

EXAM

Instructions

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

THIS EXAM WILL LAST 3 HOURS. Part I is an OPEN BOOK EXAM. It will last from 1:30 p.m. until 3:00 p.m. During this portion of the exam 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.

At 3:00 p.m. the open book portion will end, and you will be required at that point to put away all of your materials. You will then receive the CLOSED book portion of the exam and you will have 1½ hours to complete that portion of the exam.

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

Part I (OPEN BOOK)	Question 1:	85 points
Part II (CLOSED BOOK)	Question 2:	70 points
	Question 3:	15 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 Protection Act" that incorporates the provisions of the Uniform Consumer Sales Practices Act.

IF YOU USE BLUEBOOK(S), 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: OPEN BOOK

QUESTION 1 (85 points)

Elsea is a corporation engaged in selling and servicing new and used manufactured homes in Linden. It has sales offices throughout Linden. Mid-Linden is exclusively owned by Elsea and provides financial services to customers who seek to purchase or have purchased manufactured homes from Elsea.

In January 1999, the McWhorters visited an Elsea sales office in Piketon, Linden with the interest of purchasing a used manufactured home. Initially, the McWhorters offered to buy a 1988 Redman home for \$17,400. To purchase this home, the McWhorters completed a credit application, and Elsea obtained the McWhorters' credit report. Bank One agreed to purchase the retail installment contract for the 1988 Redman at a 9% annual interest rate for 120 months and a 10% down payment. Elsea never informed the McWhorters of Bank One's rates. Instead, Mid-Linden offered the McWhorters a retail installment contract for the purchase of the 1988 Redman at 14.99% annual interest rate for 144 months with a \$1500 cash down payment. This proposal would have required a \$240 monthly payment, which the McWhorters believed they could not afford.

The McWhorters returned to the Elsea lot in March 1999. During this visit, the Elsea salesperson showed the McWhorters a 1973 Hillcrest manufactured home with a purchase price of \$8,900. The salesperson informed the McWhorters that the 1973 Hillcrest came with a 30-day warranty on the furnace, water heater and plumbing. The salesperson also said that the home was covered by a "2-10 warranty," which was a standard form common to new home construction agreements that provides for arbitration of disputes over construction defects. The McWhorters again filled out a credit application, and Elsea obtained a credit report. After reviewing the McWhorters' credit report, Mid-Linden offered a 14.99% annual interest rate for 108 months with a \$550 down payment. The McWhorters agreed to the deal, signed the requisite paperwork, including a Form 500, paid the required fees, and purchased the home. At the closing the McWhorters received a pamphlet entitled "Your 2-10 Warranty," which contained a toll-free number to call in the event of questions or concerns about their purchase.

In the Form 500 agreement presented by Elsea and signed by the McWhorters, Elsea expressly stated:

1. The seller of this mobile home sells it "as is" and assumes no responsibility for defects.
2. The purchaser of this mobile home must accept it with all defects and take the entire risk, under contract law, as to its condition.
3. The purchaser represents they have examined the mobile home and found it acceptable.
4. Furnace will operate. 30 days
5. No utility connections are included in the purchase of any used home.
6. Water lines and water tank will hold water. 30 days

Approximately one month later, the manufactured home was delivered to the McWhorters' property in Vinton County. At the time of delivery, an Elsea employee informed the McWhorters that after they had completed hooking up the utility connections, the McWhorters would be entitled to the delivery of "skirting" that would extend from the bottom of the mobile home to the ground. However, upon hooking up the water to the home, they discovered serious leaks in the plumbing, which caused them to disconnect the water. The hot water tank also leaked and did not work properly. As a result of these problems, the McWhorters claim that they were unable to cook, clean or bathe at their home.

The McWhorters notified Elsea of the leaks and hot water tank malfunction. Elsea claims that it was not able to return the McWhorters' phone call to establish an appointment because the

McWhorters did not have a home phone. Elsea did have a phone number on file for a McWhorter family relative, but that phone did not have an answering machine to leave a message. Finally, the McWhorters sought a remedy under their 2-10 warranty, but when they called the toll-free number they learned that there was a \$75 “deductible,” in addition to the service cost, every time that Elsea made a trip to repair a home.

Elsea installed the mobile home skirt in March 2000, nearly ten months after the McWhorters purchased the home. Due to the leaks and other problems at the home that were never repaired, the McWhorters withheld their monthly payments. Accordingly, Elsea turned over the retail installment contract to collections, and the McWhorters have now been sued.

You have been asked to represent the McWhorters. Assume for purposes of this assignment that it is the year 2000. Ignore the Magnuson-Moss Warranty Act (it turns out that the Act only applies to goods manufactured after its effective date, 1975, which is after the manufacture date of the mobile home). Please analyze the potential defenses and/or counterclaims that you would raise on the McWhorters' behalf.

## PART II: CLOSED BOOK

[NOTE: This portion of the exam is to be handed out only after the open book portion of the exam has concluded and the open-book materials have been put away.]

QUESTION 2 (70 points)

Sharan Battle and Tamara Johnson purchased used automobiles from two different Nissan dealerships. Each signed a retail installment agreement to finance her purchase.

Johnson purchased a used 1999 Chevrolet Tahoe from Gordie Boucher Nissan on or about December 17, 2003. Battle purchased a used 2001 Nissan Quest from Russ Darrow Honda Nissan Suzuki on or about April 22, 2004. Both agreements were between the purchaser and the dealer but used forms provided by Nissan Motor Acceptance Corporation ("NMAC"). Thereafter, the agreements were assigned to NMAC.

Each agreement contained a clause mandating arbitration of any dispute arising out of the purchase. In capital letters above the purchasers' signatures the agreements state: "NOTICE: THIS CONTRACT CONTAINS AN ARBITRATION CLAUSE. PLEASE SEE OTHER SIDE."

The next page contains the following provision, set off by horizontal lines above and below and with the bolded heading "**ARBITRATION CLAUSE-IMPORTANT-PLEASE REVIEW-AFFECTS YOUR LEGAL RIGHTS.**"

1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this clause, and the arbitrability of the claim or dispute) between you and us or our employees, agents, successors or assigns, which arise out of or relate to your credit application, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose any one of the following arbitration organizations and its applicable rules:....

.... The arbitration hearing shall be conducted in the federal district in which you reside. We will pay your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of \$1,500.... Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act ( et seq.) and not by any state law concerning arbitration.

You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to seek remedies in small claims court for disputes or claims

within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court.... This clause shall survive any termination, payoff or transfer of this contract. If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable.

The Linden Consumer Protection Act ("LCPA") contains a provision stating that any rights declared by the act are "enforceable by action." Under Linden statutory law, a consumer may not waive any right contained in the LCPA, including that of a judicial forum.

You have been approached by Sharan and Tamara to represent them. They believe that they were charged higher interest rates because of their gender and their race. Please advise them regarding potential remedies they may seek and any procedural considerations that might affect the outcome.

QUESTION 3 (15 points)

You are legislative counsel to Senator Harrumph. One of his constituents has proposed legislation that would amend the Linden equivalent of the Fair Credit Reporting Act to include as a violation of that Act the furnishing by a credit bureau or credit reporting agency of names and addresses of consumers in its database to merchants or lenders who then solicit loans or purchases from such consumers. The Senator has asked for your opinion as to whether this would benefit consumers. Please comment on the advantages and disadvantages of the proposal.