



Returns and Exchanges

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REFUND POLICIES

I. THE BASICS OF REFUND LAWS

- A. Many states have laws that regulate the disclosure of a retailer's refund policy. While these laws vary slightly from state-to-state, the key to compliance is to adequately disclose to the consumer—prior to the time of the purchase—the retailer's policy. Generally, as long as a retailer properly discloses its policy, it may pick and choose the substantive terms.

Examples:

1. New York

§ 218-a. Disclosure of refund policies

- i. Every retail mercantile establishment shall conspicuously post, in the following manner, its refund policy as to all goods, wares or merchandise offered to the public for sale:
 - (a) on a sign attached to the item itself; or
 - (b) on a sign affixed to each cash register or point of sale; or
 - (c) on a sign so situated as to be clearly visible to the buyer from the cash register; or
 - (d) on a sign posted at each store entrance used by the public.
- ii. The sign, required by subdivision one of this section to be posted in every retail mercantile establishment, shall state whether or not it is the policy of such establishment to give refunds and, if so, under what conditions, including but not limited to whether a refund will be given:
 - (a) on merchandise which had been advertised as "sale" merchandise or marked "as is;"
 - (b) on merchandise for which no proof of purchase exists;
 - (c) at any time or not beyond a point in time specified; or
 - (d) in cash, or as credit or store credit only.
- iii. Enforcement. Any retail mercantile establishment which violates any provision of this section shall be liable, for a period of up to twenty days from the date of purchase, to the buyer for a cash refund or a credit, at the buyer's option, provided that the merchandise has not been used or damaged by the buyer.



- iv. The provisions of subdivision one shall not apply to retail mercantile establishments or departments that have a policy of providing, for a period of not less than twenty days after the date of purchase, a cash refund for a cash purchase or providing a cash refund or issuing a credit for a credit purchase, which credit is applied to the account on which the purchase was debited, in connection with the return of its unused and undamaged merchandise.
 - a. Preemption. This section does not relieve any person, firm, corporation or association subject to the provisions of this section from complying with any law, ordinance, rule or regulation of any locality relating to the posting of refund policies which affords the buyer greater protection than do the provisions of this section.

(NY G.B.L. § 218-a)

2. Ohio:

§ 1345.03. Unconscionable acts or practices generally

(A) No supplier shall commit an unconscionable act or practice in connection with a consumer transaction. Such an unconscionable act or practice by a supplier violates this section whether it occurs before, during, or after the transaction. (B) In determining whether an act or practice is unconscionable, the following circumstances shall be taken into consideration:...(7) Whether the supplier has, without justification, refused to make a refund in cash or by check for a returned item that was purchased with cash or by check, unless the supplier had conspicuously posted in the establishment at the time of the sale a sign stating the supplier's refund policy. (C) This section does not apply to a consumer transaction in connection with a residential mortgage.

(Ohio Rev. Code Ann. 1345.03)

3. California:

§ 1723. Display by retail store of policy regarding refunds and exchanges

(a) Every retail seller which sells goods to the public in this state that has a policy as to any of those goods of not giving full cash or credit refunds, or of not allowing equal exchanges, or any combination thereof, for at least seven days following purchase of the goods if they are returned and proof of their purchase is presented, shall conspicuously display that policy either on signs posted at each cash register and sales counter, at each public entrance, on tags attached



to each item sold under that policy, or on the retail seller's order forms, if any. This display shall state the store's policy, including, but not limited to, whether cash refund, store credit, or exchanges will be given for the full amount of the purchase price; the applicable time period; the types of merchandise which are covered by the policy; and any other conditions which govern the refund, credit, or exchange of merchandise.

(b) This section does not apply to food, plants, flowers, perishable goods, goods marked "as is," "no returns accepted," "all sales final," or with similar language, goods used or damaged after purchase, customized goods received as ordered, goods not returned with their original package, and goods which cannot be resold due to health considerations.

(1) Any retail store which violates this section shall be liable to the buyer for the amount of the purchase if the buyer returns, or attempts to return, the purchased goods on or before the 30th day after their purchase.

(2) Violations of this section shall be subject to the remedies provided in the Consumers Legal Remedies Act (Title 1.5 commencing with Section 1750) of Part 4).

(3) The duties, rights, and remedies provided in this section are in addition to any other duties, rights, and remedies provided by state law.

(Cal. Civ. Code § 1723)

B. Disclosures on a Customer's Receipt.

1. While it is a long-standing practice of retailers to place a return policy on the back of customers' receipts, doing so is merely a courtesy; this method of disclosure does not satisfy any state's refund policy disclosure statutes.

C. There are also federal and state industry-specific refund laws—including laws covering: residential mortgage transactions, door-to-door sales, health club memberships, and future services (e.g., Spanish Lessons).

II. PARTICULAR PROBLEMS/ISSUES

A. **Restocking Fees:** Retailers need to be extra cautious about restocking fees because many state officials have expressed a desire to protect unsuspecting consumers from having to pay such fees. For example, in 2005, the New York City Department of Consumer Affairs announced that it settled violations with six retail chains for charging customers restocking fees without clear disclosure. Arizona specifically addresses this issue by statute:



§ 44-1377. Disclosure of restocking fee; enforcement; definition

- a) A business in this state that charges a restocking fee on a product the business sells shall disclose the existence of the fee and the amount of the fee to a customer in accordance with this section.
- b) If a business charges a restocking fee, the business shall do all of the following:
 1. Disclose in any print advertising and promotional material, including a catalog that a restocking fee may apply to the purchase of goods. The disclosure shall be printed in a clear and conspicuous manner in the advertising and promotional material.
 2. Post a notice disclosing that a restocking fee may apply to the purchase of goods and where the customer may obtain the full restocking fee policy. The notice shall be clearly and conspicuously visible to the customer before purchase.
 3. Disclose on the sales receipt in a conspicuous manner in type at least as large as the majority of the printed text on the receipt and in print that is clear and legible, both of the following:
 - (a) That a restocking fee may apply to the purchased good.
 - (b) Where the customer may obtain the full restocking fee policy.
 4. At the point of purchase for a good on the web site of the business, disclose that a restocking fee may apply to the purchase of goods. The business must provide the full restocking fee policy on the web site. The disclosure prescribed by this paragraph shall be printed in a clear and conspicuous manner on the web site.
- c) An act or practice in violation of this section is an unlawful practice under section 441522. The attorney general may investigate and take appropriate action as prescribed by chapter 10, article 7 of this title.
- d) For the purposes of this section, "restocking fee" means a fee charged by a business for restocking of the good purchased on its return or exchange.

(A.R.S. § 44-1377)

- B. **Restocking Fees - Returns Without Receipts:** Since many states require retailers—as part of their disclosure obligations—to state in their policies the circumstances under which merchandise cannot be returned, stores must remember to state that not having a receipt will be a basis for denying a return.



C. **Wardrobing:** Retailers' policies should explicitly state that only unused, unopened, unworn, "tags still on" merchandise may be returned, as the case may be.

D. **Defective items.**

U.C.C. §§ 2-314 and 2-714 establish what is known as the implied warranty of merchantability and the ability of consumers to recover the purchase price of an item which breaches the implied warranty, respectively. Under the implied warranty of merchantability, unless excluded or modified, a warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Exclusion and modification, in turn, are described in U.C.C. § 2316, which states in pertinent part:

"(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to Section 2-202, negation or limitation is inoperative to the extent that such construction is unreasonable. (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it in a consumer contract the language must be in a record, be conspicuous, and state "The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract," and in any other contract the language must mention merchantability and in case of a record must be conspicuous. Subject to subsection (3), to exclude or modify the implied warranty of fitness, the exclusion must be in a record and be conspicuous. Language to exclude all implied warranties of fitness in a consumer contract must state "The seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in the contract," and in any other contract the language is sufficient if it states, for example, that "There are no warranties that extend beyond the description on the face hereof" Language that satisfies the requirements of this subsection for the exclusion or modification of a warranty in a consumer contract also satisfies the requirements for any other contract. (N) Notwithstanding subsection (2):

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language that in common understanding calls the buyer's attention to the exclusion of warranties, makes plain that there is no implied warranty, and, in a consumer contract evidenced by a record, is set forth conspicuously in the record;

(b) if the buyer before entering into the contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods after a demand by the seller there is no implied warranty with regard to defects that an examination in the circumstances should have revealed to the buyer; and

(c) an implied warranty may also be excluded or modified by course of dealing or course of performance or usage of trade."

Thus, while state refund policy disclosure laws regulate the sale of a non-defective good, compliance with them is irrelevant to issues regarding the sale of a defective good.

For example, in *Baker v. Burlington Coat Factory Warehouse*, 175 Misc. 2d 951 (N.Y. City Ct. 1998), a consumer sued a merchant to recover the purchase price of a fake fur coat that she returned two days after she purchased it because the item was shedding. The merchant



refused to give the consumer a refund because the store had a 'store credit only' refund policy. The consumer did not want a store credit. The Court found that the merchant's signs and the front and back of its sales receipt reasonably informed consumers of its 'store credit only' refund policy but held that the policy was unenforceable because the item was defective and breached the implied warranty of merchantability. The Court stated "[a]s between the implicit cash refund policy contained in UCC 2-314 and 2-714 and the no cash refund policy explicitly authorized in General Business Law § 218-a (2), the UCC provisions are paramount and preempt any contrary provisions in General Business Law § 218-a." 175 Misc. 2d 951 at 955 (citations omitted).

III. ISSUE: MONITORING 'HABITUAL RETURNERS'

- A. Many major retailers now monitor who returns what items, and how they return them (e.g., with or without receipts). Most major retailers use a company called "The Retail Equation" (previously: "The Retail Exchange"). Significantly, the Retail Equation allows a consumer who was denied a return or exchange by the company to request a copy of his or her return activity report. According to the company, it does not share customer data among retailers—i.e., the database is limited to The Retail Equation, the customer, and the retailer that provided the data to The Retail Equation.
- B. If you are a retailer thinking of tracking returns, you should be aware that states are showing an increased interest in this issue (as are consumer privacy advocacy groups).

Examples:

1. **California:** According to the California Attorney General, if a store reports to a central reporting company and uses this as the basis for deciding whether to grant or deny a return, then the return policy notice must refer to that practice.
2. **Connecticut** (warning; legislation that will affect this statute is pending):

Sec. 42-110aa. Refund and exchange policies, generally.

(a) Refusal to accept returns prohibited. Use of electronic monitoring system. No person engaged in trade or commerce in this state, upon the return of goods purchased from such person's place of business, shall refuse to accept the returned goods immediately and issue the individual returning such goods either a cash or credit refund of the purchase price or credit towards the purchase of another item offered for sale at such person's place of business, provided such return is made within the period of time established by such person for the acceptance of returned goods



and provided further, such goods are returned in a manner consistent with such person's conspicuously posted refund or exchange policy. Any such person that utilizes an electronic system to record, monitor and limit the number or total dollar value of returns made by a consumer shall clearly indicate the use of such system within such person's conspicuously posted refund or exchange policy.

(b) Notice of termination of right to return goods. Any person that utilizes an electronic system to record, monitor and limit the number or total dollar value of returns made by a consumer shall, prior to terminating the right of any such consumer to return goods at such person's place of business pursuant to any such limitation, provide written notice to such consumer that indicates such termination. Such termination notice shall not affect such consumer's right to return any goods purchased by such consumer or purchased for the benefit of such consumer prior to the date of such notice, if such consumer has a valid receipt evidencing a purchase date for such goods that is prior to the date such consumer receives such notice. Any such notice that is mailed to the last known address of such consumer or to the address of such consumer that is obtained through reasonably available public records shall be deemed to comply with the notification requirements of this subsection.

(c) Extension of time for accepting returned goods permitted. This section shall not be construed to prohibit any person engaged in trade or commerce in this state from extending the period of time during which such person will accept the return of goods purchased from such person's place of business.

(d) Exemptions. This section does not apply to perishable goods, including readily perishable foods and beverages, or goods clearly marked as nonreturnable pursuant to such person's conspicuously posted refund or exchange policy.

(e) Violation deemed unfair trade practice. Any violation of the provisions of subsection (a) of this section shall constitute an unfair trade practice for purposes of section 42-110b.

(Conn. Gen. Stat. § 42-110aa)

3. **New York:** In 2005, the New York City Department of Consumer Affairs announced that three retail chains paid the City a total of \$95,000 to settle charges that the companies refused customer returns without properly disclosing conditions of their return policies.



The companies, which used the Return Exchange, did not clearly post why returns may be denied, as required by the City's Consumer Protection Law.