

Chapter 714H

Private Right of Action for Consumer Fraud

Plaintiff's Perspective

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I. LIMITS OF TRADITIONAL ACTIONS FOR CONSUMER MISREPRESENTATION

A. Deceit/fraud/nondisclosure

1. Scienter (intent to deceive) required. *State ex rel. Miller v. Pace*, 677 N.W.2d 761, 771 (Iowa 2004).
2. "Justifiable" reliance required.
 - a) Often detected by disclosures/disclaimers and other facts known to plaintiff.
 - b) Buyers should be suspicious; puffery and opinions not actionable.
 - c) Burden of proof: clear and convincing evidence. *Clark v. McDaniel*, 546 N.W.2d 590 (Iowa 1996).
3. Often impractical to file, except for large (home, auto) purchases. No attorney fee recovery.

B. Negligent misrepresentation (RESTATEMENT SECOND OF TORTS §552 (1977))

1. Limited to professionals. *Freeman v. Ernst & Young*, 516 N.W.2d 835 (Iowa 1994) ("We believe that the duty recognized under the tort of negligent misrepresentation is generally not applicable to a retailer in the business of selling and servicing his merchandise."); *Meier v. Alfa-Laval, Inc.*, 454 N.W.2d 576, 581 (Iowa 1990).
2. Justifiable reliance required.
3. No attorney fee recovery.

C. Innocent misrepresentation of material fact inducing sale (RESTATEMENT SECOND OF TORTS §552C (1977))

1. Damages expressly limited to difference between value as represented and value as delivered—no incidental/consequential damages.

2. "...some doubt whether Iowa recognizes innocent misrepresentation as a separate tort." *Beeck v. Kapalis*, 302 N.W.2d 90, 98 (Iowa 1981).
3. "Justifiable" reliance required.
4. No attorney fee recovery.

D. Breach of Express Warranty

1. Some level of reliance is required.
2. Supplanted by UCC as to personal property—disclaimers/warranties.
3. No attorney fee recovery, except in limited circumstances (e.g. Magnuson-Moss Act).

II. CHAPTER 714H - IOWA CONSUMER FRAUD STATUTE - PRIVATE ACTION

A. Overview

1. Elements:
 - a) A **consumer** who
 - b) suffers an **ascertainable loss of money or property**
 - c) as the **result of a prohibited practice or act** in violation of this statute
 - d) may bring an action at law to recover **actual damages**. The court may order such equitable relief as it deems necessary to protect the public from further violations, including temporary and permanent injunctive relief.
2. Although Chapter 714H is new, several significant terms have the same definition in §714.16 and have been interpreted in Iowa appellate decisions. In addition, Iowa courts likely will look to other states' consumer fraud statutes and Federal Trade Commission guidelines and rulings in further defining terms. *See, e.g., State ex rel. Miller v. Cutty's Des Moines Camping Club, Inc.*, 694 N.W.2d 518, 525 (Iowa 2005) (unfair practice); *State ex rel. Miller v. Pace*, 677 N.W.2d 761, 771 (Iowa 2004) ("intent that others rely" on prohibited act); *State ex rel. Miller v. Rahmani*, 472 N.W.2d 254, 258 (Iowa 1991) (materiality). *See generally* MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 5:10 (2008).

B. Elements

1. Consumer—“natural person or the person’s legal representative.”
 - a) Not limited to purchasers of “consumer merchandise”—actions for per se violations may be brought for non-consumers. *Equity Control Associates Unlimited v. Route*, 638 N.W.2d 664 (Iowa 2001).
2. “Ascertainable loss of money or property.”
 - a) Low standard. *See* PRIGDEN, *supra*, at § 5:10 (2008). If product or service is not as represented, an ascertainable loss exists. *Scott v. Western Int’l Surplus Sales, Inc.*, 517 P.2d 661, 662 (Or. 1973).
 - b) Loss need not be measurable to be “ascertainable”. *Talalai v. Cooper Tire & Rubber Co.*, 823 A.2d 888, 897 (N.J. Super. 2001); *Mayhall v. A.H. Pond Co., Inc.*, 341 N.W.2d 268, 271 (Mich. Ct. App. 1983) (a “**loss**” exists when a “victim does not receive what he expected to receive.”). Plaintiff need not prove specific amount of actual damages. *Hinchliffe v. American Motors Corp.*, 440 A.2d 810 (Conn. 1981).
 - c) However, definition of “actual damages” in §714H.2(1) requires that damages be “reasonably ascertainable in amount.” See discussion at ¶ f) below.
 - d) “Ascertainable loss” requirement may preclude recovery where only right to statutory damages is established or where only technical, e.g., notice, violations exist. *Jiries v. BP Oil*, 682 A.2d 1241 (N.J. Super. 1996).
 - e) Loss still must “result” from the prohibited practice or act. *See, e.g. Billions v. White & Stafford Furniture Co., Inc.*, 528 So.2d 878 (Ala. Civ. App. 1988) (no loss related from undisclosed but unenforced change in interest rate on debt).
 - f) Under Iowa statute, “ascertainable” loss apparently is a requirement for standing. *See Weinberg v. Sprint Corp.*, 801 A.2d 281 (N.J. 2002) (if consumer’s claim of ascertainable loss does not survive defendant’s motion for summary judgment, associated claims for an injunction and attorney’s fees must be dismissed); *cf.* Ind. Code § 24-5-0.5-3.
3. “Prohibited practice or act in violation of this chapter.”
 - a) Two types: §714H3(1) (General) and §714H3(2) (Per Se).

(1) General violations—§714H3(1):

(a) a person shall not engage in a practice or act that a person knows or reasonably should know is:

(i) an “unfair practice”,

(a) Broadly defined as “conduct which a Court of equity would consider unfair.” *State ex rel. Miller v. Cutty’s Des Moines Camping Club, Inc.*, 694 N.W.2d 518, 526 (Iowa 2005).

(ii) deception,

(a) *See State ex rel Miller v. National Dietary Research, Inc.*, 454 N.W.2d 820, 824 (Iowa 1990). Because deception involves capacity to mislead others, evidence of other customers’ complaints and claims is admissible), or

(iii) false pretense, or

(iv) false promise,

(v) done “with the intent that others rely upon the unfair practice.”

(a) Unlike common law fraud, which requires intent to deceive, intent under act is relatively easy to prove—defendant’s use of practice or act in connection with sale or lease presumably was intended to influence the consumer. *State ex rel. Miller v. Pace*, 677 N.W.2d 761, 771 (Iowa 2004).

(vi) Must occur “in connection with” the advertisement, sale or lease of “consumer merchandise” or charitable solicitations.

(a) “in connection with” is broadly defined to include post-sale conduct. *Miller v. National Dietary Research*, 694 N.W.2d at 526 (applied to post-sale collection of club dues from ex-members).

(vii) “Consumer merchandise”: merchandise offered for sale or lease, or sold or leased, primarily for personal, family, or household purposes.

(a) “merchandise” is **broadly** defined in § 714.1 to include any objects, wares, goods, commodities, **intangibles**, **securities**, bonds, debentures, **stocks**, **real estate** or **services**. Similar language in other state consumer fraud statutes has been found to support many investment-based claims. *See, e.g., Kittilson v.*

Ford, 595 P.2d 944 (Wash. Ct. App. 1979), judgment *aff'd*, 608 P.2d 264 (1980) (fraud in sale of real estate contract); *E.F. Hutton & Co., Inc. v. Youngblood*, 741 S.W.2d 363 (Tex. 1987); *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720 (Minn. 1983) (sale of silver coins as investments); *New Equity Sec. Holders Committee for Golden Gulf, Ltd. v. Phillips*, 97 B.R. 492 (E.D. Ark. 1989) (sale of securities); *Jackson v. John Hancock Fin. Servs., Inc.*, Nos. 04-2500-CM, 04-2501-CM, 04-2502-CM, 2006 WL 2710327 (D. Kan. Sept. 20, 2006) (same); *Widmer v. Hallier*, No. 03-CV-2490-DJW, 2005 WL 1802132 (D. Kan. July 28, 2005) (sale of mutual funds).

(viii) Prohibited practice must be “related to a material fact or facts.”

(a) For general purposes, under section 714.16, a material misrepresentation is any untruthful statement which is likely to affect a consumer’s conduct or decision with regard to a product or service. *See* PRIGDEN, *supra*, at § 10-05. This is the test we apply in this case. *State ex rel. Miller v. Rahmani*, 472 N.W.2d 254, 258 (Iowa 1991).

(2) Per Se violations—§714H3(2):

(a) See list in Appendix A.

(b) Relief is not limited to transactions involving “consumer merchandise.”

(c) No proof required under Chapter 714H:

(i) That defendant knew or should have known that practice or act was deceptive, etc.

(ii) That practice or act was material to consumer’s decision.

(d) Note: many acts and practices are covered.

4. “Actual Damages”—Causation/Reliance Issues

a) Reliance is not expressly required by Chapter 714H but §714.H.2(1) defines actual damages as those “**proximately caused**” by a prohibited practice or act. Section 714H.5(1) also requires that that person be damaged as “the result of” the practice.

b) A critical distinction between common law and statutory consumer fraud is that with statutory claims reliance need not be “justifiable” or “reasonable.”

- (1) Recovery is permissible even if the plaintiff should have discovered the fraud or otherwise should have known of it. *Peery v. Hansen*, 585 P.2d 574, 578 (Ariz. Ct. App. 1978); *Brandt v. Olympic Const., Inc.*, 449 N.E.2d 1231, 1233 (Mass. 1983) (failed to check the public records in their suit against a real estate developer for misrepresenting future use of lot adjoining the property they wished to buy); *Pleasant v. Bradford*, No. 03-07-00167-CV, 2008 WL 2544814 (Tex. Ct. App. 2008) (failure of buyers to notice discrepancy in square footage during 30 days of occupancy prior to closing did not preclude reliance, nor did the fact that they signed a form which disclaimed reliance on statements by the realtor).
- (2) Consumer fraud statutes generally provide relief from misrepresentations even where disclaimers and disclosures direct the consumer not to rely on them. *See, e.g., Gaidon v. Guardian Life Ins. Co. of America*, 725 N.E.2d 598 (N.Y. 1999) (vanishing premium case, disclaimers directed consumer to ignore agents' illustrations and representations); *DeAngelis v. Timberpeg East, Inc.*, 858 N.Y.S.2d 410 (N.Y. Sup. Ct. 2008) (consumer fraud claims for misrepresentations in sale of manufactured home allowed despite merger and disclaimer clauses); *Viene v. Concours Auto Sales, Inc.*, 787 S.W.2d 814 (Mo. Ct. App. 1990) ("As is" warranty does not bar suit alleging that the seller of a used car falsely represented that the car had passed state safety inspection.); *Smith v. Scott Lewis Chevrolet, Inc.*, 843 S.W.2d 9 (Tenn. Ct. App. 1992) ("as is" disclaimer did not preclude consumer from basing suit on alleged misrepresentation by car dealer that car had not been wrecked); *Duran v. Leslie Oldsmobile, Inc.*, 594 N.E.2d 1355 (Ill. App. Ct. 1992) (consumer relied on salesman's oral misrepresentations of warranty coverage when she signed purchase order, even though these statements were contradicted by warranty documents she received some time later).
- (3) The misrepresentations need not be made directly to the plaintiff. *Raudebaugh v. Action Pest Control, Inc.*, 650 P.2d 1006, 1009 (Or. 1982) (termite inspector falsely claimed to the homeowner that the house was free of insect infestation, later buyer who relied on that statement could sue the termite inspector under statute); *Warren v. LeMay*, 491 N.E.2d 464, 474 (Ill. App. Ct. 1986).
- (4) Many cases emphasize that reliance may be wholly unreasonable. *See e.g. Guggenheimer v. Ginzburg*, 372 N.E.2d 17 (N.Y. 1977) (sale of dictionaries claimed to be discounted from fictional "list price," consumer fraud statute protects "the ignorant, the unthinking and the credulous who, in making purchases, do not stop to analyze but are governed by appearances and general impressions"). A number of other states refer to the effect on the "unsophisticated consumer" when determining whether or not an act or practice is deceptive; *see e.g., Murphy v. McNamara*, 416

A.2d 170 (Comm. Super. Ct. 1979) (Statute “must be applied to protect the unthinking, the unsuspecting and the credulous as well as the sophisticated.”); *Williams v. Bruno Appliance & Furniture Mart, Inc.*, 379 N.E.2d 52, 54 (Ill. App. Ct. 1978); *Dennis Weaver Chevrolet, Inc. v. Chadwick*, 575 S.W.2d 619 (Tex. Civ. App. 1978), *RRTM Restaurant Corp. v. Keeping*, 766 S.W.2d 804 (Tex. Civ. App. 1988).

(5) For related reasons, in statutory consumer cases, unlike common fraud cases, reliance may be based on an opinion, *see, e.g., Duhl v. Nash Realty Inc.*, 429 N.E.2d 1267 (Ill. App. Ct. 1981), or a predicted future event. *Taylor v. McCollom*, 849 P.2d 1123 (Or. Ct. App. 1993) (claim based on representations by the developer’s agent as to the prospective height of an unconstructed building).

(6) Reliance questions present unique concerns in class action consumer fraud cases. See discussion at ¶ II.E below.

5. May recover “all compensatory damages.”

- a) Majority approach under most state consumer fraud statutes is “benefit of the bargain”, value of product/services as represented less value as delivered, which is more favorable to consumer than “out of pocket” approach. PRIGDEN, *supra*, at § 6:4.
- b) “All compensatory” damages presumably includes consequential and incidental damages, including repair costs and lost profits, where foreseeable and otherwise recoverable under damages rules. *See, e.g., Hyder-Ingram Chevrolet, Inc. v. Kutach*, 612 S.W.2d 687 (Tex. App. 1981); *Metro Ford Truck Sales, Inc. v. Davis*, 709 S.W.2d 785 (Tex. App. 1986); *Hugh Wood Ford, Inc. v. Galloway*, 830 S.W.2d 296 (Tex. App. 1992) (lost profits allowed in consumer fraud cases involving consumer vehicles also used in business).
- c) Since Iowa statute expressly requires that damages be “proximately caused by” the prohibited practice or act and “result” from it, foreseeability and other damages requirements apply. *See Abrahams v. Young and Rubicam, Inc.*, 692 A.2d 709 (Conn. 1997).

6. Punitive Damages

- a) Same burden of proof as in other punitive damage cases: “preponderance of convincing and satisfactory evidence” and “willful and wanton disregard for rights of another.” See Iowa Code § 668A.1(a).
- b) Limited to three times actual damages.

7. Injunctions

- a) Both temporary and permanent injunctions and other equitable relief authorized “to protect the public from further violations”—different from common law standard, especially four factor temporary injunction standard. *See State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617 (1989); *cf.* §714.16 (7).

8. Attorney Fees

- a) **If** consumer proves violation and actual damages, the court **shall** award to the consumer the costs of the action **and to the consumer’s attorney reasonable fees**.
 - (1) Reasonable attorney fees to be determined by court based on 12 factors:
 - (a) The time and labor required.
 - (b) The novelty and difficulty of the issues in the case.
 - (c) The skills required to perform the legal services properly.
 - (d) The preclusion of other employment by the attorney due to the attorney’s acceptance of the case.
 - (e) The customary fee.
 - (f) Whether the fee is fixed or contingent.
 - (g) The time limitations imposed by the client or the circumstances of the case.
 - (h) The amount of money involved in the case and the results obtained.
 - (i) The experience, reputation, and ability of the attorney.
 - (j) The undesirability of the case.
 - (k) The nature and length of the professional relationship between the attorney and the client.
 - (l) Attorney fee awards in similar cases.
 - b) Factors are similar to those in civil rights cases. *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990) (“appropriate factors to consider in allowing attorney fees include the time necessarily spent, the nature and extent of the service, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar service.”); *Dickerson v. Young*, 332 N.W.2d 93, 101 (Iowa 1983) (factors include “in addition to the time and work involved, the novelty and difficulty of the questions presented, expertise required, preclusion of other available employment, customary fee for such a case, fixed or contingent nature of the fee, time limitation imposed, amount involved, result obtained, experience and ability of the attorney, unpopularity of the case, nature and length of attorney-client relationship, and fee awards in similar actions”).

- c) Iowa has adopted federal analysis for fees in both civil rights and wage claims, and therefore federal decisions on specific fee issues are persuasive. *Dutcher v. Randall Foods*, 546 N.W. 2d 889 (Iowa 1996).
- d) A contingent fee agreement “does not set a maximum limit on the statutory allowance for recovery of attorney fees.” *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990).
- e) Determination of fees will be made by the court following trial on the merits. See *Ayala v. Center Line, Inc.*, 415 N.W.2d 603, 606 (Iowa 1987); *State ex rel. Miller v. Fiberlite Intern., Inc.*, 476 N.W.2d 46, 47 (Iowa 1991) (consumer fraud action under §714.16, “[w]e believe that the attorney general, in seeking to recover reasonable attorney fees and investigative costs under this statute, is entitled to wait until the merits of the claim have been resolved before presenting evidence of reasonable attorney fees and investigative costs incurred in pursuing the case”).
- f) In class action cases, IOWA R. CIV. P. 42.16(e) sets out similar but not identical factors that the court “shall” consider. *King v. Armstrong*, 518 N.W.2d 336, 338 (Iowa 1994).

C. Exclusions: exempt professionals and regulated industries

1. Iowa statute’s list of 35 exempted categories of professionals appears to be the most extensive in the nation. See Mark D. Bauer, *The Licensed Professional Exemption In Consumer Protection: At Odds With Antitrust History and Precedent*, 73 TENN. L. REV. 131, 131 (2006); PRIDGEN, *supra*, at APP. A; *cf.* Md. Code Ann. Com. Law § 13-104 (2009) (22 exemptions).
2. Section 714H.4(1)(a): “Merchandise offered or provided...**pursuant to** a profession or business for which (those exempted) are licensed or registered....” Exempt professions and businesses may lose their exemption if they are not “engaged in” the professional license or registration at the time of the act in question. See *Equity Control Associates, Ltd. v. Root*, 638 N.W.2d 664, 673 (Iowa 2001) (business planner not “engaged as an accounting practitioner” under § 535C.2(4)(c) at time he extended loan, although planner provided accounting services); *cf. FINDERNE MGMT. CO., INC. v. BARRETT*, 955 A.2d 940, 953 (N.J. Super. Ct. App. Div. 2008) (insurance agent not exempt from statute when providing financial advice).
3. Language exemption will not apply to activities commonly engaged in by certain professions/businesses yet not engaged in “pursuant to” the profession, e.g., financial planning/sales of securities and other investments by insurance professionals.

D. Section 714H.6: Chapter 714H “does not affect consumer’s right to seek relief under any other theory of law”

1. Consider common law misrepresentation claims where appropriate.
2. Other specific state consumer fraud statutes that create private rights of action:
 - a) Chapter 706A: ongoing criminal conduct (state “RICO”). Any criminal act committed for financial gain on a continuing basis that is punishable as a serious misdemeanor or punishable as an indictable offense, including theft by deception (Section 714.1); insurance fraud (Section 507E.3); fraudulent practices (Section 714.8-714.13); *see Brown v. Kerkhoff*, 504 F. Supp. 2d 464 (S.D. Iowa 2007).
 - b) Section 552.13: health club memberships.
 - c) Chapter 553: antitrust claims.
 - d) Section 714B.8: prize promotions.
 - e) Sections 573.5201–5203: consumer credit code.
 - f) Section 714D.6: telephone carrier “slamming.”
 - g) Section 714.16B: identity theft.
 - h) Chapter 714E: e-mail spamming.
 - i) Section 714F.9(1): restricting purchases and agreements to sell foreclosed homes.
 - j) Section 808B.8: interception of telephone and other oral communications, telephone recordings.

E. Class actions: 714H.7

1. Requires consent of Attorney General before action is filed.
2. Liberal standard for allowing. Attorney General “shall” allow unless it determines claim is “frivolous.”
3. All other requirements for class actions under IOWA R. CIV. P. 1.261–1.277 and FED R. CIV. P. 23 also apply:
 - a) Numerosity, commonality, typicality, adequacy of representation, predominance of common questions of law and fact, and manageability.

- b) Generally, courts are more receptive to consumer fraud class actions than common law fraud class actions, in view of relaxed of reliance/causation requirements. *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 752 A.2d 807, 818 (N.J. Super. Ct. App. Div. 2000) (vanishing premium claims certified, “class actions are generally considered the superior form of disposing of cases involving claims of consumer fraud”); *Wiegand v. Walser Automotive Groups, Inc.*, 683 N.W.2d 807, 812 (Minn. 2004) (discussing difference between proof of “causal nexus” in proving damages from consumer fraud and “justifiable reliance” in common law fraud claims in class action claim for fraud in sale of auto service contracts); *Tylka v. Gerber Products Co.*, 178 F.R.D. 493, 499 (N.D. Ill. 1998) (“objective” standard used to determine materiality under Illinois Consumer Fraud statute).
- c) Courts also certify classes despite individualized damages differences when it is logical to assume that deception or unfair practice resulted in actual damage. *See, e.g., Peterson v. H & R Block Tax Servs, Inc.*, 174 F.R.D. 78, 84-85 (N.D. Ill. 1997) (certifying class of persons qualified for earned income credit and paid advance fee for early refund but were not eligible because no early refunds were provided for earned income credit; class wide reliance on refund was justified as “the only logical explanation” for class members to pay a fee); *Johnson v. Midland Career Institute, Inc.*, No. 93 C 1363, 1993 WL 420954, at *6 (N.D. Ill. Oct. 18, 1993) (on fraudulent tuition loan scheme for school that closed a short time later, causation and damages apparent from “the simple fact that the class members enrolled and by their willingness to take on student loans to pay tuition”); *Garner v. Healy*, 184 F.R.D. 598 (N.D. Ill. 1999) (Court certified class of consumers who purchased a substance represented as “car wax” that allegedly contained no wax; “if Plaintiffs paid money for a ‘wax,’ but instead received a worthless ‘non-wax’ product, then issues of proximate cause would be relatively simple to resolve on a class wide basis”); *Negrete v. Allianz Life Ins. Co. of North America*, 238 F.R.D. 482 (C.D. Cal. 2006) (class claims for RICO and state consumer fraud against insurer and affiliated field marketing organizations to induce class members to purchase deferred annuities; class wide reliance inferred from “common marketing schemes” used by agents and “standardized written marketing materials” including “standardized consumer brochures”).
- d) Despite generally receptive class treatment by many courts, issues of predominance and manageability can create obstacles in consumer class actions, especially with complex class actions involving multiple methods persons and means involved in communicating the misrepresentations. *See, e.g., In re Neurontin Marketing, Sales Practices and Products Liability Litigation*, 2009 WL 1323835 at *1 (D. Mass. May 13, 2009) (decided May 13, 2009) (certification denied for class of purchasers of Neurontin for “off label” use); *Carroll v. Cellco P’ship*, 713 A.2d 509 (N.J. Super. Ct. App. Div. 1998); *cf. Voss v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36 (Iowa 2003);

Quamme v. Advanced Trading, Inc., 2001 WL 540056 (Iowa Ct. App. May 23, 2001).

- e) Only the named plaintiff in a class action under a consumer fraud act should be required to satisfy threshold standing requirement of claim of “ascertainable loss” that could survive a motion for summary judgment. *See, e.g., Laufer v. U.S. Life Ins. Co. in City of New York*, 896 A.2d 1101 (N.J. Super. Ct. App. Div. 2006).
- f) Possible Impact of Class Action Fairness Act of 2005 (CAFA):
 - (1) Pub. L. No. 109-2, 119 Stat. 4 (2005), amends 28 U.S.C. §§ 1332D, 1453 & 1711–1715. Intends to reduce forum shopping by plaintiffs in state courts by expanding federal diversity jurisdiction, and providing greater scrutiny of class action settlements.
 - (2) With several exceptions, CAFA confers federal diversity jurisdiction where 1) there is “minimal diversity” (at least one class member diverse from a defendant); 2) proposed class contains at least 100 members; and 3) the amount in controversy is at least \$5 million in the aggregate. *Plubell v. Merck & Co.*, 434 F.3d 1070, 1071 (8th Cir. 2006); *Rakes v. Life Investors Ins. Co. of America*, No. 06-CV-99-LLR, 2007 WL 2122195, at *6 (N.D. Iowa July 20, 2007). *Larsen v. Pioneer Hi-Bred Intern., Inc.*, No. 4:06-cv-0077-JAJ, 2007 WL 3341698, at *5 (S.D. Iowa 2007).

F. Miscellaneous issues

- 1. Predatory lending - often addressed in consumer fraud litigation.
 - a) Inaccurate disclosures, changes in loan types and interest rates, and disproportionately high fees and points financed by the borrower.
 - b) Examples of procedural predatory lending include the following: “loan flipping” (borrowers are encouraged to refinance repeatedly over a short period of time); nondisclosure of material terms, and the misuse of “yield spread premiums”; lender pays the broker an indirect compensation for securing a mortgage at an interest rate higher than lender would have issued borrower.
 - c) Other statutes do not adequately protect borrowers against predatory lending:
 - (1) Real Estate Settlement Procedures Act (RESPA) does not allow for a private right of action for most common abuses;
 - (2) Truth in Lending Act (TILA) has only a one-year statute of limitations;

- (3) Home Owners Equity Protection Act (HOEPA) only applies to most extreme mortgage loan abuses. *See* Jessica Fogel, *State Consumer Protection Statutes: An Alternative Approach to Solving the Problem of Predatory Mortgage Lending*, 28 SEATTLE U. L. REV. 435 (2005).
 - d) Claims under Chapter 714H may address mortgage broker abuse, but are limited to brokers because of exemption for financial institutions.
2. Arbitration clauses.
- a) May limit effectiveness of private cause of action under Chapter 714H.
 - b) Likely will be enforced under Federal Arbitration Act. *See* 9 U.S.C. §2; *Faber v. Menard, Inc.*, 267 F. Supp. 2d 961 (N.D. Iowa 2003), *aff'd in part and rev'd in part*, *Faber v. Menard, Inc.*, 367 F.3d 1048 (8th Cir. 2004) (Iowa Arbitration Act, including § 679A.1(2)(a) prohibiting enforcement of arbitration clauses in adhesion contracts, is preempted by Federal Arbitration Act).
 - c) Pending federal legislative proposals may provide some relief.

APPENDIX A
PER SE VIOLATIONS UNDER § 714H.3(2)

Iowa Code § 321.69	Damage disclosure statements and sale/transfer of vehicles.
Iowa Code Ch. 516D	Car rental and collision damage waiver act, contains numerous rights, including claims for misrepresentation of characteristics or availability of reserved vehicle, claims arising from additional driver fee charges and many other claims.
Iowa Code §§ 516E.5, 516E.9, 516E.10	<p>Owner vehicle service contracts, including required disclosures (516E.5); misrepresentations that it is “insurance” and is approved by state (516E.9), and other and misleading advertising and representations in sale of a service contracts (516E.10).</p> <p>Prohibits untrue, deceptive and misleading statements e.g., “robo calls” (516E.10(g)).</p>
Iowa Code Ch. 555A	<p>Door to door sales.</p> <p>Applies to sales of consumer goods in which seller or representative personally solicits sale, including those following invitation by the buyer, and made at a place other than the place of business of the seller (includes seminars)</p> <p>Also includes sale of funeral services (555A.1B(1)),but see exemption in § 714H.4(4) funeral homes licensed under Chapter 154.</p> <p>Also includes sale of social referral service (dating services) or related services.</p> <p>Requires notices of right to terminate, etc.</p> <p>Will legislatively reverse <i>Baird v. Oldfield</i>, 728 N.W.2d 223 (Iowa App. 2006) (held no private cause of action for failing to send notice of cancelation re: oral agreement to build pond and applying “four factor test” to determine whether private cause of action may be applied for violation of notice to cancel statute (unpublished opinion)).</p>

Iowa Code § 714.16(2)(b)	Advertising for sale at price or where purchase terms are “contingent upon procurement of prospective customers” or sales.
Iowa Code § 714.16(2)(c)	Prohibits “going out of business” sales that continue for more than 120 days.
Iowa Code § 714.16(d)(1)	Transfer of subdivided land without approval of Iowa Real Estate Commission.
Iowa Code § 714.16(d)(2)	False or misleading statements under § 306.21 (requiring filing of subdivision plan and plats) and 354 of subdivision procedure, including advertising, offers to sale and contracts.
Iowa Code § 714.16 (2)(e)	Violations of alcohol sales statute, Chapter 123 (with distillers certificate of compliance under 123.19).
Iowa Code §§ 535C.1-535C.10	Iowa Loan Brokers Act. <i>See Gardin v. Long Beach Mortgage Company</i> , 661 N.W.2d 193 (Iowa 2003); <i>Equity Control Associates Unlimited v. Route</i> , 638 N.W.2d 664 (Iowa 2001) (applies to non-consumer loans).
Iowa Code § 714.16(2)(g)	Going out of business sales.
Iowa Code § 714.16(2)(h)	Representations to remove health related contaminants from water.
Iowa Code § 714.16(2)(i)	Deceptive claims concerning water treatment systems.
Iowa Code § 714.16(2)(j)	Deceptive claims that water treatment systems are endorsed by the State.
Iowa Code § 714.16(2)(k)	Violation of 537B—motor vehicle repairs, requiring notice, no aftermarket parts.
Iowa Code § 714.16(2)(l)	Deceptive acts by repair facility or manufacturer/distributor of aftermarket crash parts under 537B(4). Inadequate disclosure and sale of wood products and misrepresentation of geographic location by listing fictitious business name implying local address.

Iowa Code Ch. 714A	Pay per call (900) service.
Iowa Code § 535A.6	Damages claim for redlining and reverse redlining, tying arrangements.
Iowa Code § 552.13	Health clubs, including misrepresentations of facilities, staff and benefits (552.14); remedies in 552.13.
Iowa Code § 714B.8	Prohibiting prize promotions without detailed disclaimers, including odds of winning and value of prize.
Iowa Code § 714D.6	Telephone carrier “slamming,” changing carriers and “cramming,” including unauthorized charges on bills.
Iowa Code § 714.16B	Identity theft statute.
Iowa Code Ch. 714E	Foreclosure consultants (statute also includes own private right of action at §714E.6).
Iowa Code § 537.5201	Debt collection practices, private causes of action for violation of numerous provision of Iowa Consumer Credit Code., including debt collection restrictions under 537.7103 and door to door sales restrictions under Section 537.3501.

APPENDIX B
EXEMPT PROFESSIONS AND INDUSTRIES

714H.4(1)(a)(1)	Insurance companies
714H.4(1)(a)(2)	Attorneys
714H.4(1)(a)(3)	Financial institutions (state or federally chartered banks, savings and loans, credit unions and any affiliate or subsidiary)
714H.4(1)(a)(4)	<p>Persons under the following facilities licensed, certified or registered under the following chapters:</p> <ul style="list-style-type: none"> • 135B (Hospitals) • 135C (Healthcare facilities (residential care facilities)) • 135J (Hospice) • 148 (Medicine/surgery) • 148A (Physical therapy) • 148B (Occupational therapy) • 148C (Physician’s assistant) • 149 (Podiatrists) • 151 (Chiropractors) • 152 (Nursing) • 152A (Dieticians) • 152B (Respiratory therapists) • 153 (Dentists) • 154 (Optometrists) • 154B (Psychologists) • 154C (Social workers) • 154D (Behavioral science practitioners (marriage and family therapy)) • 155A (Pharmacy) • 154 (Funeral homes) • 169 (Veterinarians) • 522B (Insurance producers) • 542 (Accountants) • 542B(Engineers and Land Surveyors) • 543B (Real estate sales) • 544A (Architects) • 544B (Landscape architects)
714H.4(1)(b)	Advertising by a retailer for non-health products unless retailer participated in the ad or knew or should have known it was deceptive, false or misleading.

714H.4(1)(c)	Newspaper magazine publication or other print media, or radio, television or electronic media advertisement.
714H.4(1)(d)	Local exchange telephone service with a certificate under § 476.29.
714H.4(1)(e)	Public utilities under §476.1.
714H.4(1)(f)	Any advertisement that complies with FTC statutes or regulations.
714H.4(1)(g)	Conduct required or permitted by orders or rules of federal, state or government agency.
714H.4(1)(h)	Act in violation of the statute but required by other law.
714H.4(1)(i)	Unpaid, uncompensated volunteers engaged in charitable solicitation.
714H.4(1)(j)	Cable television service or video service under §§ 364.2 or 477A.2.
714H.4(1)(k)	Industrial loan licensees and regulated loan licensees under Ch. 536 and 536A with fewer than 60 employees.