

EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL YOU ARE TOLD TO BEGIN.

THIS EXAM WILL LAST 3 HOURS. Part I is a CLOSED BOOK EXAM. It will last from 1 p.m. until 2:30 p.m. At 2:30 p.m. I will collect all of the exams. If you finish ahead of time you may read Part II (Question 3) and make notes but you may not begin writing your answer to it.

Part II is a modified OPEN BOOK exam. It will last from 2:30 p.m. until 4:00 p.m. You may use any notes you have made yourself, your textbook, a supplement containing statutes relevant to consumer protection, and any outlines that I have distributed to you. YOU MAY NOT use any commercially printed outlines, hornbooks, treatises, articles, etc., except that you may use up to 50 pages photocopied from such materials.

While waiting for the exam to begin, be sure that you have written your EXAM NUMBER on each bluebook, that you have read these instructions, and that you are otherwise ready to begin. For each of the questions, START A NEW BLUEBOOK.

POINTS are assigned based upon the rough number of minutes it should take to complete each section. The division is as follows:

Part I	Question 1:	70 points
	Question 2:	15 points
Part II	Question 3:	85 points
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	TOTAL	170 points

For purposes of this exam, assume that you and your clients are located in the State of Linden, and that Linden has adopted the Linden Consumer Sales Practices Act, attached to this exam (you may consult it for purposes of the closed book portion of the exam as well as the open book portion).

PLEASE DOUBLE-SPACE YOUR ANSWERS. Label the bluebooks "Question 1, Book 1"; "Question 1, Book 2"; "Question 2, Book 1"; etc.

GOOD LUCK!

PART ONE: CLOSED BOOK

QUESTION 1 (70 points)

You are employed by Nokia, a manufacturer of cell phones. Nokia has been served with complaints filed in five state courts, about which more will be said later. By way of background, here is some information about the product your client sells:

A wireless telephone (commonly called a cell phone) is actually a radio containing a low power transmitter. When a wireless telephone is turned on, it searches for a base station (usually a tower) within range. A base station is a fixed transmitter containing antennae and electronic equipment that communicates with the transmitter in a wireless telephone. If a wireless telephone finds a base station within range, the telephone identifies itself by transmitting its Mobile Identification Number (MIN), its System Identification Code (SID), and its Electronic Serial Number (ESN). The ESN is a number permanently programmed into the telephone when it is manufactured. The SID and the MIN are programmed into the wireless telephone when a customer purchases a service plan and the telephone is activated. The base station relays the identifying information (MIN, SID, and ESN) to the local mobile telephone switching office (MTSO), which confirms that the telephone is assigned to a valid customer. An MTSO is a sophisticated computer that controls all of the base stations in a particular area for the purpose of coordinating radio transmissions to and from wireless telephones. Once an MTSO confirms that a wireless telephone is assigned to a valid customer, the MTSO assigns a frequency on which the user may communicate.

Base stations receiving and routing transmissions from wireless telephones have a relatively small transmission range because they have low power transmitters. Accordingly, to provide continuous wireless telephone service coverage over an extended area, numerous base stations must be built. Cities and regions are divided into cells, typically ten square miles, each containing a base station. As a user moves out of one cell (and thus out of range of the base station in that cell) and into an adjoining cell, the MTSO hands the signal off to the base station in the adjoining cell. Wireless telephones emit a low level of radio frequency (RF) radiation, a form of electromagnetic energy, from their antennae when they communicate with base stations. While it is well established that exposure to high levels of RF radiation can cause adverse health effects, there is no scientific consensus on the effects of low level exposure. The Federal Communications Commission (FCC) requires all transmitters that emit RF radiation to be authorized by the agency before they are marketed or sold. Pursuant to the National Environmental Policy Act of 1969, which requires agencies to consider the impact of their actions on the quality of the human environment, the FCC has promulgated rules that limit the amount of RF radiation that FCC-regulated transmitters (including wireless telephones) may emit.

Now, back to the class actions. Five different sets of class representatives have filed class actions, alleging as follows: (1) wireless telephones emit an unsafe level of RF radiation and (2) Nokia, in knowing this, negligently and fraudulently endangered the consuming public by marketing wireless telephones without headsets. According to the plaintiffs, they were exposed to the risk of adverse biological effects from the RF radiation emitted by their wireless telephones when they used the telephones without headsets. The plaintiffs purport to represent wireless telephone users who have not been diagnosed with brain- or eye-related diseases and who were not provided headsets when they leased or bought their wireless telephones. Compensatory damages are sought in an amount sufficient to buy a headset for each class member who lacks one and to reimburse each class member who has already bought one. For class members with wireless telephones that are not headset-compatible, an injunction is sought to require Nokia to provide them with telephones that can be used with a headset. The plaintiffs also seek punitive damages, costs, and attorneys' fees.

Please respond to your employer's request for an evaluation of these claims.

QUESTION 2 (15 points)

You work for the staff of the Federal Trade Commission. A consumer advocacy group

has proposed a rule regarding consumer "rebates," extending from new cars to tubes of toothpaste. The problem identified is that many consumers base their buying decisions on the "price after rebate," but in fact do not actually receive the rebate they are due because they do not actually file a rebate request, or when they do file a request, a substantial number are rejected for failure to comply with the requirements. Under the proposed rule, each seller offering a rebate would be required to report the percentage of consumers who actually received the rebate, and if a seller reported that less than 50% of those eligible for rebates actually received them, the advertising of a price "after rebate" would be considered unfair and deceptive. The rule would then require sellers to devise and implement a system consumer reimbursement subject to the approval of Commission staff.

Please comment on whether the proposed rule should be adopted by the Commission.

PART II: OPEN BOOK

QUESTION 3 (85 points)

Sarah Goldstein ("Goldstein") leased a Manhattan apartment from Stahl York Avenue Co. ("Stahl") in 1992. Beginning in 1996, a number of disputes arose between Stahl and Goldstein concerning alleged lease violations and rent arrears. The law firm of Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti ("Hutton") represented Stahl in connection with the landlord-tenant matters. State court proceedings in early 2005 ended with the settlement of allegations relating to illegal subletting and alterations but did not resolve issues concerning back rent. On April 4, 2005, Hutton prepared, and caused Goldstein to be served with, a "three-day notice" pursuant to the Linden Real Property Actions and Proceedings Law, demanding that all outstanding rent be paid within three days, or possession of the apartment relinquished within that period, and threatening summary dispossession proceedings in the event of noncompliance.¹ Hutton commenced a summary proceeding on April 11.

Goldstein has come to your office, outraged at the high-handed tactics of Hutton. In conversations with other tenants and former tenants, she has learned that Hutton had a system in place for preparing and issuing the notices: it relayed tenant arrears information to an outside computer service which generated the notices, assigned a paralegal to review them for consistency with the information provided by the landlord's managing agent, and sent the notices to a process server for delivery to the tenant. The firm's name was shown on the notice and on the mailing envelope "to provide a contact person for the recipients of the notices if the recipients had questions or wished to pay their rent." Research on your part has revealed that Hutton is a large firm, with annual revenues of \$10 million, and as a courtesy to its real estate clients it performs the above work, for which it charged its clients a total of \$5,000.

Please analyze what remedies, if any, Goldstein would have based on consumer law.

LINDEN CONSUMER SALES PRACTICES ACT

§ 1. [Purposes, Rules of Construction].

This Act shall be construed liberally to promote the following policies:

- (1) to simplify, clarify, and modernize the law governing consumer sales practices;
- (2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices;
- (3) to encourage the development of fair consumer sales practices;
- (4) to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection; and
- (5) to make uniform the law, including the administrative rules, with respect to the subject of this Act among those states which enact it.

§ 2. [Definitions].

As used in this Act:

- (1) "consumer transaction" means a sale, lease, assignment, award by chance, or other disposition of an item of goods, a service, or an intangible [except securities] to an individual for purposes that are primarily personal, family, or household, or that relate to a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged, or a solicitation by a supplier with respect to any

¹Issuance of a three-day notice is a statutory prerequisite to the commencement of summary proceedings to recover possession of property for non-payment of rent. Linden Real Prop. Acts Law § 711.

of these dispositions;

(2) "Enforcing Authority" means the Consumer Protection Division of the Linden Attorney General;

(3) "final judgment" means a judgment, including any supporting opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired;

(4) "person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or any other legal entity;

(5) "supplier" means a seller, lessor, assignor, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer.

§ 3. [Deceptive Consumer Sales Practices].

(a) A deceptive act or practice by a supplier in connection with a consumer transaction violates this Act whether it occurs before, during, or after the transaction.

(b) Without limiting the scope of subsection (a), the act or practice of a supplier in indicating any of the following is deceptive:

(1) that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits it does not have;

(2) that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;

(3) that the subject of a consumer transaction is new, or unused, if it is not, or that the subject of a consumer transaction has been used to an extent that is materially different from the fact;

(4) that the subject of a consumer transaction is available to the consumer for a reason that does not exist;

(5) that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not;

(6) that the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(7) that replacement or repair is needed, if it is not;

(8) that a specific price advantage exists, if it does not;

(9) that the supplier has a sponsorship, approval, or affiliation he does not have;

(10) that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations if the indication is false; or

(11) that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if receipt of the benefit is contingent on an event occurring after the consumer enters into the transaction.

§ 4. [Unconscionable Consumer Sales Practices].

(a) An unconscionable act or practice by a supplier in connection with a consumer transaction violates this Act whether it occurs before, during, or after the transaction.

(b) The unconscionability of an act or practice is a question of law for the court. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.

(c) In determining whether an act or practice is unconscionable, the court shall consider circumstances such as the following of which the supplier knew or had reason to know:

(1) that he took advantage of the inability of the consumer reasonably to protect his interests because of his physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement, or similar factors;

(2) that when the consumer transaction was entered into the price grossly exceeded the price at which similar property or services were readily obtainable in similar transaction by like consumers;

(3) that when the consumer transaction was entered into the consumer was unable to receive a substantial benefit from the subject of the transaction;

(4) that when the consumer transaction was entered into there was no reasonable probability of payment of the obligation in full by the consumer;

(5) that the transaction he induced the consumer to enter into was excessively one-sided in favor of the supplier; or

(6) that he made a misleading statement of opinion on which the consumer was likely to rely to his detriment.

§ 5. [Duties of the Enforcing Authority].

(a) The Enforcing Authority shall:

(1) enforce this Act throughout the State;

(2) cooperate with state and local officials, officials of other states, and officials of the Federal government in the administration of comparable statutes;

(3) inform consumers and suppliers on a continuing basis of the provisions of this Act and of acts or practices that violate this Act, including mailing information concerning final judgments to persons who request it, for which he may charge a reasonable fee to cover the expense;

(4) receive and act on complaints;

(5) maintain a public file of (i) final judgments rendered under this Act that have been either reported officially or made available for public dissemination under Section 5(a)(3), (ii) final consent judgments, and (iii), to the extent the Enforcing Authority considers appropriate, assurances of voluntary compliance; and

(6) report to the Governor and Legislature on the operations of his office and on the acts or practices occurring in this State that violate this Act.

(b) The Enforcing Authority's report shall include a statement of the investigatory and enforcement procedures and policies of his office, of the number of investigations and enforcement proceedings instituted and of their disposition, and of the other activities of his office and of other persons to carry out the purposes of this Act.

(c) In carrying out his duties, the Enforcing Authority may not publicly disclose the identity of a person investigated unless his identity has become a matter of public record in an enforcement proceeding or he has consented to public disclosure.

§ 6. [General Powers of the Enforcing Authority].

(a) The Enforcing Authority may conduct research, hold public hearings, make inquiries, and publish studies relating to consumer sales acts or practices.

(b) The Enforcing Authority shall adopt substantive rules that prohibit with specificity acts or practices that violate Section 3 and appropriate procedural rules.

§ 7. [Rule-making Requirements].

The Linden Administrative Procedure Act applies to administrative action taken by the Enforcing Authority under this Act.

§ 8. [Investigatory Powers of the Enforcing Authority].

(a) If, by his own inquiries or as a result of complaints, the Enforcing Authority has reason to believe that a person has engaged in, is engaging in, or is about to engage in an act or practice

that violates this Act, he may administer oaths and affirmations, subpoena witnesses or matter, and collect evidence.

(b) If matter that the Enforcing Authority subpoenas is located outside this State, the person subpoenaed may either make it available to the Enforcing Authority at a convenient location within the State or pay the reasonable and necessary expenses for the Enforcing Authority or his representative to examine the matter at the place where it is located. The Enforcing Authority may designate representatives, including officials of the state in which the matter is located, to inspect the matter on his behalf, and he may respond to similar requests from officials of other states.

(c) Upon failure of a person without lawful excuse to obey a subpoena and upon reasonable notice to all persons affected, the Enforcing Authority may apply to the court for an order compelling compliance.

(d) After consultation with the Attorney General, the Enforcing Authority may request that an individual who refuses to comply with a subpoena on the ground that testimony or matter may incriminate him be ordered by the court to provide the testimony or matter. Except in a prosecution for perjury or false swearing, an individual who complies with a court order to provide testimony or matter after asserting a privilege against self-incrimination to which he is entitled by law, may not be subjected to a criminal proceeding or to a civil penalty with respect to the transaction concerning which he is required to testify or produce relevant matter. This subsection does not apply to damages recoverable under Section 11(b) or to civil sanctions imposed under Section 9(a)(2).

§ 9. [Remedies of the Enforcing Authority].

(a) The Enforcing Authority may bring an action:

- (1) to obtain a declaratory judgment that an act or practice violates this Act; or
- (2) to enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is otherwise likely to violate this Act;
- (3) to recover actual damages, or obtain relief under subsection (b)(2), on behalf of consumers who complained to the Enforcing Authority before he instituted enforcement proceedings under this Act.

(b) (1) The Enforcing Authority may bring a class action on behalf of consumers for the actual damages caused by an act or practice specified as violating this Act in a rule adopted by the Enforcing Authority under Section 6(b) before the consumer transactions on which the action is based, or declared to violate Section 3 or 4 by final judgment of the superior court of this State that was either reported officially or made available for public dissemination under Section 5(a)(3) by the Enforcing Authority ten days before the consumer transactions on which the action is based, or, with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment that became final before the consumer transactions on which the action is based.

(2) On motion of the Enforcing Authority and without bond in an action under this subsection, the court may make appropriate orders, including appointment of a master or receiver or sequestration of assets, to reimburse consumers found to have been damaged, or to carry out a transaction in accordance with consumers' reasonable expectations, or to strike or limit the application of unconscionable clauses of contracts to avoid an unconscionable result, or to grant other appropriate relief. The court may assess the expenses of a master or receiver against a supplier.

(3) If a supplier shows by a preponderance of the evidence that a violation of this Act resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under Section 9(b) is limited to the amount, if any, by which the supplier was unjustly enriched by the violation.

(4) If an act or practice that violates this Act unjustly enriches a supplier and

damages can be computed with reasonable certainty, damages recoverable on behalf of consumers who cannot be located with due diligence shall escheat to the State.

(5) No action may be brought by the Enforcing Authority under this subsection more than 2 years after the occurrence of a violation of this Act, or more than one year after the last payment in a consumer transaction involved in a violation of this Act, whichever is later.

(c) The Enforcing Authority may terminate an investigation or an action other than a class action upon acceptance of a supplier's written assurance of voluntary compliance with this Act. Acceptance of an assurance may be conditioned on a commitment to reimburse consumers or take other appropriate corrective action. An assurance is not evidence of a prior violation of this Act. However, unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation of this Act.

§ 10. [Coordination with Other Supervision].

(a) If the Enforcing Authority receives a complaint or other information relating to noncompliance with this Act by a supplier who is subject to other supervision in this State, the Enforcing Authority shall inform the official or agency having that supervision. The Enforcing Authority may request information about such suppliers from the official or agency.

(b) The Enforcing Authority and any other official or agency in this State having supervisory authority over a supplier shall consult and assist each other in maintaining compliance with this Act. Within the scope of their authority, they may jointly or separately make investigations, prosecute suits, and take other official action they consider appropriate.

§ 11. [Private Remedies].

(a) Whether he seeks or is entitled to damages or has an adequate remedy at law, a consumer may bring an action to:

- (1) obtain a declaratory judgment that an act or practice violates this Act; or
- (2) enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is otherwise likely to violate this Act.

(b) Except in a class action, a consumer who suffers loss as a result of a violation of this Act may recover actual damages or \$100, whichever is greater.

(c) Whether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, he may bring a class action for declaratory judgment, an injunction, and appropriate ancillary relief, except damages, against an act or practice that violates this Act.

(d) (1) A consumer who suffers loss as a result of a violation of this Act may bring a class action for the actual damages caused by an act or practice (i) specified as violating this Act in a rule adopted by the Enforcing Authority under Section 6(b) before the consumer transactions on which the action is based, or (ii) declared to violate Section 3 or 4 by a final judgment of the superior court of this State that was either reported officially or made available for public dissemination under Section 5(a)(3) by the Enforcing Authority ten days before the consumer transaction on which the action is based, or (iii) with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment which became final before the consumer transactions on which the action is based.

(2) If a supplier shows by a preponderance of the evidence that a violation of this Act resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this section is limited to the amount, if any, by which the supplier was unjustly enriched by the violation.

(3) If an act or practice that violates this Act unjustly enriches a supplier and the damages can be computed with reasonable certainty, damages recoverable on behalf of consumers who cannot be located with due diligence shall escheat to the State.

(e) Except for services performed by the Enforcing Authority, the court may award to the

prevailing party a reasonable attorney's fee limited to the work reasonably performed if:

(1) the consumer complaining of the act or practice that violates this Act has brought or maintained an action he knew to be groundless; or a supplier has committed an act or practice that violates this Act; and

(2) an action under this section has been terminated by a judgment or required by the court to be settled under Section 13(a).

(f) Except for consent judgments entered before testimony is taken, a final judgment in favor of the Enforcing Authority under Section 9 is admissible as prima facie evidence of the facts on which it is based in later proceedings under this section against the same person or a person in privity with him.

(g) When a judgment under this section becomes final, the prevailing party shall mail a copy to the Enforcing Authority for inclusion in the public file maintained under Section 5(a)(5).

(h) An action under this section must be brought within 2 years after occurrence of a violation of this Act, within one year after the last payment in a consumer transaction involved in a violation of this Act, or within one year after the termination of proceedings by the Enforcing Authority with respect to a violation of this Act, whichever is later. However, when a supplier sues a consumer, he may assert as a counterclaim any claim under this Act arising out of the transaction on which suit is brought.

§ 12. [Class Actions].

(a) An action may be maintained as a class action under this Act only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately protect the interests of the class; and

(5) either:

(A) the prosecution of separate actions by or against individual members of the class would create a risk of:

(i) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(B) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(C) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(b) The matters pertinent to the findings under subsection (a)(5)(C) include:

(1) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(3) the desirability or undesirability of concentrating the litigation of the claims in

the particular forum; and

(4) the difficulties likely to be encountered in the management of a class action.

(c) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be amended before the decision on the merits.

(d) In a class action maintained under subsection (a)(5)(C) the court may direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that:

(1) the court will exclude him from the class, if he so requests by a specified date;

(2) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(3) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(e) When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class.

(f) In the conduct of a class action the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in the manner the court directs to some or all of the members or to the Enforcing Authority of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly; or

(5) dealing with similar procedural matters.

(g) A class action shall not be dismissed or compromised without approval of the court. Notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(h) The judgment in an action maintained as a class action under subsection (a)(5)(A) or (B), whether or not favorable to the class, shall describe those whom the court finds to be members of the class. The judgment in a class action maintained under subsection (a)(5)(C), whether or not favorable to the class, shall specify or describe those to whom the notice provided in subsection (d) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

§ 13. [Omitted]

§ 14. [Application].

(a) This Act does not apply to:

(1) an act or practice required or specifically permitted by or under Federal law, or by or under State law;

(2) a publisher, broadcaster, printer, or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter insofar as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated this Act;

(3) a claim for personal injury or death or a claim for damage to property other than the property that is the subject of the consumer transaction; or

(4) the credit terms of a transaction otherwise subject to this Act.

(b) A person alleged to have violated this Act has the burden of showing the applicability of this Section.

§ 15. [Effect on Other Remedies].

The remedies of this Act are in addition to remedies otherwise available for the same conduct under state or local law, except that a class action relating to a transaction governed by this Act may be brought only as prescribed by this Act.