

# products litigation bulletin

## New Merchant Display Cash Register Statutes Increase Potential for Merchant Liability

Over the past year, many states have enacted legislation governing retailers' obligations as to what information needs to be visible or displayed to consumers at the point of sale. These statutes fall within the broad concept of consumer protection legislation and often, therefore, carry with them the range of penalties available under consumer protection statutes, including the ability to bring consumer class actions. Moreover, the state attorney general is usually vested with enforcement power, and with the ability to seek fines, injunctions and other penalties. As a result, retailers should be aware of the provisions of these statutes.

States having such legislation are listed below in alphabetical order, with a brief description of the requirements of the legislation and the remedies available in each state. At the end of this bulletin is also a description of legislation pending in New York.

### Connecticut

Connecticut's current merchant cash register display statute is as follows:

**Requirements** No person, partnership, association or corporation may use, in the ordinary course of business, a cash register, or machine or device of similar function, that does not produce a read-out that is conspicuous to consumers on the front or back of the register. This statute does not apply to any retail food store, supermarket or any business

establishment that either provides such a cash register in each department or provides consumers with a sales receipt at the time of the transaction that describes the item purchased. This description requirement is satisfied by a statement designating (1) the department in which the item is purchased, (2) a classification of items that includes the item purchased, or (3) an inventory control or similar number corresponding to an identical number appearing on the price tag or label affixed to the item. The requirements of this statute only apply to cash registers, machines or devices that are installed, purchased, leased or otherwise contracted for in Connecticut after April 1, 1978. CONN. GEN. STAT. § 42-115t (2003).

**Remedies** Any violation of the cash register display requirements is an unfair sales practice punishable by a fine of not more than \$500, imprisonment of not more than 90 days, or both. A person likely to be damaged by such a practice may be granted an injunction. Monetary damage, loss of profits, competition, actual confusion or misunderstanding, or intent to deceive are not required. If the defendant willfully engaged in the practice, the prevailing party may be awarded costs or reasonable attorneys' fees. Violating the merchant display cash register requirements is also an unfair or deceptive trade practice. The commissioner of consumer protection may issue a cease and desist order, direct restitution if the amount involved is less than \$5,000, or both. Alternatively, the attorney general may seek to restrain and enjoin a prohibited practice, order restitution and the appointment of a receiver, or

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both. Neither the commissioner nor the attorney general is required to demonstrate public interest or public injury. In both types of proceedings, the court may award reasonable attorneys' fees, accounting and other equitable relief. The attorney general may also recover a civil penalty of not more than \$5,000 for each unfair or deceptive trade practice that is willfully committed. The statute allows an action to recover actual damages by any person or class that suffers any ascertainable loss of money or property as a result of an unfair or deceptive trade practice. Plaintiffs also may be awarded punitive damages, equitable relief—including an injunction—and costs and reasonable attorneys' fees. There is a right to a jury trial, but not with respect to punitive damages, costs or attorneys' fees, and injunctive or other equitable relief.

### Massachusetts

Massachusetts's current merchant cash register display statute is as follows:

**Requirements** Cash registers, or other mechanical devices located at a counter for totaling the monetary value of retail purchases, must be in a position so that customers can observe the total. MASS. GEN. LAWS ch. 98, § 56C (2003).

**Remedies** Whoever violates the cash register display requirement will be fined \$50 or be subject to a civil citation. Failure to display cash register totals may also violate Massachusetts's consumer protection statute that prohibits, among other things, unfair or deceptive acts or practices in the conduct of any trade or commerce. The attorney general may bring an action, if such proceedings would be in the public interest, to restrain or enjoin any person he or she has reason to believe is using or is about to use any unlawful practice. The court may also act to restore money or property to any person who has suffered a loss by reason of an unlawful practice. A person that knew or should have known a practice violated the chapter may be required to pay a civil penalty of not more than \$5,000 for each violation, as well as reasonable

costs of investigation and litigation, and reasonable attorneys' fees.

Massachusetts's consumer protection statute allows consumers that are injured by an unlawful practice to bring an action in superior court, including a class action, for damages and equitable relief. Plaintiffs may recover actual damages or \$25, whichever is greater, as well as reasonable attorneys' fees and costs. At least double, but not more than triple, damages shall be awarded where the defendant willfully or knowingly violated the chapter or refused to grant relief upon demand in bad faith with knowledge or reason to know that the act or practice in question violated the chapter.

The statute also allows any person or class that engages in the conduct of trade or commerce, and who suffers any loss of money or property as a result of an unlawful practice, to bring an action in superior court for damages and equitable relief. If an unlawful practice has not yet caused loss, an injunction may be granted if loss may occur in the future. Reasonable attorneys' fees and costs may be awarded and, as in consumer actions, where the defendant willfully or knowingly violated the statute, the plaintiff shall recover at least two times, but not more than three times, the amount of actual damages. An action, other than a class action, may be brought in district court for money damages only.

### New Jersey

New Jersey's current merchant cash register display statute is as follows:

**Requirements** Any individual business establishment using a cash register with item cost indicators must ensure that such indicators are always visible to customers paying for items or services. This statute does not apply to business establishments that provide either cash registers in each department or an itemized sales receipt or similar document fully identifying each item and stating its price. N.J. STAT. ANN. § 46:30A-6 (West 2003).

**Remedies** An owner or manager of any individual business establishment that knowingly makes it impossible or difficult for customers to see a cash register's item cost indicator commits an unlawful selling practice and may be fined no more than \$50 for the first offense, no more than \$100 for the second offense and no more than \$250 for each subsequent offense. The attorney general may also obtain an injunction.

Violating the cash register display law may also violate New Jersey's consumer fraud statute that prohibits, among other things, unconscionable, deceptive or fraudulent practices in connection with the sale of any merchandise. Such practices are unlawful whether or not any person has in fact been misled, deceived or damaged. The attorney general may issue a cease and desist order or obtain an injunction, and is entitled to recover costs. The court may also act to prevent prohibited practices or restore unlawfully acquired money or property. The director of any certified county or municipal office of consumer affairs is entitled to the authorized penalties and reasonable costs with respect to any successful action it initiates.

Any person who violates New Jersey's consumer fraud statute may not be fined more than \$10,000 for the first offense, and not more than \$20,000 for the second and each subsequent offense. A violator that knew or should have known that the victim was a senior citizen or disabled individual may be fined an additional \$10,000 if the violation caused the victim pecuniary injury. A violator may be fined an additional \$30,000 if the violation was part of a sales or advertising scheme, plan or course of conduct directed at senior citizens or disabled individuals. The attorney general may also order restitution; senior citizens may be awarded twice the amount or value of money or property unlawfully acquired. Finally, any person who suffers any ascertainable loss of money or property as a result of an unlawful practice may bring an action and recover three times the damages sustained, reasonable attorneys' fees,

filing fees and reasonable costs of the suit, and any other appropriate legal or equitable relief.

## Rhode Island

Rhode Island's current merchant cash register display statute is as follows:

**Requirements** No person, firm or corporation may intentionally obstruct the view of any price being registered by a cash register or similar device, or the total cost of purchases, if retail consumers purchasing goods or merchandise cannot view the price in another display on the same register or device. The statute makes clear that obstruction to the view of any price is not prima facie evidence of intent. R.I. GEN. LAWS § 6-13-13 (2002).

**Remedies** Intentionally obstructing such view is an unlawful, unfair sales practice punishable by a \$25 fine. The Superior Court may, upon the complaint of any person, restrain and enjoin such a prohibited practice. A violation of the merchant display requirements may also violate Rhode Island's statute that makes it unlawful to engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. The attorney general may seek an action for an injunction when such a proceeding would be in the public interest. The court may also act to restore any money or property acquired by an unlawful practice. Any person who purchases or leases goods or services primarily for personal, family or household purposes and who suffers an ascertainable loss of money or property as a result of a prohibited practice, may bring a private or class action to recover actual damages or \$200, whichever is greater. The court may also award punitive damages, reasonable attorneys' fees and costs, and provide other equitable relief. In *Scully Signal Co. v. Joyal*, 881 F. Supp. 727 (D.R.I. 1995), the court held that this statute does not provide a private right of action for business persons or entities.

## South Dakota

South Dakota's current merchant cash register display statute is as follows:

**Requirements** Any person that owns or operates a retail outlet utilizing an electronic cash register must either provide each customer with a receipt for every transaction or display the transaction on the register so that it is visible to customers. S.D. CODIFIED LAWS § 37-24-6.1 (Michie 2003).

**Remedies** Each violation of the statute is a separate, petty offense carrying a potential fine of \$20. In addition, it is a Class 2 misdemeanor to knowingly and intentionally employ any deceptive practice in connection with the sale of any merchandise, regardless of whether anyone has in fact been misled, deceived or damaged. Employing a deceptive practice is prima facie evidence, for the purpose of actions brought by the attorney general or state's attorneys, that the practice was engaged in knowingly and intentionally. A person convicted of a Class 2 misdemeanor may be imprisoned for up to 30 days in a county jail, fined no more than \$200, or both. The defendant also must make restitution to any victim. The attorney general may bring an action to enjoin a deceptive practice if such a proceeding would be in the public interest. The court may also act to restore any money or property acquired by an unlawful, deceptive practice. In an action brought by the attorney general, a person who knew or should have known that his or her conduct violated the statute is subject to a civil penalty of not more than \$2,000 per violation. Any person adversely affected by a deceptive practice may bring a civil action to recover actual damages suffered as a result of the act or practice. In *Wyman v. Terry Schulte Chevrolet, Inc.*, 584 NW 2d 103 (S.D. 1998), the court held that punitive damages are not recoverable.

## New York

New York has two merchant display statutes pending before its state legislature. The first

legislation, introduced to the Assembly Committee on Consumer Affairs and Protection on February 4, 2003, would require every retail establishment utilizing cash registers to arrange such registers in a manner enabling customers to view the numbers and amounts as the attendant presses the register's keys. NY A.B. 3235.

The second bill, introduced to the Senate Committee on Consumer Protection on April 4, 2003, would require any newly installed cash register, used by or in the operation of a business customarily dealing with consumers, to display the amount of any sale in a manner readily visible to such consumers. The proposed statute would exempt hotels, motels, retail licensed premises for the on-premises consumption of alcoholic beverages, or restaurants where a printed and itemized check is provided for the customer's perusal before payment. The attorney general may petition a court or justice having jurisdiction by a special proceeding to issue an injunction regardless of whether there is proof that any person has been injured or damaged. The court could also impose a civil penalty of not more than \$500 for each violation. NY S.B. 3895.

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