance with any housing codes.

Unlawful Detainer

If a landlord wants a tenant to move after the lease is terminated or if the tenant refuses to pay his rent, the landlord can file a suit in court for unlawful detainer.¹ Of course the landlord is bound by the lease as to the amount of notice that must be given for termination of a lease (30 days notice is required for a month-to-month tenancy).

In an unlawful detainer, the landlord files an action in Circuit Court after having given three (3) days notice to the lessee to surrender the premises.² The tenant has five days to answer the complaint after it is served upon him or her.³

If the tenant answers the complaint, the Circuit Court Judge holds a preliminary hearing to determine if the landlord has a right to the premises. The preliminary hearing is limited to the questions of: Does the landlord own the property? Has the tenant paid the rent?

If the Court determines that the landlord is entitled to the premises, he or she is required to post a bond and obtain a Writ of Possession. The tenant is then evicted by the Sheriff unless he or she also posts a bond.

At a later date, a final hearing is held by the Circuit Court to listen to any defense the tenant may present, to determine any rent that the tenant may owe, and to determine who should have possession of the premises.

Criminal Eviction

A tenant must also keep in mind that Arkansas has a criminal eviction law.⁴ Under the terms of the statute, if a tenant refuses to pay his or her rent when it is due, or if he or she is unable to pay it, he or she immediately loses their right to occupy the dwelling or land. If the landlord then gives the tenant notice to vacate the land and after ten days the tenant is still occupying the premises and refuses to leave, the tenant will be guilty of a misdemeanor. Each day the tenant holds over constitutes a separate offense and the tenant can be fined an amount from \$1 to \$25 a day for each offense.⁵

This statute may become important to tenants with low incomes because it makes no provision for those who think they have a good faith defense to the eviction notice. Thus, a fine of up to \$25 a day could be imposed on the tenant even while he or she pursues their claim in court.

This could be both risky and costly to the tenant.

Some Good Things To Know

Keep receipts of rent payments, copies of lease agreements, records of damages and any correspondence between you and the landlord.

A landlord may not demand or receive a security deposit in an amount or value greater than two months rent.

When the lease terminates - whether voluntarily or involuntarily - the landlord has the right to dispose of any property left in or on the premises as he or she sees fit, without consulting the tenant.

All property placed on the premises by the tenant is subjected to a lien in favor of the landlord to insure payment of all the amounts the tenant has agreed to pay.

The landlord must return your security deposit within thirty days after your lease ends. The landlord may deduct from your security deposit, however, any unpaid rent, necessary repair costs

or cleaning costs. Should your landlord fail to return your security deposit and/or fail to provide you a written explanation of any deductions, you should contact him or her in writing. If you receive no satisfaction, you may wish to consult an attorney or consider filing a claim in small claims court.

The landlord does not always have to pay for repairs. Before you do them or hire someone else under the assumption that the landlord will reimburse you, get a written agreement from the landlord stating that the landlord will pay. If you are responsible for the damage, the landlord has no obligation at all.

If an apartment is found to be or suspected of being substandard (in violation of housing codes), a tenant should:

- a) Call the landlord and ask for repairs.
- b) Make a written request of the landlord for repairs.
- c) Call the health department or building inspector if the landlord does nothing.
- d) Contact a lawyer.

Rent Deposits

Many landlords require tenants to give a cash deposit up front before allowing them to rent land

Often, the tenants have problems getting the deposit back when it is ready to move out. The law takes this into account and requires the landlord to return the deposit unless certain conditions are met.⁶ Security deposits may be applied to pay for unpaid rent or damages to the property.

However, the landlord must itemize the reasons for withholding the deposit, in writing, and return the remainder of the deposit with thirty (30) days after the tenancy is terminated.⁷ If the landlord attempts to contact the tenant by mail and is unable to locate the tenant after one hundred and eighty (180) days, the landlord may keep the deposit.

ENDNOTES

1. Ark. Code Ann. § 16-60-304.
2. Ark. Code Ann. § 16-60-304.
3. Ark. Code Ann. § 16-60-307(b).
4. Ark. Code Ann. § 18-16-101.
5. Ark. Code Ann. § 18-16-101(b).
6. Ark. Code Ann. § 18-16-305.
7. Ark. Code Ann. § 18-16-305.

LIVING WILL AND HEALTH CARE DECLARATION

The terms living will and health care declaration are often used interchangeably. Both terms describe the same thing. Their intent is to permit an individual to make a present decision about his or her future medical care or treatment.

A living will is not a substitute for a will which disposes of one's property at death. A living will is a written document which, when properly drafted and executed by a person of sound mind and at least 18 years old, allows the person to direct his physician to withhold or withdraw life-sustaining treatment that only prolongs the process of dying.¹ The declaration could be put into effect if one develops an incurable or irreversible condition that will cause death within a relatively short time or if one becomes permanently unconscious.²

One may be reluctant to make such a declaration while still alive and in good health. If so, he or

she may wish to give a spouse or child the authority to make such a health care decision in the event he or she is no longer able. By declaring someone as your "health care proxy", as it is called, you can avoid some of the conflict that frequently tears family members apart.³

In order to assure that one's wishes are followed, it is important that you communicate and provide a copy of your health care declaration to your regular attending physician.⁴ You should also provide a copy to your healthcare proxy and your spouse, an adult child, or other responsible person. In all cases, you should let the involved person know where you have placed the original copy of the declaration.

Much of the complication has been removed from health care declarations by the legislature's passage of the Arkansas Rights of the Terminally Ill or Permanently Unconscious Act.⁵ With the passage of this Act, any individual who desires to assure that his or her wishes concerning the right to die will be followed can do so with a health care declaration.

ENDNOTES

1. Ark. Code Ann. § 20-17-202.
2. Ark. Code Ann. § 20-17-203.
3. Ark. Code Ann. § 20-17-202.
4. Ark. Code Ann. § 20-17-203.
5. Ark. Code Ann. § 20-17-201, et seq.

POWER OF ATTORNEY

A power of attorney is an instrument which authorizes another person to transact business or make certain decisions on your behalf. A power of attorney may be used to permit someone else to sell your real estate or your automobile or to authorize someone to transact banking business on your behalf. The effect of a power of attorney is to substitute another person in your place. In this article, the person who gives the power of attorney is called the principal. The person or agent to whom the power is given is called the attorney in fact.

The authority of a power of attorney may be either general or specific. The general power is very broad and typically authorizes the attorney in fact to transact any and all business for the principal. The specific power relates to a particular transaction such as the sale of a particular piece of property. The attorney's authority would be limited to that transaction.

The attorney in fact may be a friend or relative. It should be someone you know very well and in whom you place the utmost trust. If you are considering executing a power of attorney, remember that it can be used to your disadvantage. You should be very careful in choosing the attorney in fact.

Both the general and specific powers of attorney may be revoked at any time by the principal. The principal should notify the attorney in fact in writing and any known persons, banks or institutions with whom he or she has been doing business.

The power of attorney is revoked upon the death of either party or upon the incompetency or incapacity of either party. For the power of attorney to be useful after the principal is declared incompetent, it must be a durable power of attorney.

A durable power of attorney is not affected by the subsequent disability or incapacity of the principal.¹ If you wish to plan for the possibility that you may someday be incapable of making your own decisions, you should have a durable power of attorney. Remember that a durable power of attorney must be executed while you are still competent and able to make your own decisions.

With the durable power of attorney, you can define the scope of authority as well as the

individual you wish to be appointed. The durable power can also be drafted so that it does not go into effect until you become incompetent.

If you have not executed a valid durable power of attorney, and you become incompetent, the court may appoint either a conservator or a guardian to look after you and transact your business. You have little control over whom the court appoints. Because of the extra protection and safeguards afforded by the durable power of attorney, some additional time and expense is incurred in drafting and executing the power. You should expect to pay a little more money for a durable power of attorney than you would for a general or specific power of attorney.

If you are contemplating the preparation and execution of any type of power of attorney, you should be prepared to discuss the following matters with your lawyer. The lawyer will need to know the names and current mailing addresses for you and your attorney in fact. You may want to discuss more fully the differences between the various powers of attorney mentioned in this article. It will be helpful for both you and the lawyer if you have your deeds, titles, abstracts, certificate of deposit and other papers which will be affected by the power of attorney. You may want to define the beginning date of the power and the duration. You may also want to consider whether the attorney in fact will be compensated, and if so, in what way. Many powers of attorney give the attorney in fact the power to appoint his or her successor. You may want to limit that authority or simply name the successor in the original power. If the power of attorney is a specific one dealing with the sale of a particular piece of property, you may want to include certain terms directing the actions of the attorney in fact.

The power of attorney is a very useful instrument for transacting business in your absence, but remember that it should be used carefully and wisely.

ENDNOTES

1. Ark. Code Ann. § 28-68-402 (Michie 1987; Supp. 1999).

PRACTICAL GUIDES FOR THE PURCHASE OF A USED VEHICLE

Each year, millions of American consumers purchase used automobiles. Most, if not all, of the potential purchasers have certain apprehensions concerning the legal rights they have in connection with a used car purchase. Certainly, the old maxim "Caveat Emptor," which translated means "let the buyer beware", is of great importance to any used car buyer.

Simply because you purchase a used car does not, however, necessarily mean that you are without certain legal rights. Many State and Federal laws provide consumers with a degree of protection in the purchase of a used car. What is most important is that you understand the basics of the transaction.

The following questions and answers are designed to provide you with some basic legal principles which apply to used car purchases. While not exhaustive, these questions and answers should assist the potential used car purchaser in understanding the transaction from a legal standpoint.

QUESTION: Do I get a warranty when I purchase a used car?

ANSWER:

It depends on what is marked on a piece of paper called "The Buyers Guide" which is placed on the vehicle.¹ The Buyers Guide will generally have one of the following boxes marked:

- a. As Is - No Warranty
- b. Warranty

c. Implied Warranties Only

When a box is marked "as is - no warranty", the purchaser of the automobile is responsible for all repairs and expenses which may be incurred after the purchase.² The purchaser is at greatest risk when buying a car with a tag marked "as is - no warranty".

If the box is marked "warranty" then it will be either a "Full" or "Limited" warranty. A full warranty consists of the following:

a. Warranty service will be provided to anyone who owns a vehicle during the warranty. When a problem is reported, the warranty service will be provided free of charge, including such costs as returning the vehicle or removing and reinstalling a system covered by the warranty.³

b. At your choice, the dealer will provide either a replacement or a full refund if the dealer is unable, after a reasonable number of times, to repair the vehicle or system covered by the warranty.⁴

c. Warranty service is provided without requiring you to do anything as a precondition for receiving service, except notifying the dealer that service is needed.

A Limited Warranty is a dealer's way of telling you that he will pay the cost for some parts of the vehicle but not everything. Listed on the Buyer's Guide will be the systems covered by the limited warranty and the time period for which it is in effect.

The only other box that can be checked on the Buyer's Guide is "Implied Warranties Only".⁵

Typically, implied warranties are the warranty of fitness for a particular purpose and the warranty of merchantability. The warranty of merchantability means the seller promises that the product will do what it is supposed to do.⁶ For example, if a hardware store sells you a hammer, it should be suitable for driving nails. The warranty of fitness for a particular purpose applies when you buy the vehicle on the dealer's suggestion that it is suited for a particular purpose.⁷ For example, a used car dealer selling you a jeep might sell you the jeep on the promise that it is suitable for running in rough terrain.

QUESTION: Are all used cars offered for sale required to have a Buyer's Guide on them?

ANSWER:

No - only dealers who sell five or more cars per year are required to post a Buyer's Guide.⁸ An individual seeking to sell a single used vehicle will not, therefore, be required to post a Buyer's Guide.⁹ Furthermore, certain kinds of vehicles such as motorcycles and recreational vehicles do not have to have a Buyer's Guide posted.¹⁰

QUESTION: Is a verbal agreement from a dealer for certain repairs or services enforceable?

ANSWER:

For dealers who are otherwise required to post Buyer's Guides, the best advice is to have the dealer put the verbal agreement in writing and include it on the Buyer's Guide.¹¹ If the agreement is not included on the Buyer's Guide, then the dispute becomes your word against the written contract which the dealer will most assuredly present against your word that a verbal agreement exists. The written contract will almost certainly prevail. The same is true for a dealer's statement about the condition of the car. If the dealer tells you that the car has not been wrecked or that it was involved in only a little "fender bender", ask him to put those terms in writing. If a car dealer misleads you about the condition of a car, you may be able to sue for misrepresentation.¹² A written document containing the dealer's description of the car's condition will enable you to "prove" your word against the dealer's.

QUESTION: Are the terms of the Buyer's Guide the only protection used by car purchasers?

ANSWER:

Not necessarily. A used vehicle may still be covered by the manufacturer's original warranty.¹³ Usually the unexpired warranty on a vehicle can be transferred to the new owner upon payment of a fee. It is important to remember that the provisions of a Buyers Guide relate to warranties made by the seller, whereas a manufacturer's warranty is a guarantee from the manufacturer of the vehicle.¹⁴ For the most part the two are not interchangeable.

QUESTION: What is a Service Contract?

ANSWER:

A service contract is an agreement between the dealer and the buyer that generally relates to certain repairs on a vehicle.¹⁵ If a used vehicle is covered by a service contract, it will be so marked on the Buyers Guide.¹⁶ In addition, if you purchase a service contract within 90 days of buying the vehicle, federal law prohibits the dealer from disclaiming implied warranties on the systems covered in the service contract.¹⁷

QUESTION: Is a dealer required to inform me of prior damage to a car?

ANSWER:

The Arkansas "Salvage Title" law governs the sale of automobiles that have sustained damage in an amount equal to or exceeding seventy percent (70%) of their average retail value.¹⁸ When a car has been damaged to that extent, the dealer who offers it for sale must disclose to a prospective buyer, prior to sale, the fact that the title indicates "damaged" and that the description of the damage sustained by the vehicle is on file with the Office of Motor Vehicles.¹⁹ This applies only to: (1) persons or businesses who sold five or more motor vehicles in the previous twelve months and (2) motor vehicles five model years old or less.²⁰

The disclosure will be on a buyer's notification form affixed to a side window of the motor vehicle with the title "Buyer's Notification" facing to the outside.²¹ The form may be removed temporarily from the window during any test drive and replaced as soon as the test drive is over.²² The form will contain an acknowledgment section that the dealer shall require the buyer to sign prior to completing a sales transaction on a motor vehicle that carries a branded (damaged) title.²³ The selling dealer shall retain a copy of the signed notification form.²⁴ Failure of the selling dealer to procure the buyer's acknowledgment signature shall render the sale voidable at the election of the buyer for sixty days after the sales transaction.²⁵ That is, if the dealer does not have the buyer sign the form, the buyer may return the vehicle within sixty days and have the purchase price of the automobile refunded.²⁶ Any motor vehicle owner or dealer who conceals or attempts to conceal the fact that the motor vehicle has been damaged from any prospective buyer is in violation of the Act and shall be guilty of a Class A misdemeanor.²⁷

QUESTION: Are there other precautions to take to insure the quality of the used vehicle I wish to purchase?

ANSWER:

There are any number of smart moves that a potential buyer can take to ascertain the quality of the vehicle for potential purchase. One of the best methods of ascertaining the quality of an automobile is by what is known as a pre-purchase independent inspection. Ask the dealer to allow you to take the vehicle and have it inspected by a mechanic of your own choosing. Not only will this afford the mechanic ample opportunity to inspect the vehicle, but it will also allow for a straightforward conversation between you and the mechanic as to the quality of the vehicle. Some dealers have insurance which prevents them from allowing the vehicle to be taken off of the lot. In such a case, the next best thing is to have your mechanic come on the dealer's lot to inspect the car. If you request a pre-purchase independent inspection and the dealer refuses your request, this

may tell you something about the quality of the car that you plan to buy.

Another useful device for determining the quality of the prospective auto is to ask for maintenance records which would reflect the dates of any and all service on the car. These records would also reveal mileage on the car at the various service dates, thus revealing whether the mileage has been turned back at any point along the line. Of course, if the mileage has been turned back, it is unlikely that the dealer will present these records to you. Also, before purchasing the vehicle ask the dealer to allow you to examine any warranty or service contracts on the automobile.

Last but not least, test drive the vehicle. A good test drive includes driving the vehicle over both rough and smooth surfaces, driving the vehicle up steep terrain, and testing the braking ability of the automobile. When driving the vehicle over various grades of surfaces, notice the smoothness of the ride. Obviously, you do not want a vehicle that you plan to drive for several years that has a very rough ride. Likewise, you will want a vehicle that will pull a steep grade as well as flat grade. To test the power of the vehicle, find a steep hill and, beginning from a stop, proceed up the grade. Determine whether or not the vehicle has adequate power to pull the steep grade without straining or stalling the engine. Finally, to test the braking ability on the automobile, find an empty parking lot and, utilizing a 40 mile per hour rate of speed, apply the brakes and determine whether the braking ability of the car is adequate.

As with all types of transactions, use common sense. If a price of a car seems too good to be true, it probably is. Be sure to have automobiles advertised at extremely low prices checked by a mechanic you trust.

QUESTION: Whom do I contact in the event I have a complaint with the automobile?

ANSWER:

First of all, try to work the problem out to the satisfaction of all those concerned. The direct approach to the dealer will avoid bringing in third parties which might antagonize or otherwise prevent the dealer from reaching an amicable agreement with you. Before doing so, however, be sure of your objective before going in to discuss your complaints. Remember, this person is a professional salesperson and it is likely that he or she will once again attempt to utilize this talent in dealing with you. So, determine your goal before airing the complaint to the dealer. In the event the direct approach fails, you may consult the organizations listed at the end of this book. In the event that those agencies are unable to render effective assistance to you, you should consider the possibility of taking some form of legal action on your complaint. To this extent, you may be able to bring a claim on your own without having to invest in an attorney. If the problem can be corrected for under \$3,000, then you would be entitled to bring your claim against the person who sold the vehicle in a small claims court. Arkansas Constitution, Amen. 64. Most small claims courts are run through the local Municipal court in Arkansas. To bring a small claim, you should contact the Municipal Court Clerk and ask for further information. In the event that small claims court is unavailable as an option to you because of the size of your claim, your only other available avenue may be to retain an attorney to represent you against the person who sold the vehicle.

QUESTION: Under what circumstances is a dealer required to repair my car or refund my money?

ANSWER:

The Arkansas "lemon law" requires automobile manufacturers to repair "non-conformities" covered under warranty within 24 months or 24 thousand miles after purchase, whichever occurs later.²⁸ If you follow the procedures set out in the "lemon law" statute, the manufacturer is required to replace the motor vehicle or repurchase it from you after a "reasonable number" of unsuccessful attempts to repair the vehicle.²⁹ A "nonconformity" is defined as a defect that "impairs the use, market value or safety of a motor vehicle" or "renders the vehicle as non-conforming to the terms of an applicable manufacturer's express warranty or implied warranty of merchantability."³⁰

At the time of the sale, the dealer shall provide you with a written statement of your rights and obligations under the Act. The statement will inform you that written notice of the nonconformity to the manufacturer is required before you will be eligible for a refund or replacement vehicle. This Act also establishes an informal dispute procedure that allows both parties to appear before an "administrator" appointed with the advice and consent of the Consumer Protection Division of the Attorney General's office. If you do not use this procedure before filing suit or if you do not give notice to the manufacturer, the manufacturer is not required to provide you with a refund or replacement vehicle.

After three attempts have been made to repair the same nonconformity that substantially impairs the motor vehicle, or after one attempt to repair a nonconformity that is likely to cause death or serious injury, you should give written notification to the manufacturer in order to give the manufacturer's a final attempt to cure the problem.³¹ The manufacturer shall then give you the opportunity to have your vehicle repaired within ten days at a reasonably accessible repair facility.³²

If the manufacturer has not conformed the motor vehicle to the warranty after a reasonable number of attempts and you have given the proper written notice and followed the informal dispute procedures, the manufacturer is required to either replace the motor vehicle or repurchase it from you.³³ The replacement or refund will include payment of all collateral charges (manufacturer installed items, earned finance charges, sales taxes, title charges, and warranty charges) and incidental charges (towing charges and cost of obtaining alternative transportation), but shall not include loss of use, loss of income or personal injury claims.³⁴ Also, the manufacturer has the right to set off against either a replacement or repurchase a reasonable fee for use or damage by the consumer.³⁵

A manufacturer may establish the following defenses to any action under this Act: (1) the nonconformity or defect does not impair the use, value, or safety of the vehicle; (2) the nonconformity or defect is due to the abuse, neglect or other alteration of the vehicle by persons other than the manufacturer; or (3) the claim by the consumer was not filed in good faith.³⁶

If you have problems with your vehicle that you believe qualifies you for protection under the "lemon law," contact the dealer from whom you purchased the car. Be sure to keep copies of all repair records. If you have additional questions about protection under this Act or the informal dispute procedure, contact the Consumer Protection Division of the Office of the Attorney General at the location listed in the last section of this handbook.

QUESTION: Where is more information related to "used car buying" available on the internet?

ANSWER:

Certainly, having access to a computer and the internet provides a conduit to myriad information - some reliable and some probably not. The U.S. Government's Federal Trade Commission provides helpful, accurate information on its website "Tips for Buying a Used Car." The

internetaddress is:

<http://www.ftc.gov/bcp/online/pubs/autos/ucartip.htm>.

Other related websites include:

<http://www.ftc.gov/bcp/online/pubs/autos/usedcar.htm>
and

<http://www.ftc.gov/bcp/online/pubs/alerts/ucaralrt.htm>.

ENDNOTES

1. 16 C.F.R. § 455.2.
2. Id.
3. Ark. Code Ann. § 4-90-401, et seq.
4. Id.
5. 16 C.F.R. § 455.2.
6. Ark. Code Ann. § 4-2-314.
7. Ark. Code Ann. § 4-2-315.
8. 16 C.F.R. § 455.1 (d) (3).
9. Id.
10. 16 C.F.R. § 455.1 (d)(1).
11. 16 C.F.R. § 455.2.
12. 16 C.F.R. § 455.1 (a)(1).
13. 16 C.F.R. § 455.2.
14. 16 C.F.R. § 455.2.
15. 16 C.F.R. § 455.1 (d)(7).
16. 16 C.F.R. § 455.2 (b)(3).
17. Id.
18. Ark. Code Ann. § 27-14-2302 (a).
19. Ark. Code Ann. § 27-14-2302 (b).
20. Ark. Code Ann. § 27-14-2301 (1) (A).
21. Ark. Code Ann. § 27-14-2303 (3) (A).
22. Ark. Code Ann. § 27-14-2303 (3) (B).
23. Ark. Code Ann. § 27-14-2303 (c) (1).
24. Ark. Code Ann. § 27-14-2303 (c) (2).
25. Ark. Code Ann. § 27-14-2303 (d) (1) and (2).
26. Id.
27. Ark. Code Ann. § 27-14-2304 (a).
28. Ark. Code Ann. § 27-90-401, et seq.
29. Id.
30. Ark. Code Ann. § 4-90-403 (13) (A) and (B).
31. Ark. Code Ann. § 4-90-406 (a) (1).
32. Ark. Code Ann. § 4-90-(a) (2).
33. Ark. Code Ann. § 4-90-406 (b) (1) (A) (i) and (ii).
34. Ark. Code Ann. § 4-90-406 (b) (1) (B).
35. Ark. Code Ann. § 4-90-406 (b) (3).
36. Ark. Code Ann. § 4-90-413.

THE REAL ESTATE SALE

The purchase of a home is by far the largest single purchase made by people today. Even so, people are still relatively uninformed on who is involved in such purchase and their roles.

The Real Estate Agent

To begin the real estate sale, a seller will often contact an agent to list real property for sale. A real estate agent is a "go-between" between a buyer and seller of real estate. He or she must be licensed by the state in which he is operating. The agent will receive his compensation through a predetermined percentage of the sales price. The agent usually represents only one party, the seller. However, the agent may represent both parties upon consent.

The listing is typically a written contract stating that the agent is entitled to his/her fee upon presenting a buyer ready, willing and able to purchase the property for the listed price. Please note: Most listing agreements state that the fee is earned regardless of whether the sale is completed or not.

As stated previously, the agent is the "go-between" relaying price and terms to the buyer and seller. In many cases the buyer and seller only see each other at the closing, which is where the deal is completed.

Because the real estate agent normally receives compensation from the seller, he/she is an agent of the seller. With being an agent, he/she owes his loyalty to the seller. For example, if you offer to purchase real property for a stated amount and tell the real estate agent that you would be willing to pay an additional \$10,000.00, the real estate agent has a duty to disclose that comment to the seller.

The Lender

While the lender may also be the seller, it is usually a financial institution loaning money to the buyer. Once an offer has been accepted, it is submitted to the lender for financing. Conventional financing is usually 80% of the appraised value. Financing is available up to 100% of the appraised value. However, the lender will usually charge the buyer mortgage insurance on a loan over 80%.

The lender may also charge points and an origination fee. Points are a up-front charge, which reduces the annual percentage rate of the loan. Therefore, a lender may offer the purchaser a loan at 8% annual percentage rate (APR) for 30 years at par or 8% annual percentage rate (APR) for 30 years with 1 point. This one point equals one percent of the loan amount. By increasing points paid, the purchaser can reduce his/her APR by what is called a "buy-down." An origination fee is typically 1% of the loan amount. It represents the fee for making the loan. These points and origination fees are paid at closing and are not refundable.

As far as other closing costs, the lender will usually require an appraisal, a survey, termite insurance and title work. The appraisal is an evaluation of the property and what it is worth. A survey shows the dimensions of the property, all improvements located within the boundaries of the property, any encroachment by other property owners, whether the property is located within certain flood plains, easements, and various other recorded information.

A termite insurance certification is a simple certification by a licensed and bonded termite controller indicating the property is free of active infestation of termites. The controller also indicates whether there has ever been any damage due to termites. This guarantee is usually good for one year from the date of inspection.

What title work is required will depend upon the lender's requirements. Traditionally, abstracts and attorney's opinions were utilized. An abstract is a short summary of the chain of title, and everything affecting title, from the original patent, usually from the United States Government, to the present. The attorney reviews the abstract and pronounces that in his/her opinion the property

has clear title or is encumbered by mortgages, judgments, delinquent taxes, etc.

As abstracts have faded, title insurance has become a more and more popular way of insuring clear title. Title insurance is an insurance policy issued by an approved insurance company. A one-time premium is charged for this insurance. The title policy covers the insured for defects in title unless those defects are excepted, such as setbacks and utility easements. Title insurance can be purchased to cover only the lender (mortgagee's policy) or to cover both the lender and the owner (combination policy). Just remember, these policies have an exceptions page. This should be reviewed because the insurance could be worthless if it excepted everything.

Because the purchase of real estate is such a large purchase, you are encouraged to ask questions and become fully informed before finalizing the real estate sale.

WHAT IS A CONSUMER "SCAM"?

Consumer "scams" are fraudulent schemes to separate a consumer from money or property.

Turning a quick and easy profit is usually a high priority for the schemer. Some schemers are best described as "thieves", but these thieves rarely use a gun or knife. Their greatest weapon is deception.

Other schemers may consider themselves to be sharp business executives, but they use misleading tactics or take advantage of the ignorance of others to accomplish their purposes. Some of these tactics may be legal in that no criminal laws are broken, but the consumer is pressured into making a foolish or legally binding decision.

The elderly are often the target of consumer scams. Whether young or old, however, consumers become victims because they do not recognize a scam until the schemer is long gone. Often times victims are ashamed that they allowed themselves to be fooled, but even the smartest of consumers can be the victim of a clever scam if proper precautions are not taken.

Recognizing a Consumer "Scam"---The "Red Flag" Approach

No matter how clever the schemer may be, you can protect yourself by recognizing the "red flags" that often fly high above most consumer scams. These "red flags" are actually symbols of the tactics used by schemers for consumer rip-offs.

Not every "red flag" is a sure sign of a consumer scam. However, when a "red flag" is spotted, you should be more careful in your dealings, even if you think you are dealing with a person who seems sincere and trustworthy. Listed below are some of the most common "red flags."

1. If it seems too good to be true, it probably is. Most consumer scamstake advantage of the basic human desire to get a good deal. Whether the scam involves cheap products, miracle cures, free vacations, or risk-free investments, you must immediately heighten your awareness and realize that few people will exchange something of value for little or nothing. Failure to recognize this "red flag" and to cautiously investigate the facts behind the deal is probably the biggest mistake that victims make.

2. Schemers often hesitate to answer specific questions about their identity, their product or past customers. This "red flag" only becomes obvious after the schemer is questioned about the origin of the products or services being offered and whether previous customers have been satisfied with the results they have obtained.

Do not be shy about insisting that such information be provided. If the name of the company or a customer is provided, investigate further to verify the information. Remember that an elaborate scheme may include a fake "home office" or maybe even fake customers.

3. Schemers may refuse to put their "great deal" in writing. Always insist that any offer be put in

writing, and read it before committing. Oral contracts can be binding, and you can risk bad credit by refusing to pay for goods or services simply because the terms of the deal were not fully disclosed. You have an obligation to ask questions about exactly what will be received and how much it will cost. Of course, a writing will not always protect you. There are thieves who would be happy to give their victim a brochure or even a receipt.

4. The schemer may use high pressure to "act now" while the offer is still good. Always be wary of being forced to make quick decisions about a deal that is good for a "limited time only" or that is only offered to a privileged few. Although not all such deals are illegitimate, you should recognize this "red flag" as a possible means by which the schemer is hoping that you will make an uninformed decision. Also be wary of any requirements of paying money up front. If you hand out your money to anyone without first gathering enough information about that person, you are asking for trouble.

5. The schemer wants personal information. The surest way to become the victim of a consumer scam is to give out personal information to someone who turns out to be a thief. Specifically, information such as social security numbers can be extremely valuable to a scam artist. If anyone attempts to obtain such information, for whatever reason, you should see a "red flag" waving. Social security numbers have become more of a problem in recent years because so many financial institutions use the numbers for identification. Unfortunately, a lost check with both an account number and a social security number can pose great problems for the consumer. Never give out personal information to unknown persons.

The "red flags" listed above are common elements of many consumer scams. There are others, of course. See if you can spot additional warning signs in the kinds of scams listed below. If your license lists your social security number as your identification, replace it with an identification number. Have your social security number removed from your checks also.

Common Types of Consumer Scams

1. Door-to-door sales.

These types of sales can offer you a variety of choices and specialized services. As always, however, the key to satisfaction is understanding your consumer rights. The "red flags" mentioned above must be considered. Are you satisfied that the salesperson has answered your questions about what you are buying and how much it costs? Can the salesperson provide you with enough identification to assure you that this is not just an attempt to gain entry to your home? The salesperson should be willing to put the terms and warranties offered into writing and provide you with a copy. This is especially important since the Federal Trade Commission's "Cooling Off Rule" requires that most door-to-door sales contracts contain specific information about your right to cancel.

You may cancel a sale of goods or services exceeding \$25.00 in value by mailing written notification to the seller before midnight on the third business day following the sale. In fact, a seller should provide you with a form that can be used to cancel the sale.

There are some exceptions to the "Cooling Off Rule." Remember that the purchase price must be at least \$25.00 or more. Also, the rule does not apply to emergency home repairs or maintenance initiated by you. The rule also does not apply to real estate, insurance or securities.

2. Charities.

Some charity schemes operate with the belief that "it is better to receive than to give." These types of consumer scams hurt not only the generous giver, but also harm reputable, legitimate charitable organizations. The best way for you to make sure that you are giving to a reputable organization is to contact the Better Business Bureau or the Arkansas Attorney General's

Office. Besides having documented experience with various charities, these organizations look at certain factors which help determine whether a charity is legitimate. These factors include:

(i) Public Accountability - Does the organization publicize its costs and expenses along with the general purposes for which the money is to be spent?

(ii) Fund Raising Costs - A legitimate charity should not expend greater than 35% of its revenue on fundraising costs and should spend at least 50% of revenues for programs directly related to the charity's purpose.

(iii) Solicitation Materials - Are they truthful and do they provide enough information about the charity?

(iv) Fundraising Practices - A legitimate charity should not use high pressure tactics involving harassment, coercion or emotional appeals that distort the charity's purpose.

Consider all of these factors before you part with your hard-earned dollars.

3. Travel Scams and Free Prizes.

You should always be wary of letters or phone calls that offer goods or services at little or no cost. Many times the so-called "free prize" can turn out to be very costly. Sometimes you will be told to send in money to find out what prize you have won. Perhaps a phone call to a 900 number will tell you whether you've won a new car or \$500.00 in coupons. The catch: the phone call may cost \$4.95 a minute, and the coupons may be for savings on merchandise that is of no value. If you have won a free gift, you should not have to spend any money to receive it.

4. Home Repair.

If a generous person offers to paint your house or to fix that hole in the roof, make sure you are not giving your money to a scam artist. Some will ask you to advance money for supplies and then disappear. Many "red flags" often appear in home repair scams. Does the person require payment in advance? Will the names of satisfied customers be provided? Will the repairer let you arrange to furnish the needed materials? Do you really need the repairs that are being offered? Can you verify the quality of the work by having an experienced person inspect it? Consult friends or neighbors for referrals.

The best way to avoid this scam is to decline the services of unknown persons who contact you with an offer of home repair and find your own repairman. The elderly are particularly vulnerable to this type of "scam", but everyone should make sure to ask these important questions before parting with their money.

5. 900 Numbers.

Although previously mentioned in connection with other scams, 900 numbers require a category of their own since they have become so much more common in recent years. These numbers can be a legitimate way of carrying on business, but you should follow some simple rules to keep from being the victim of a scam.

Always know what the 900 call will cost up front. For instance, some 900 calls may list their cost as \$3.00 per minute, but the message fails to state you are being billed for a minimum of five minutes just for making the call. Furthermore, 900 numbers can be marketed toward children and teenagers who may run up an outrageous bill at their parents' expense.

If you have a problem with a 900 number charge, you should let your telephone company know immediately. Although you are probably legally obligated to pay the bill, some companies will not shut off your service while you attempt to resolve the dispute. Other companies now offer consumers the choice of "blocking" their telephone line so that no 900 numbers can be called.

6. Investment Fraud.

Investment scams are too numerous to count. Needless to say, the opportunity to make a quick

profit at relatively low risk is usually a sure sign that trouble is brewing. You should always be particularly careful when putting your money into the hands of others for investment purposes when promised with extraordinary profits. Some of these investment opportunities may turn out to be pyramid schemes, which are illegal in Arkansas. Be sure that the company you choose is a reputable one and has been highly recommended by others before entrusting it with your money.

Wills and Estate Planning

A well-prepared Will is one of a number of effective tools that can be used to assure that your property, called your estate, passes as you wish to your family and loved ones after your death. Your estate consists of property and cash assets that you own. Included would be bank accounts, land, furniture, buildings, cars, stocks, bonds, proceeds of life insurance payable to your estate, and pension plan benefits payable to you.¹

In Arkansas, in order to execute a valid Will, these requirements must be complied with:

- a) The maker (testator) must be 18 years of age or older,²
- b) The testator must be of "sound mind" at the time the Will is prepared and intend the document to be his/her Will.
- c) The Will must be properly executed by being in writing and signed by the testator.

Execution of a Will

If a Will is typewritten (attested), it must be signed by at least two disinterested witnesses to the testator's signature. A disinterested witness is a person not receiving property in the will. The testator must sign at the end of the Will in the presence of the witnesses (any writing below a signature on an attested will is ineffective).³

A handwritten (holographic) Will is valid in Arkansas if it is entirely in the handwriting of the testator and signed by the testator. There is no requirement that a holographic will be witnessed. To be admitted into court after the testator's death, three disinterested persons familiar with the testator must testify that the handwriting and signature is the testator's. The danger of a holographic Will is that you may inadvertently create an instrument which is invalid or which has unintended consequences.⁴

Changing Your Will: Codicils and Revocation

A properly executed Will, as described above, is good until it is changed or revoked by you. Changed circumstances may require an addition or correction by codicil to the Will (a document stating additions or changes to the original Will). If a codicil is used, it must be in writing, signed by you, and witnessed, just like the Will itself.⁵

A Will can be revoked only by execution of another Will or by being burned, torn, canceled or destroyed with the intent to revoke by the testator or another person in his presence and at his direction. If a married person makes a Will and later gets divorced or the marriage is annulled, the Will remains valid, but any bequest to the divorced spouse is revoked automatically. Marriage after a Will is made does not affect the Will, but the testator will probably make a new Will or add a codicil to his or her old one to include bequests to his or her spouse. Similarly, births and deaths of children or grandchildren may affect your wishes for distribution of your estate. A child (or grandchild in certain cases) who is omitted from the Will remains entitled to a share of the estate.⁶

A Will that is revoked or which becomes invalid can only be revived by re-execution of the former Will or by execution of a new Will in which the revoked or invalid Will is incorporated by reference.⁷

Separate Bequests of Tangible Property

Arkansas law allows reference in a Will that certain specific personal property bequests may be found on a separate list kept with your will. This list may be made before or after you execute your Will and may be changed without affecting the provisions or validity of your Will. This allows for more flexibility in disposing of individual items. This procedure is limited to tangible personal property and excludes real estate. It cannot be used to dispose of money bequests, evidences of indebtedness, documents of title, securities, or property used in a trade or business. It is a good idea to date such a list and, when a new list is made, to destroy any old lists.⁸

Who Administers Your Estate?

Most Wills name an executor (male) or executrix (female) to administer the Will. A financial institution with trust powers can serve as an executor. The executor is the person whom the testator chooses to oversee his or her Will during probate proceedings. The executor is responsible for closing the estate by paying all debts and taxes of the deceased as well as distributing the estate according to the testator's wishes as expressed in the Will. If the executor dies before the testator, is ill or is otherwise unable to carry out his or her duties, or if the testator fails to name an executor in his or her Will, the court will appoint an administrator to do the executor's task. The court also does this when a person dies without a Will. To avoid this situation, it is a good idea to name a successor executor just in case the first choice is unable to perform the job. An executor or administrator may also be known as a personal representative.⁹

Probate: What To Do When Someone Dies

When there is a death in a family, frequently the last thing the surviving relatives attend to is the legal distribution of the deceased's estate. When there is a valid Will, the survivors may know how to handle the distribution - not always. When there is no Will, which is often the case, the family members may not know the proper steps to take. (If you wish to make anatomical gifts, or if you have specific burial instructions, it is best not to make such provisions in your Will, as by the time your Will is produced, it may be too late.)

If an individual dies leaving property that is not transferred by other means (joint ownership, right of survivorship, trust, etc.), it must go through probate court proceedings. When a valid Will exists, the executor or executrix named by the Will should be contacted (if he or she is not already aware of the testator's death) and that person should get in touch with a lawyer (preferably the one who prepared the Will) who will initiate proceedings in the probate court. In the absence of a Will, administration is still required, and a friend or relative should contact a lawyer.

A petition must be submitted to the court to have the Will (if there is one) admitted into probate and to have a personal representative appointed. If there is no Will, the petition simply asks for the appointment of an administrator for the estate. Notice of probate proceedings are published in the newspaper. Following the publication of this notice there is a three-month period for other claims to be made, such as personal injury. The personal representative has an affirmative duty to give actual notice of the claims period to any creditor who is known or reasonably ascertainable.

With the assistance of the lawyer and the personal representative, the value of the estate is assessed, and owed taxes are paid, along with other costs of the administration. Once this is completed, and valid claims have been paid, the court confirms the distribution of the remaining property to the beneficiaries. The entire process of administering an estate takes at least six months to complete, but is not uncommon for estates to be open much longer.¹⁰

Costs of Probate

Filing fees for probate administration in Arkansas are approximately \$100 although additional costs may be incurred. The executor is entitled to receive a fee, which is a percentage (roughly

3%) based upon the value of personal property in your estate.

Additionally, the attorney hired by your personal representative is entitled to a fee based on a percentage of the total property in the estate, although it is also acceptable for the personal representative to make a contractual fee arrangement with the attorney. Regardless of the basis of fees, their reasonableness is subject to approval of the probate court.

Avoiding Probate

With or without a will, if your estate undergoes probate administration, your family will be faced with a probate court proceeding before your property is legally distributed following your death. Although it is not always best to avoid probate, several different methods exist which accomplish this.

Low Estate Valuation: If the value of a deceased person's estate does not exceed \$50,000 excluding homestead and certain allowances to the surviving spouse and minor children, and there are no claims against the estate, a person entitled to a distributive share may file an affidavit with the probate court, listing the property of the deceased and its value, along with the names of relatives and their relationship to the deceased, the persons entitled to receive the property, or the persons having possession of the property and all their heirs. Use of this affidavit, where applicable, eliminates the need for probate administration.¹¹

Joint Ownership as a Will Replacement: Joint ownership of property with the right of survivorship presents a major restriction to the normally lenient Arkansas laws of property distribution through Wills. In such a relationship, the surviving party automatically becomes the sole owner of all jointly owned property, real estate, bank accounts, motor vehicles, and household goods when the other party dies. Joint ownership between husband and wife in Arkansas is called tenancy by the entirety.

Property in joint ownership does not pass through probate. Because of this, you may be tempted to use joint ownership to distribute your estate, instead of a Will, with the idea of sparing your family the delay of probate court proceedings. This may or may not be wise. Joint ownership is a fixed and rigid system that does not allow for changes in circumstances. It gives another person equal control over whatever property you decide to place under that arrangement. For example, a joint owner of your bank account can draw on or deplete that account while you are still living, without your permission, even though you may only intend for that person to have the money in that account after your death.

Remember that using joint ownership as a means of helping your family avoid probate court after your death may cause you considerable problems in your lifetime. Used in addition to a Will, joint ownership can be a useful legal device in helping distribute your estate after you die, but be certain you are acting wisely. Remember also that a husband and wife who own everything jointly may still need a Will in the event that they die simultaneously. Additionally, probate administration will still be necessary for the estate of the surviving joint tenant when that person dies.

Living Trusts: A living trust (also called a revocable trust) is an arrangement whereby one person (the "trustee") manages property for the benefit of another person (the "grantor"), who transfers all or part of his or her property into the trust prior to his death. A living trust may also be created jointly by a husband and wife. Many people prefer the trust to a Will, because the trust's terms do not become public at the grantor's death, and the assets owned by the living trust do not pass through probate court. The greatest disadvantage is that certain assets may inadvertently never be transferred to the trust, thus remaining outside the trust at the grantor's death, and necessitating a probate administration after all.

Many companies who market living trusts promote tax savings as an incentive, but unless your estate exceeds \$675,000, your estate will not be subject to federal estate tax and the living trust will not provide any extra savings. If you are interested in a living trust, it is advisable to contact an attorney to draft a trust instrument which will be tailor-made to your particular needs and circumstances.

Lapse

In Arkansas, if you leave property in a Will to someone who dies before you do, the gift lapses and goes into the residue of your estate (the residue consists of all of the property of a testator which is not specifically mentioned in his Will). An exception to this occurs when you leave property to a descendant (a child or grandchild), and your descendant has surviving children or grandchildren. In that case, if your descendant dies before you, the gift passes to his or her descendant or descendants and does not lapse.¹²

Rights of the Surviving Spouse: Elective Share or Taking Against the Will

Arkansas law provides for "taking against the Will" in some circumstances. Those who may take against the Will are: (1) a surviving spouse (provided the husband and wife have been married at least one year) who is excluded or omitted from his/her spouse's Will or is given less than he/she would have received by law if the spouse had died without a Will; (2) a child who is born or adopted after a Will was executed (unless the Will makes provision for afterborn or adopted children); (3) a child who is living at the time the Will is executed but is not mentioned in the Will. (A parent may disinherit a child in a Will by listing him or her by name and making it clear that he or she is to receive nothing from the testator's estate.)¹³

Dying Without a Will: Intestate Succession

Dying without a Will, called dying intestate, means that all of your property - other than that which is held jointly - will be distributed among your surviving relatives according to Arkansas law. For example, if you are the sole owner of a piece of real property and you die intestate, leaving children, this property would descend to your children, which may not be your intent. Your spouse would be limited to a life interest in one-third of the property. If the children wish to sell the property, they have to prove their legal right to the property to "clear the title" and work out an agreement as to the life interest of the surviving parent. (If there had been a Will, title to the property would have been established without the need for additional proceedings.)

If your children are minors, a guardian may be appointed for them by the court, and the estate will remain under court supervision until the children are 18. The guardian is required to post bond. With a Will, if you leave property to a minor child, you can (1) suggest a guardian of your choice and request the elimination of the bond requirement or (2) leave the property in trust for the children.

If you die without a Will, your estate cannot be distributed to your friends or to your favorite charity.¹⁴

Estate Taxes

Whether an estate must pay an estate tax depends upon the size of the estate and whether the estate is left to a surviving spouse. The estate is subject to federal estate tax only insofar as its value exceeds \$675,000. (This is the current amount, however, it will gradually increase until the year 2006 when the amount goes up to \$1,000,000). Under present law, the portion of an estate left to a surviving spouse is exempted from the estate tax (the marital deduction).

Your gross estate for tax purposes is all property owned at death, certain property transferred during your lifetime and, in some circumstances, property transferred within three years of your

death. Your taxable estate consists of your gross estate less certain deductions and exemptions. The State of Arkansas imposes an estate tax, but the Federal tax allows a credit for state death taxes. Under Arkansas law the estate tax due to Arkansas equals the Federal tax credit.

Having Your Will Declared Valid Before You Die

Arkansas law makes it possible for you to present your Will to the probate court during your lifetime, requesting that the court rule on the validity of the Will (a procedure known as ante-mortem probate). If the court finds that the Will is properly executed, that you are of sound mind and free of undue influence and that the Will is otherwise valid, the court may declare it valid. The Will is then placed on file with the court. If you change your Will, or write a new one, this procedure will not validate the new or changed Will. A new proceeding must be commenced. The purpose of this procedure is to prevent a Will contest after your death. All persons who may have an interest in your estate must be made parties to such a proceeding. A Will may also be filed with the probate court without any ruling made as to its validity, as a means of safekeeping the document.¹⁵

ENDNOTES

1. Ark. Code Ann. § 28-1-102 (a) (8).
2. Ark. Code Ann. § 28-25-101.
3. Ark. Code Ann. § 28-25-104.
4. Ark. Code Ann. § 28-25-104.
5. Ark. Code Ann. § 28-1-102.
6. Ark. Code Ann. § 28-25-109.
7. Ark. Code Ann. § 28-25-110.
8. Ark. Code Ann. § 28-40-107.
9. Ark. Code Ann. § 28-40-106.
10. Ark. Code Ann. § 28-40-101, et. seq.
11. Ark. Code Ann. § 28-41-101.
12. Ark. Code Ann. § 28-26-104.
13. Ark. Code Ann. § 28-39-401 et seq.
14. Ark. Code Ann. § 28-9-201 et seq.
15. Ark. Code Ann. § 28-40-201 et. seq.

References and Information

If you desire the services of an attorney, but do not know how to locate one to represent you, legal representatives can be obtained by logging onto the Internet Site at www.arkbar.com. Inside this site is a service called arkansasfindalawyer where you can search for an attorney by name, city, county or type of service.

Consumer Complaint Agencies

Arkansas Agencies:

Arkansas Attorney General's Office

Consumer Protection Division

200 Tower Building

323 Center Street

Little Rock, AR 72201

(501) 682-2341 (in Pulaski County)

1-800-482-8982 (statewide)

Arkansas Public Service Commission
P.O. Box 400
Little Rock, AR 72203
(501) 682-1718 (in Pulaski County)
1-800-482-1164 (statewide)

Better Business Bureau of Arkansas
1415 South University
Little Rock, AR 72204
(501) 664-7274 (in Pulaski County)
1-800-482-8448 (statewide)

Federal Trade Commission
For Consumers Call
1-877-FTC-HELP
or go to their website at:
www.ftc.gov

Find A Lawyer