5

CONSUMER RIGHTS IF YOU ARE SOLD DEFECTIVE GOODS OR SERVICES

§ 5. 1. Introduction

This consumer rights chapter describes your rights when you are sold defective goods or services. It contains the following sections:

§ 5. 2. When Can You Return Goods Or Services?

Can you ever back out of a contract and receive a refund for a consumer good or service you purchased? Certainly you can if you discover the good or service is seriously defective and you act immediately. The business should return your money, no questions asked. What if the business has a "no cash refund" policy? That makes no difference if the product is defective.

If you do not discover the defect until after you have used the product or service for some time, then you probably cannot just demand your money back. First, you should give the seller a chance to replace the item or make repairs. *However, if the item is still within its "useful life" and you have not abused it (e.g., using your food processor to mix paint), then the repair of a serious defect should be made at no charge to you.*

Of course, whether or not an item is defective, if a store has adopted a money return policy for customers who have had second thoughts, it must honor that policy.

§ 5. 3. Immediate Rejection Of Defective Goods

The Maine Uniform Commercial Code (U.C.C.) gives you the right to "reject" merchandise and have your money refunded or the item replaced whenever the goods "fail in any respect to conform to the contract."[1] For example, you can immediately "reject" a defective item if it breaches the seller's express warranty, even if the defect is minor. However, if a defect is minor, then the seller should be given a chance to "cure" (e.g., repair) the defect at no charge to you.[2] If the item is "substantially defective"[3] then you should demand that the seller give you either a replacement or your money back. For example, if you put a $500 deposit on a blue 1992 motorcycle and the seller orders a brown one by mistake, then you may *reject* the motorcycle and demand either your deposit or the right color. Nor do you have to wait an unreasonable length of time for the dealer to find a replacement.[4]

Therefore, if you buy a consumer good (with or without a warranty) and you immediately discover a defect (within the first day or so and before any significant use of the item),[5] then pursuant to 11 M.R.S.A. § 2-602 of the Maine U.C.C.:

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[1] 11 M.R.S.A. § 2-601(1).

[2] 11 M.R.S.A. § 2-508. In most cases, the consumer should allow the dealer the opportunity to fulfill the terms of the contract. *See Schiavi Mobile Homes, Inc. v. Gagne*, 510 A.2d 236, 238 (Me. 1986) (since mobile home was delivered within a reasonable time, dealer had an opportunity to cure defect that sustained rejection). *See also Uchitel v. F.R. Tripler & Co*., 434 N.Y.S.2d 77 (N.Y.Sup.Ct. 1980) (consumer cannot refuse to try on an allegedly mistailored coat).

[3] 11 M.R.S.A. § 2-608(1). Perhaps the simplest measure of whether a good is substantially defective is when the item is not "fit for the ordinary purposes for which such goods are used" (11 M.R.S.A. §2-314(2)(c)). But there can be other measures as well. For example, the Maine Law Court has described "substantial impairment" as "any defect that shakes the buyer's faith or undermines his confidence in the reliability and integrity of the purchased item. . . ." *Innis v. Methot Buick-Opel, Inc.*, 506 A.2d 212 (Me. 1986) (quoting *McCullough v. Bill Swad Chrysler-Plymouth, Inc.*, 449 N.W.2d 1289, 1294 (Ohio, 1983); *see also Beaulieu v. Dorsey*, 562 A.2d 678 (Me. 1989) (a consumer's private unfair trade practice action over defective furniture resulted in restitution and an attorney's fee award of more than $18,000).

[4] *See* 11 M.R.S.A. § 309. If a specific delivery date is not set, then the goods must be delivered within a reasonable time.

[5] If you only occasionally use the product, there may be additional time to reject. For example, if you bought a boat for pleasure and only used it on weekends, then the court might allow you additional days before you must either accept or reject the boat.

A. You can immediately "reject" the item (i.e., cancel the sale) and demand the return of the purchase price and damages, if any.[6]

B. If the discovered defect is minor, then before you reject the item the seller probably should have the right to repair ("cure") it.[7] If the seller cannot repair it within a reasonable time (e.g., a week or two), then you would still have a right to reject the item.

C. If the defect is substantial, then usually your remedy is either replacement or your money back and not a free repair (cure).[8]

D. If the defect is substantial, then you have a right to have full confidence in the replacement. For example, it may not be sufficient to simply replace a defective transmission.[9]

Remember: if your item is not defective, then whether or not you can return it depends on the store's return policy. If their policy is "no returns unless defective," then you must keep the item unless it was somehow significantly misrepresented to you. They are not obligated to give cash refunds if that is not their policy.

§ 5. 4. How To Reject Defective Goods

To obtain your refund, you must reject the goods in accordance with the law.[10] To reject, you must:

A. Notify the seller of your rejection. The notice should be in writing and should state the reasons for rejecting the goods (e.g., list defects). You should mail the notice to the seller's place of business and keep a copy for yourself.

B. Notify the seller within a reasonable time after the goods are delivered.[11] The law does not provide a specific time for rejection, but to be safe you should notify the seller before paying for the goods. If you do not notice the defect until after you have taken the merchandise home, you must notify the seller immediately and you may not use the goods as if you owned them. Any use of the goods will prevent you from rejecting them.[12] You must also hold the goods "with reasonable care" and permit the seller to remove them[13]

The same law applies if the seller doesn't make the goods available as promised. For example, if

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[6] Canceling the sale is a legal remedy as opposed to an equitable remedy. Therefore, not only would you be eligible for the return of the purchase price but also for consequential and incidental damages, if any (11 M.R.S.A. § 2-715).

[7] *See* 11 M.R.S.A. § 2-508(2). If the defect is *not* minor, but the dealer's contract "time of performance" has not expired, then the dealer can still repair the defect. For example, if your contract for a used car requires the car to be delivered by October 15 and you discover a serious defect on October 1, the dealer still has 15 days to "cure" the problem. *See Schiavi Mobile Homes v. Gagne*, 510 A. 2d 236, 238 (Me. 1986)(for a mobile home built to the consumer's specifications, "time for performance" is established by a "reasonableness" standard). If the contract does not state a delivery date, then most courts assume the "time of performance" date is the date the consumer actually received the item from the dealer.

[8] 11 M.R.S.A. § 2-508.

[9] 11 M.R.S.A. § 2-508(2). *See e.g.*, *Zabriskie Chevrolet, Inc. v. Smith*, 240 A.2d 195 (N.J. 1968) (seller's attempted replacement of a defective transmission in a new car with a transmission of unknown lineage was held an inadequate cure); *see also Bayne v. Nall Motors, Inc.*, 12 U.C.C. Rep. 1137 (Iowa Dist. Ct. 1973) (differential on a four-day-old car that was driven only 400 miles locked up because of a lack of lubricant; the seller's attempted replacement of the differential was held to be an inadequate cure when the seller failed to check for damage to the power train and other parts likely to have resulted from the lubrication problem).

[10] 11 M.R.S.A. § 2-602.

[11] 11 M.R.S.A. § 2-602(1).

[12] 11 M.R.S.A. § 2-602(2)(a).

[13] 11 M.R.S.A. § 2-602(2)(b).

you ordered the blue motorcycle for delivery on June 1, and it isn't available on the agreed-upon date, then you may reject the motorcycle and the seller must refund your deposit.

§ 5. 5. Layaway Sales

These rules also apply to layaway sales with one major exception, the seller's "right to cure." Assume that you purchased the blue motorcycle on layaway and agreed to make twelve monthly payments. After four months, you find out that the seller has by mistake set aside a brown motorcycle. Even if you reject the brown motorcycle, the seller can notify you that he intends to get a blue one within the remaining time of eight months.[14]

In this situation, you should *not* make any more installment payments until the seller assures you that he will have the right motorcycle within the remaining 8 months. Before suspending payments, however, you must send the seller a letter demanding that he give you "adequate assurance" that he will have the proper merchandise within the remaining time.[15] You should demand:

A. That the seller notify you in writing within 30 days if he does intend to obtain the right motorcycle; *and*

B. Give you some evidence (e.g., a copy of the order) showing that he has taken steps to honor his obligation. Your obligation to make payments is automatically suspended while you are waiting for a response.[16]

If the seller does give you a satisfactory response within the 30 days then you must make your payments. If he doesn't respond within the 30 days, or doesn't give you "adequate assurance," you may cancel the contract and recover all payments made.[17] To cancel, you should send a letter informing the seller that you are canceling the contract and requesting a full refund.[18]

WARNING: If you fail to make payments but do not follow this procedure *exactly*, you will have broken the contract and the seller may keep some of your money as damages.

§ 5. 6. When The Defect Is Not Immediately Discovered

If you do not immediately discover the defect, it is difficult to use the above "rejection" steps. Rather, you must rely on your express (written) or implied warranty rights (*see* Chapter 4) and seek repairs from the dealer or manufacturer. If the repairs are not satisfactory and the defect is substantial, then you can consider your right to "revoke acceptance."[19]

Let's assume you received an express warranty with your consumer good or service. Once you complain about a defect and seek repair, you have "frozen" your express warranty rights as to that problem. If the warranty period then expires and the repair has not yet been made the seller cannot claim you are no longer eligible for warranty repairs (*see* § 4.4 in this Guide).

Maine law also states that any consumer item sold by a merchant comes with an invisible "implied" warranty of merchantability stamped on each item.[20] In addition to any "express" warranty the item may have, this implied warranty guarantees that an item will perform as it was designed to: a

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[14] 11 M.R.S.A. § 2-508(1).
[15] 11 M.R.S.A. § 2-609(1).
[16] 11 M.R.S.A. § 2-609(1).
[17] 11 M.R.S.A. § 2-609(4).
[18] 11 M.R.S.A. §§ 2-609(4), 2-610(2), 2-711(1).
[19] 11 M.R.S.A. § 2-608.
[20] 11 M.R.S.A. § 2-3l4.

washing machine will wash, a sewing machine will sew. Further, merchants cannot exclude or modify this implied warranty right. To attempt to do so is to commit an illegal unfair trade practice.[21] Thus, if a dealer sells you an item which proves to be seriously defective[22] during the course of its "usual life,"[23] and you have not abused it, then the dealer should be required to repair it free of charge either under your express or implied warranty.

If the merchant cannot repair the defect, then you may have the right to revoke ownership and sue either the dealer or the manufacturer for your money back.[24] Here are the four steps you must follow to enforce your implied warranty rights:

A. The defect must be one that "substantially impairs" the value of the item to you.

B. You must have given the retail dealer or the manufacturer notice of the defect within a reasonable time and a reasonable opportunity to fix the defect.

C. If the item cannot be repaired then you must revoke ownership within a reasonable time after the defect is discovered.

D. You must notify the seller you are revoking ownership due to breach of warranty (*see* 11 M.R.S.A. § 2-608).

E. Except for the defect that is causing you to revoke, you should be sure the item is being returned without "substantial change" (*e.g.*, your child's scratches on the TV cabinet when you are returning what you claim to be a defective picture tube).

Implied warranty rights last only 4 years from the date of sale. If you decide to go to court to enforce your implied warranty rights, you must do so before this 4 year period expires.

We strongly recommend that before you revoke ownership you should consult a lawyer. This is especially important if you purchased the item on credit and are still paying (*see* Chapter 27 in this Guide, Consumer Rights and Credit Sales).

§ 5.7. Damages

If the item (new or used) cannot be repaired, but you do not want to revoke ownership, you can

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[21] 11 M.R.S.A. § 2-316(5)(a).

[22] *See Suminski v. Maine Appliance Warehouse*, 602 A.2d 1173 (Me. 1992). The court found that consumer Suminski did not prove that his 13-month-old television (which came with a 12 month express warranty) was so defective as to be in breach of the Maine implied warranty law:

> The District Court heard evidence that Suminski bought a new expensive television set which began to turn off automatically after thirteen months. No evidence was presented concerning the specific defect in the product. In some circumstances a breach of the implied warranty of merchantability under the U.C.C. may be established by circumstantial evidence. *See e.g. A.A.A. Exteriors, Inc. v. Don Mahurin Chevrolet & Oldsmobile, Inc.*, 429 N.E.2d 975, 978 (Ind.App.1982). In the case at bar, however, the television set was in all respects satisfactory during approximately thirteen months after it was purchased. For all that appears in the record, the malfunction at that time may have resulted from a defective switch, repairable at a small cost. We conclude that the sale of a major appliance with a switch that fails more than a year later, cannot support a finding that the entire appliance was unmerchantable when sold. To use an automotive example, an unmerchantable battery may not render an entire vehicle unmerchantable. *Cf. Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 605 P.2d 1275,1278 (Wash.Ct.App.1979); *Tracy v. Vinton Motors, Inc.*, 296 A.2d 269, 272 (Vt. 1972).

[23] Even if an item has a lengthy useful life (*see* § 4.8) a consumer, in almost all cases, must commence a Uniform Commercial Code action within 4 years from the date of sale; *see* § 5.9, Statute of Limitations.

[24] See *Searles v. Fleetwood Homes of Philadelphia*, 878 A.2d 509, 515 (Me. 2005) (purchasers entitled to revoke acceptance of home when manufacturer persistently failed to follow up on promised repairs and to complete repairs within a reasonable amount of time).

bring a legal action for your damages (losses). The basic measure of damages for breach of warranty is the difference between the value of goods accepted and the value the goods would have had if they had been delivered in good condition.[25] In addition, you may also be eligible for incidental damages[26] and consequential damages.[27] The U.C.C. also allows a buyer to notify the seller that the contract has been breached and that the consumer is deducting reasonable damages ("setoff") from the payments still owed.[28] Remember, consumers injured by a seller's or manufacturer's negligence should take reasonable steps to mitigate (lessen) their damages.[29]

§ 5. 8. Unfair Trade Practices

If you have purchased a seriously defective item and the seller refuses to honor your express or implied warranty rights, the refusal may also violate the Unfair Trade Practices Act[30] and you can sue for damages or restitution (the return of your money) or other suitable equitable relief (*e.g.*, specific performance) and your attorney fees.[31] *See* Chapter 3 in this Guide, the Maine Unfair Trade Practices Act.

§ 5. 9. Statute Of Limitations

Many of the contract rights discussed in this chapter are based on Article 2, Sales, of the Maine Uniform Commercial Code. Pursuant to 11 M.R.S.A. § 2-725(1), you must begin any U.C.C. lawsuit "within 4 years after the cause of action has accrued." If this time period has expired, you may not be able to claim a U.C.C. breach of warranty or other U.C.C. violation.

A cause of action accrues when a breach of contract occurs.[32] In a breach of express or implied warranty, this usually means when the seller delivers the item to you. Thus, in most cases,[33] the 4-year U.C.C. statute of limitations period begins on delivery and *not* from when you first discover the breach. However, if your express warranty is longer in length than four years (e.g., a 6-year drivetrain warranty or a "lifetime" warranty), then the U.C.C. 4-year statute of limitations may not bar your lawsuit until the express warranty expires.

If your complaint also involves an Unfair Trade Practice Act violation[34] then you may have an additional two years to begin your suit as the statute of limitations for a private unfair trade practice

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[25] 11 M.R.S.A. 2-714(2).

[26] Incidental damages resulting from the breach would include, for example, reasonable expenses for the care of defective goods. Suppose you were sold a defective car and it cost you $50 to tow it back to the dealer for repairs. The cost of the tow would be an incidental damage.

[27] *See* 11 M.R.S.A. § 2-715. Consequential damages include damages which could not reasonably be avoided and which are a direct result of the breach. For example, if the consumer were sold a defective car and that car was the consumer's only available form of transportation (*e.g.*, she lived in the country and there were no buses), then the cost of a rental vehicle would be a consequential damage.

[28] 11 M.R.S.A. § 2-717; *Cianbro Corp. v. Curran-Lavoie*, 814 F.2d 7, 13 (1st cir. 1987).

[29] *See Searles v. Fleetwood Homes of Pennsylvania*, 878 A.2d 509, 520-21 (Me. 2005).

[30] 5 M.R.S.A. § 207. *See Suminski v. Maine Appliance Warehouse*, 602 A.2d 1173 (Me. 1992) (refusal to recognize the existence of implied warranties can be an unfair trade practice).

[31] *See* 5 M.R.S.A. § 213; *see also State v. Bob Chambers Ford*, 522 A.2d 362 (Me. 1987) (Court allowed re-rustproofing (specific performance) instead of returning the cost of the rustproofing (restitution)).

[32] 11 M.R.S.A. § 2-725(2).

[33] An exception to this rule is "where a [express] warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance." In this case the cause of action accrues when the breach is or should have been discovered. *See* 11 M.R.S.A. § 2-725(2). *See Mittasch v. Seal Lock Burial Vault, Inc.,* 344 N.Y.S. 2d 101(App. Div.1973)(a warranty for a casket and burial vault that stated it "will give satisfactory service at all times" was held to extend future performance).

[34] 5 M.R.S.A. §§ 207, 213.

claim is 6 years.[35] You should argue that this period begins to run when a reasonable person would have been put on notice concerning the unfairness or the deception.

§ 5. 10. Seller's Damages When The Consumer Unfairly Breaks The Contract

When you cancel a sale without justification, you have broken the agreement and the seller is entitled to damages. (The only exception is when the seller has agreed to allow you to cancel and returns your deposit.) A common measure of damages is the seller's lost profits (*e.g.*, the difference between the market price of the goods and the contract price), together with the seller's incidental damages (reasonable expenses caused by the buyer's refusal to pay).[36] For example, it would not be improper for a seller to charge a "restocking fee" if the consumer wants to return a non-defective item. But it would not proper to charge such a fee if the item were being returned because it was defective.

§ 5. 11. Return Of Deposits

What happens when you put down a deposit and then decide not to buy the item? When you order expensive merchandise, the seller will probably ask for a deposit or partial payment in advance. Never make a deposit unless you are sure you want the merchandise and can afford it. If you cancel the sale, you have breached your contract and you will lose a portion of your deposit and perhaps all of it.

The right to recover your deposit or layaway payments depends on your agreement with the seller (your contract) and whether the seller broke that agreement. If you have not accepted delivery of the goods (or the merchant has taken the goods back), then the Maine U.C.C. [37]allows you to recover only so much of your deposit or layaway payments that exceeds:

A. A reasonable "liquidated damages" clause in your contract, or

B. If there is no such damages clause, 20% of the total contract price or $500, whichever is smaller.

A liquidated damage clause sets the amount of damages in the contract and typically provides for forfeiture of the buyer's deposit. *However*, courts will not enforce these clauses unless they reasonably reflect the seller's actual damages.[38](Remember the seller still possesses the item and can sell it at a

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[35] 14 M.R.S.A. § 752. The Maine Unfair Trade Practices Act is an *additional*, not parallel, consumer remedy to any separate common law or statutory remedy. *See Murary v. Western American Mortgage Company*, 604 P.2d 651-54 (Az. 1979) (Consumer Fraud Act creates a cause of action separate from common law fraud). Therefore, the finding of a violation of the Unfair Trade Practices Act is necessarily separate and distinct from the violation of any other statutes that the act or practice may have violated. Nor is it necessary to find a violation of a separate statute before a violation of the Maine Unfair Trade Practices Act can be found. The elements of an unfair trade practice are substantively different than the elements for other causes of action (*e.g.*, a U.C.C. violation of implied warranty). *See* § 4.7 in this Guide. To be in violation of the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 207, it is sometimes not enough that an act or practice be in violation of a particular statute. It should also possess an attribute of significant unfairness or deception. *See Tierney v. Ford Motor Company*, 436 A.2d 866, 873 (Me. 1981). If the court does indeed deem it to be an "unfair trade practice," then the 6-year statute of limitations established by 14 M.R.S.A. § 752 applies. The 6-year statue of limitations does not apply to an UTPA enforcement action by the State.

[36] 11 M.R.S.A. §§ 2-708 - 2-710.

[37] 11 M.R.S.A. § 2-718(2). This buyer's right to restitution may be subject to "offset" (11 M.R.S.A. § 2-718(3)) if the buyer establishes upon reselling the goods that he has been damaged more than amount of the deposit he is allowed to keep under § 2-718(2).

[38] *See Dairy Farm Leasing Co., Inc. v. Hartley*, 395 A.2d 1135, 1140 (Me. 1978).

profit to another buyer.) Too often these "damages" clauses are found in form contracts and consumers are presented them on a "take it or leave it" basis. Such contracts are sometimes found to be unfair "adhesion" contracts and therefore not enforceable.

For example, assume that you purchase a $300 chair on layaway and make payments of $75. However, you are unable to complete the purchase and request a refund. Your contract did not have a liquidated damages clause. Under 11 M.R.S.A. § 2-718(2), the seller can keep only $60 of the deposit ($300 x 20%) and must return the $l5 balance. Similarly, if you order a new car for $l0, 000 and place a $750 deposit but decide to cancel the order, the dealer can keep $500.

§ 5. 12. Services And Real Estate Transactions

The law governing return of deposits on contracts for the sale of services or real estate is much the same as for goods, with two major differences.

A. Substantial Breach

In order to cancel the contract and recover your deposit you must show that the seller's breach is substantial. For sales of goods, even a slight *variance* from the contract may allow you to reject and recover your deposit.[39] However, for services, you must show that the seller's breach " *substantially impairs the value* to you of his performance," or that he acted willfully or negligently.[40]

For example, if you contract with a carpenter for a new porch, with construction to begin on June 1, and the carpenter does not start until June 3, you probably cannot cancel the contract and recover your deposit. You could, however, sue for any damages caused by the delay.

However, if the porch was to be used for a wedding on June 5, and the carpenter knew this, the failure to start on June 1 would be a substantial breach allowing you to cancel and recover your deposits.

B. Damages

If the buyer of services cancels the contract without sufficient justification, then the seller may keep so much of the buyer's deposit as will cover his damages. The amount of damages is measured by:

(1) administrative costs (*e.g.*, bookkeeping); and

(2) lost profits.

However, since the seller already has your deposit, it may be difficult to recover any money, even if the deposit exceeds the seller's damages. You may have to sue to recover your money.

§ 5. 13. Hotel And Motel Services

A common service problem concerns hotel or motel reservations that typically require a deposit. The buyer may cancel his reservation and find the seller unwilling to return the deposit. The law allows the seller to keep so much of the deposit as represents his administrative costs and lost profits, even if the buyer has a good reason for canceling, such as illness. If the seller is able to re-rent the room, and has no other similar vacancies, then he has not lost profits. Otherwise, the seller has lost his profit on

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[39] *See*, *e.g.*, *Moulton Cavity & Mold v. Lyn-Flex Industries*, 396 A.2d 1024, 1027 (Me. 1979).

[40] *See* Restatement of Contracts (Second), §§ 241(e), 243(4).

the rental and is entitled to withhold that amount from the deposit. Always ask first about the hotel's deposit policy. If the policy does not provide for refunds, you may not be able to recover your deposit if you cancel.

If a hotel or motel provides extremely poor service, it might have breached your contract and you can seek reasonable damages. Indeed, if its service is very bad, the hotel or motel might be in violation of the Maine Unfair Trade Practices Act. [41]

§ 5. 14. Magnuson-Moss Consumer Warranty Act

The Federal Magnuson-Moss Act[42] also provides consumers protection against defective products. Consumers (persons who purchase for purposes other than resale) have remedies if the seller or manufacturer provides a written express warranty and:

A. Fails to properly disclose warranty or service contract terms;

B. Breaches written warranties; or

C. Breaches implied warranties.

The possible remedies for violation of this act include *damages*, *equitable relief* and *attorney fees*. In any "breach of warranty" lawsuit, the injured consumer should consider including a separate claim that the seller also violated the Magnuson-Moss Warranty Act (e.g., "The defendant is in violation of the federal Magnuson-Moss Warranty Act, 15 U.S.C.§ 2301, *et seq.*, due to the Defendant's failure to comply with the Act's warranty obligations.").

The National Consumer Law Center provides several instances when consumers fighting a breach of warranty could include a claim under the Magnuson-Moss Warranty Act.[43] Here are four:

A. The Act provides for attorney fees for breach of an implied warranty, even if there is no express warranty.

B. If there is a written express warranty then the Act prohibits the seller from disclaiming implied warranties, at least during the term of the express warranty (15 U.S.C. § 2308).

C. If a seller sells a service contract (sometimes improperly referred to as an "extended warranty") within 90 days of the sale of the item the the Act prohibits the seller from disclaiming implied warranties. In Maine, this provision is important when buying a used car, as that is the only time a seller of consumer goods (i.e. the car dealer) is allowed to disclaim implied warranties.

D. The Act applies not only to sales but also to lease transactions.

§ 5. 15. "As–Is" Sales

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[41] *See* Chapter 3 of this Guide. In 1996 the Department of the Attorney General entered into a Court-ordered Consent Decree that prohibited motel owner Clifford Shattuck from inflicting the following unfair trade practices on his guests: abusive, rude, irrational, physically threatening, physically assaultive and damaging conduct. *See State v. Lighthouse Motel and Cottage Court* (Me. Super. Ct., Kenn. Cty., September 24, 1996); *State v. Shattuck,* 747 A.2d 174, 180-81(Me. 1999) ($15,000 court ordered sanction justified by motel owner's violation of Consent Decree).

[42] 15 U.S.C. §§ 2301-2312.

[43] NCLC Reports Deceptive Practices and Warranties Edition, 13-16 (January-February, 2008).

It may be a violation of the Maine U.C.C.[44] to label a consumer good "as is." This age-old expression can be interpreted as an attempt to disclaim your implied warranty rights and Maine law prohibits this. The most "as is" can mean in Maine is that the seller is not offering any *express* warranties. The consumer good (new or used) will still come with an implied warranty that it is not seriously defective.[45] The only exception to this rule is the sale of used cars. The Maine Legislature has allowed used car dealers to disclaim implied warranties, but they must expressly do so.[46]

§ 5. 16. Dangerous Consumer Goods

Sometimes consumer products are so defective that they can cause physical injury. This is an area of law called "tort" and one which is beyond the scope of this chapter. Maine does have specific laws protecting consumers from physical injury (*e.g.*, pursuant to 14 M.R.S.A. § 221, the seller of unreasonably dangerous consumer goods is strictly liable if the product injures the consumer).[47] If you have been injured by a defective consumer product, we recommend that you seek the advice of a lawyer and contact the National Consumer Product Safety Commission.

§ 5. 17. Leases And Rent-To-Own Transaction

Maine Consumer laws also apply to leases for defective consumer goods.[48] Maine recently enacted a statute regulating "rent-to-own" purchases, which requires written contracts to disclose all terms.[49] The Office of Consumer Credit Regulation (800-332-8529) is responsible for enforcing this new law.

§ 5.18. Summary Of Rights If Sold Defective Goods or Services

A. *Seriously defective goods* can be rejected *immediately* and the money must be returned to the consumer or the item replaced (at the seller's option). This is true even if the seller has a "No Refund or Credit Only" policy. Goods must be rejected in accordance with the Maine Uniform Commercial Code (U.C.C.).[50]

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[44] 11 M.R.S.A. § 2-316(5)(a); *see also V.S.H. Realty, Inc. v. Texaco, Inc.,* 757 F.2d 411, 417 (1st Cir. 1985) (even though the contract stated the sale was "as is," it was an unfair trade practice under Massachusetts law to fail to disclose a material fact).

[45] *See* Chapter 4, §4.2 in this Guide.

[46] 10 M.R.S.A. § 1473. However, the Magnuson-Moss Warranty Act prohibits disclaimers of implied warranties when the dealer sells the consumer a service contract. *See* § 5.14 of this Guide.

[47] *See e.g., Williams v. Inverness Corp.,* 664 A.2d 1244 (Me.1995) (supplier of ear piercing system held liable for negligence, strict liability, breach of express warranty and implied warranty). *See also Sullivan v. Young Bros. & Co., Inc.*, 91 F.3d 242, 254 (1st. Cir.1996); *Oceanside at Pine Point Condominium Owners Assn. v. Peachtree Doors, Inc.*, 659 A.2d 267-270-71 (Me.1995) (pursuant to economic loss doctrine, no tort recovery for a defective product's damage to itself.)

[48] 11 M.R.S.A. § 2-1104(1)(c).

[49] 9A M.R.S.A. §§ 11-101 to 11-121.

[50] 11 M.R.S.A. § 2-602.

B. If defective goods are not rejected immediately but rather are used over a period of time, then the consumer's remedy is probably an *express warranty* remedy or an *implied warranty* remedy. The seller of goods then has the right to *repair* the goods free of charge and is not necessarily required to return the money or to replace the item. In general, consumers should treat seriously a business's offer of free repair, as the courts (and common sense) will often be favorably impressed by such an offer. Implied warranty protection applies during the useful life of the product, but in most cases this does not extend past four years from sale. If the manufacturer or dealer is unable to make the repair and the defect is substantial, then the consumer can consider *revoking ownership*, pursuant to the Maine U.C.C.[51]

C. If a consumer breaches a contract for consumer goods, then the seller is entitled to *reasonable damages*. If the seller accepts return of the goods, the consumer can often recover only so much of his deposit or layaway payments as exceeds:

(1) A valid liquidated damages clause; or

(2) In the absence of such a damage clause, 20% of the total contract price or $500, whichever is smaller.[52]

D. If the contract is for services and not for goods and the consumer breaches the contract, then the seller is entitled to collect:

(1) Administrative costs (e.g. bookkeeping); and

(2) Lost Profit.

However, it may be difficult to recover a deposit once it is in the seller's possession, even if the deposit exceeds the seller's damages. You may have to sue to recover your money

E. If a consumer cancels a hotel or motel reservation, the law allows the hotel to keep so much of the deposit as represents his administrative costs and lost profits, even if the consumer has a good reason for canceling, such as illness. If the hotel re-rents the room and has no similar vacancies, then it cannot claim lost profits.

[51] 11 M.R.S.A. § 2-608.
[52] 11 M.R.S.A. § 2-718.