Testimony before the

COMMITTEE ON FINANCIAL SERVICES

Subcommittee on Financial Institutions & Consumer Credit

regarding

H.R. 1701

The Consumer Credit Protection Act

July 12, 2001

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Mr. Chairman and Members of the Committee, the **National Consumer Law Center**[1] thanks you for inviting us to testify today regarding the impact of H.R. 1701 on consumers. We offer our testimony here today on behalf of our low income clients, as well as the **Consumer Federation of America,**[2] **Consumers Union,**[3] and the **U.S. Public Interest Research Group.**[4]

On behalf of the millions of low and moderate income consumers that these groups collectively represent, we can say unequivocally that we are unalterably opposed to H.R. 1701. The bill will not help consumers, it will only hurt them. Consumers need protections from the exorbitant prices charged to purchase items through rent to own dealers; they need protections from high fees; and consumers need assurances that they can reinstate their contract with reasonable fees and under reasonable conditions after they have spent considerable sums trying to purchase the items. While we believe that even the most precise disclosures would not adequately protect consumers in these transactions, the disclosures required by H.R. 1701 do not provide meaningful information.

You have asked me to answer three questions regarding H.R. 1701. Below I answer these questions and than provide substantial background information on the rent to own industry and its impact on consumers.

Question 1. Whether or not the bill provides an adequate national "floor" for consumer protections.

Answer. There seems to some sort of misunderstanding. This bill, by its terms, does not provide a floor for consumer protections, it provides a ceiling. And this ceiling is very, very low. H.R. 1701 explicitly provides – in section 1018 – that any state law on the subject is preempted if it is inconsistent with H.R. 1701. Thus, any law which included the consumer protections such as the following would be

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[1]The **National Consumer Law Center** is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states who represent low-income and elderly individuals on consumer issues. As a result of our daily contact with these advocates, we have seen examples of predatory practices against low-income people in almost every state in the union. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. We publish and annually supplement twelve practice treatises which describe the law currently applicable to all types of consumer transactions.

[2]The **Consumer Federation of America** is a nonprofit association of over 280 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

[3]**Consumers Union** is the publisher of Consumer Reports.

[4]The **U.S. Public Interest Research Group** is the national lobbying office for state PIRGs, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

inconsistent, and thus preempted: 1) a limitation on the total amount a consumer could be required to pay to obtain ownership of an item, or 2) a requirement that a rent to own ("RTO") dealer allow reinstatement based on terms different than those in the bill, 3) a limitation on the fees that a dealer can charg, or 4) a disclosure like the annual percentage rate. No other consumer protection law preempts state consumer protections in this way. This is because the intent of this bill is not to provide consumer protections to consumers, but to provide cover from challenges to the industry's unconscionable practices.

Question 2. The likely impact on consumers if this bill becomes law.

Answer. Consumers will be hurt. While the laws in many states may not adequately protect consumers from the high prices and unfair practices of this industry, **the majority of the U.S. population is currently governed by better RTO provisions than this bill provides. The majority of state laws which govern RTO transactions provide *more* consumer protections than H.R. 1701. Yet H.R.1701 would curtail these protections, quite significantly in some states.** A few examples of the *better* consumer protection provisions in some state RTO statutes *which would be preempted* by H.R. 1701 include:[5]

- **California** – where, among other things, the RTO statute includes a much better definition of "cash price," closely limits the definition of default, provides more comprehensive reinstatement rights after default, and shifts the burden to the dealer to act in good faith.[6]

- **Iowa** – where, among other things, the RTO statute limits the total amount the consumer can be required to pay for ownership of the item, limits fees, and provides better rights to reinstatement of the contract after the consumer's default.[7]

- **Michigan** – where, among other things, the RTO statute limits the total amount the consumer can be required to pay for ownership, limits fees, provides better rights to reinstatement of the contract after default.[8]

- **Minnesota** – where, among other things, the statute provides a better definition of cash price, better disclosures, improved reinstatement rights,[9] and the courts have required that RTO contracts be treated for what they really are: disguised credit sales and subject to general usury

[5]This list is meant to represenational only. There are scores of other provisions in the RTO statutes of these states as well as others not mentioned which are better for consumers than H.R. 1701 and would be preempted if H.R. 1701b were to pass.

[6] Cal. Civ. Code §§1812.644, 1812.631.

[7]Iowa Code §§ 537.3608, 537.3613, 537.3616.

[8]Mich. Comp. Ann. §§ 445.954, 445.958.

[9] Minn. Stat. Ann. §§ 325F.84, 325F.86, 325F.90.

ceilings.[10]

- **New York** – where, among other things, the legislative history indicates that the definition of "cash price" is more consumer friendly, fees are strictly limited, there is a cap on the total amount consumers can be required to pay to obtain ownership, there is an early purchase option, as well as better reinstatement protections than in H.R. 1701.[11]

- **Ohio** – where the RTO statute includes a limitation on fees, improved reinstatement rights, restrictions on the definition of default, a close cap on the total of payments, and an early purchase option.[12]

- **Oregon** – where the RTO statute includes limitations on late fees and fees for reinstatement which are not in H.R. 1701.[13]

- **Pennsylvania -** where the RTO statute includes limitations on late fees and fees for reinstatement, the consumers rights to reinstatement are friendlier than those in H.R. 1701, and there is a limit on the total of payments.[14]

- **Tennessee** – where the RTO statute includes better rights for consumers' reinstatement than those in H.R. 1701.[15]

- **Texas** – where the RTO statute includes limitations on late fees and fees for reinstatement not found in H.R. 1701.[16]

- **Vermont** – where the statute provides a strict definition of cash price and strictly limits the total amount a consumer can be required to pay to acquire ownership. Also, regulations have been passed in Vermont requiring an annual percentage rate type disclosure.[17]

- **West Virginia** – where, among other things, the total of payments is limited and the definition

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[10] *Fogie v. Rent-A-Center, Inc.*, 1995 WL 649575 (D.Minn. 1995), *aff'd sub nom., Fogie v. Thorn Americas, Inc.*, 95 F. 3rd 645 (8th Cir. 1996), *subsequent appeal on different grounds*, 190 F.3rd 889 (8th Cir.1999).

[11]N.Y. Pers. Prop. Law §§ 500, 501, 503.

[12]Ohio Rev. Code Ann. §§ 1351.01, 1351.05, 1351.06.

[13]Or. Rev. Stat.§ 646.253.

[14]Pa. Cons. Stat. Ann.§§ 6904, 6905, 6906.

[15]Tenn. Code. Ann. § 47-18-607.

[16]Tex. Bus. & Com §35.72

[17]Vt. Stat. Ann. tit. 9, § 41b and Rule C.F. § 115.04.

of cash price is much stricter than in H.R. 1701.[18]

In addition, the legislatures of New Jersey, North Carolina, and Wisconsin have deliberately rejected RTO statutes, choosing instead to regulate these transactions as credit sales. In all, the populations of these 17 states (plus the District of Columbia) represent over 55% of the population of this nation. The RTO consumers in these jurisdictions would clearly be worse off if H.R. 1701 becomes law. There is no trade off, either. The rest of population in the remaining states would certainly not be better protected as a result of H.R. 1701. H.R. 1701 simply does not provide any meaningful consumer protections.

What is *Wrong* with H.R. 1701?

As both the RTO industry and the FTC statistics show, the customer base for RTO transactions are among the poorest Americans. The FTC statistics also show that the vast majority of these customers enter into these transactions as a method of purchasing goods. While the industry attempts to claim that the majority of these transactions are rentals, this is belied by the information provided to the IRS and in litigation. On average the RTO stores dispose of rental units within two years of RTO's purchase of inventory and dispose of about 90% of all rental units within 3 ½ years of purchase. *In other words, almost all of an RTO dealer's merchandise is sold to the RTO customer base in two to three years.*[19]

The interesting distinction is between the FTC statistics and the industry statistics on this point. The FTC says that seventy percent of RTO merchandise is purchased.[20] The industry indicates in its promotional materials for this bill that "only 25 percent to 30 percent of rental-purchase customers actually pursue the ownership option." The difference between these statistics is that the FTC is counting *people* and the industry is counting *contracts.*

The reason for the difference in the numbers is that RTO customers frequently "refinance" their RTO contracts and continue making payments. Ultimately customers end up owning RTO goods. The 25% rate of initial contracts being completed all the way to purchase is more an indication of the industry's collection practices than it is an indication of customer intent to purchase. The income levels of most RTO customers creates ample opportunity for bumps in the customer's economic road that will adversely affect the ability of the customer to consistently continue to pay $19.99 a week to an RTO dealer over a period of 18 to 21 months. This is why the reinstatement protections in the governing law are so crucial to the customer. When a customer has defaulted on an RTO contract, some credit for weeks of past payments must be applied toward the purchase of the item. As the industry statistics show, the ultimate purchase will frequently not occur until the customer has entered into two or three RTO contracts for the same or a similar item.

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[18]W. Va. Code §§ 46B-1-1 to 46B-1-5.

[19]*ABC Rentals v. IRS*, 142 F.3d 1200, 1202 (10th Cir. 1998).

[20]Federal Trade Commission, Bureau of Economics Staff Report, *Survey of Rent-to-Own Customers*, Executive Summary.

What does this low income customer base most need to protect them from an industry which preys upon their lack of perceived options? These consumers need protection from high costs and unfair practices. Although we believe that the best way to achieve these protections is to treat these transactions as what they really are – disguised credit sales – we also believe that adequate federal regulation can be provided in the RTO context.

It is evident that H.R. 1701, and most state RTO statutes were intended to provide dealers with complete insulation from consumer claims that the transactions are disguised credit sales. There are numerous ways in which RTO legislation can be improved. RTO consumers need, at the least:

- A true definition of the *cash price.* H.R. 1701 and many state RTO laws that require a cash price disclosure permits RTO dealers to set that price wherever they choose. *However, some state laws do require a cash price based on the reasonable price at which the merchandise is sold by other dealers. H.R. 1701 would preempt these.*

- Limitations on the total of payments that a consumer should be required to pay for the purchase of the item. A number of states have adopted some limitations, which often are not sufficient, but are better than no limitation at all. These include Iowa, Ohio, Michigan, New York, Pennsylvania, Vermont, and West Virginia. *Yet this essential regulation is excluded from H.R. 1701.*

- Limits on "fees" such as late fees, insurance fees, home pick-up fees, etc. *Most state laws include limits on these fees, unlike H.R. 1701.*

- Reinstatement rights: clear rights to have payments made on previous contracts applied to new contracts for the same types of items. *Many state laws are much friendlier to the consumer on this point than is H.R. 1701.*

- Price tag disclosures, as well as contract disclosures. By the time the customer gets the contract the decision to proceed with the transaction has often been made. Price tag disclosures provide information before the commitment to rent to own has been made. Price tag disclosures should include information that will simply convey information about the high relative cost of renting to own to the prospective purchaser. Yet, H.R. 1701, while requiring price tag disclosures – in section 1010 – does not provide an effective remedy for a dealer's failure to comply with this requirement. *Section 1012 on civil liability omits compliance with section 1010 from its coverage.*

- Meaningful penalties for dealers who violate the provisions of the RTO statute. H.R. 1701 provides no such penalties because Section 1012 (c) allows dealers to avoid liability for disclosure violations if, within 60 days of learning of the violation, the dealer adjusts the consumer's account so that the consumer would not have to pay more than was actually disclosed. *This provision clearly encourages dealers to ignore disclosure requirements because they suffer no penalty so long as they adjust once the consumer complains.*

- A disclosure like the annual percentage rate which shows the consumer the true cost of renting to own, to compare it with other methods of purchasing personal items.

Background on Rent To Own Transactions in the United States.

RTO businesses are essentially appliance and furniture retailers which arrange lease agreements rather than typical installment sales contracts for those customers who cannot purchase goods with cash or who are unsophisticated about money management. These lease agreements contain several special features. First, the lease agreements contain purchase options which typically enable the lessees to obtain title to the goods in question by making a nominal payment at the end of a stated period, such as eighteen months. Second, the leases are short term, so that "rental payments" are due weekly or monthly. Third, the leases are "at will." In other words, the leases theoretically need not be renewed at the end of each weekly or monthly term.

The RTO industry aims its marketing efforts at low-income consumers by advertising in minority media, buses, and in public housing projects, and by suggesting it has many features attractive to low-income consumers: quick delivery, weekly payments, no or small down payments, quick repair service, no credit checks, and no harm to one's credit rating if the transaction is canceled.[21] Most RTO customers enter into these transactions with the expectation of buying an appliance and are seldom interested by the rental aspect of the contract.[22] This attitude is encouraged by RTO dealers who emphasize the purchase option in their marketing even while they are minimizing its importance in the written contract. Of course, if and when a transaction is challenged in court, an RTO dealer will point to the rental provisions of the contract and claim that statutes which control traditional retail installment sales are irrelevant to RTO agreements.

The chief problem with RTO contracts is not only that these supposed leases are used to mask installment sales, but also that these sales are made at astronomic and undisclosed effective interest rates.

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[21] The Association of Progressive Rental Organizations (APRO), the RTO trade association, publishes information on RTO at its Web site. *See* www.apro-rto.com. It reports that the majority of RTO customers (65%) have annual incomes under $36,000; over 65% are under the age of 45; over 58% have a high school education or less; and about 70% are Caucasian. However, a Warren Rudman report found that 61% of the respondents surveyed in 1994 had personal earnings less than $20,000 and 29% earned less than $10,000. Warren B. Rudman, "Market Survey Results and Economic Analysis" (Feb. 1994) at 14 (report to the Board of Directors of Thorn EMI PLC concerning the operations of the Rent-A-Center Division of Thorn Americas Inc.).

[22] The industry often says that less than one-quarter of its customers purchase the "rented" goods, but its method of deriving that statistic is suspect. Discovery obtained in one class action against a major RTO company showed that 66% of one year's inventory was sold, and between 73% and 77% of the company's revenues came from sales, not rentals. *See* Ramp, *Renting-To-Own in the United States,* 24 Clearinghouse Rev. 797 (Dec. 1990). Data obtained from RTO dealer's databases from different chains in several states confirm that 75% or more of the dealer's gross revenue is derived from customers who purchase goods. For example, RTO Enterprises Inc., Canada's largest rent-to-own company, reports that approximately 85% of RTO's revenues are generated through the rent-to-own program and approximately 87% of all rent-to-own customers purchase the merchandise at the end of the rental term. *See* www.stockdepot.com/buylowsellhigh/rto.html (as of 1998) for RTO Enterprises Inc. (This website is now available to subscribers only). APRO statistics confirm this assumption. In 1994, 2,403,000 products were purchased, with title passing to customers. Corresponding numbers for 1991 and 1993 were 3,033,600 and 2,160,000 respectfully. *See* "Industry Survey with Five-Year Comparison," Association of Progressive Rental Organizations, Nov. 1, 1995, Clearinghouse No. 52,050.

Under most RTO contracts, the customer will pay between $1000 and $2400 for a TV, stereo, or other major appliance worth as little as $200 retail, if used, and seldom more than $600 retail, if new. This means that a low-income RTO customer may pay 1 ½ to 12 times what a cash customer would pay in a traditional retail store for the same appliance.

The finance charge and interest rate or annual percentage rate (APR) of an RTO contract depends on the retail cash value of the appliance (especially whether new or used) and the timing, amount, and number of payments. The following chart illustrates the APR computations, assuming no payments in arrears.[23]

		52 Weeks		78 Weeks		104 Weeks	
Amount Financed	**Weekly Paymt**	**Finance Charge**	**APR**	**Finance Charge**	**APR**	**Finance Charge**	**APR**
$200	$16	$632	408%	$1048	415%	$1464	416%
	$18	$736	462%	$1204	467%	$1672	468%
300	$16	$532	254%	$ 948	272%	$1364	276%
	$18	$636	294%	$1104	309%	$1572	311%
400	$16	$432	68%	$ 848	197%	$1264	204%
	$18	$536	201%	$1004	226%	$1472	231%
500	$16	$332	111%	$ 748	148%	$1164	159%
	$18	$436	140%	$ 904	173%	$1372	182%
	$20	$540	168%	$1060	197%	$1580	204%
600	$16	$232	68%	$ 648	113%	$1064	128%
	$18	$336	95%	$804	135%	$1272	147%
	$20	$440	121%	$960	156%	$1480	167%
700	$18	$236	60%	$704	106%	$1172	122%
	$20	$340	84%	$ 860	125%	$1380	139%
	$22	$444	107%	$1016	144%	$1588	156%

For example, in the Boston area, a 19-inch brand name, new color TV with standard features sells for less than $300. A 25-inch table model, color television sells for less than $500 and a 25-inch console television sells for less than $600. Therefore, if an RTO customer leases a new 19-inch color TV (worth $300) for $16 per week for 52 weeks, the APR would be about 254%. However, if the customer leased a used 19-inch color TV (worth about $200 or less) for the same payment terms, the APR could be 408% or more.

Trends in the RTO industry

The Association of Progressive Rental Organizations (APRO), the RTO trade association, maintains a website. As of July 2001, APRO reports that RTO is a $5 billion dollar a year industry serving about 3 million customers a year. Thus, the average RTO customer is spending over $1,667 a year or over $138 per month on RTO merchandise. These figures have remained essentially constant

[23] Payments in advance are called "annuity due" transactions, as contrasted with "ordinary annuities" as used in Truth in Lending's Regulation Z, Appendix J. For example, the top line of the chart shows different APRs if RTO payments are made at the beginning of each week: 52 weeks at $16 bears an APR of 445%, seventy-eight weeks at $16 amounts to 451% APR, and 104 weeks yields 452%, because the time value is different. The entire chart would show greater APRs for payments in advance. Because RTO dealers usually demand payments at the beginning of each week, the astronomic APR's in this chart are probably understated.

throughout the 1990s.[24]

[24] One of the reasons the customer base has not grown significantly may be that adverse publicity about RTO has discouraged potential customers.

Year	Total RTO revenues (in billions)	Total RTO customers (in millions)	Average RTO customer payment
2000	$5.0	3.00	$1,667
1999	$4.70	3.30	$1,424
1996	$3.98	2.85	$1,396
1994	$3.85	2.73	$1,410
1993	$4.49	3.43	$1,282
1991	$3.57	2.91	$1,226

Source: APRO

With the enactment of protective state laws and the resolution of IRS disputes,[25] banks and Wall Street have recognized the tremendous profit potential of RTO. The industry, however, is rapidly consolidating into a few dominant national companies.[26]

Once the current wave of consolidations has run its course the industry will need to expand its customer base if it wants to maintain its earnings record. Some dealers are already reporting that they are seeking to serve a new type of client, middle income individuals who have exhausted their credit lines

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[25] One of the most significant financial advantages enjoyed by RTO dealers that is not available to retail firms is the ability to depreciate household goods as rental merchandise. Retail merchants offering identical households goods cannot depreciate their inventory. For a discussion of the importance of the depreciation issue for RTO dealers, *see* Susan Lorde Martin & Nancy White Huckins, *Consumer Advocates v. The Rent-to-Own Industry: Reaching a Reasonable Accommodation,* 34 American Bus. L.J. 385, 416 (1997); Laura Saunders, "Taxing Matters", Forbes, Mar. 10, 1997, at 84. The RTO industry and the IRS have disputed the speed with which dealers can depreciate their merchandise. Dealers have argued that they should be able to depreciate very quickly since, on average, nearly all merchandise is disposed of in two to three years. In 1996, the industry prevailed on this issue in *ABC Rentals & San Antonio Inc. v. Commissioner,* 86 F.3d 392 (10th Cir. 1996). The court permitted RTO dealers to use a much faster depreciation methodology than the IRS argued was allowable. However, this decision was undermined by a change in the Code added by Section 1086 of the Taxpayer Relief Act of 1997 which allows RTO dealers the ability to depreciate their goods over three years if they have "qualified rent-to-own property." Pub. L. No. 105-34, codified at 26 U.S.C. § 168(g)(14). The impact of this tax provision on rent-to-own operations and customers may be profound since under the Act dealers are only entitled to use the three year depreciation schedule "if a substantial portion of the rent-to-own contracts terminate and the property is returned." I.R.C. § 168(i)(14)(B). This provision provides an even greater financial motivation for RTO dealers to immediately repossess goods rather than refinance the contract, permit the customer to reinstate the contract with payment of a late fee or otherwise negotiate an extension for late payment. Previously, many RTO dealers permitted the customer to retain the goods in their home while a new contract was substituted for the prior one. This can no longer be done because the Code requires that the property must be returned to the dealer. The net effect of this provision may well be an increase in repossessions for RTO customers, an event that has repeatedly led to litigation in the past. *See, e.g., Mercer v. DEF Inc.,* 48 B.R. 563 (Bankr. D. Minn. 1985); *Murphy v. McNamara,* 416 A.2d 170 (Conn. Super. Ct. 1979); *Fassitt v. United TV Rental, Inc.,* 297 So. 2d 283 (La. Ct. App. 1974); *State v. Action TV Rentals, Inc.,* 467 A.2d 1000 (Md. 1983); *Kimble v. Universal TV Rental, Inc.,* 417 N.E.2d 597 (Ohio Mun. Ct. 1980).

[26] For an account of consolidations within the RTO industry between 1994 and 1996, *see* Susan Lorde Martin & Nancy White Huckins, *Consumer Advocates v. The Rent-to-Own Industry: Reaching a Reasonable Accommodation,* 34 American Bus. L.J. 385, 405/-/06 (1997).

but still desire to purchase additional consumer items.

Despite RTO successes, there are significant problems on the horizon. RTO industry revenues have remained stagnate throughout the 1990s with the exception of 1999 (see above table). To date, the industry has not been able to convince the public that RTO is a good idea. Press on RTO remains overwhelming negative.[27]

Unconscionability and RTO pricing

Dealers typically set RTO prices in reference to weekly or monthly rates (e.g., $15.99 a week) and will determine the number of terms needed to acquire ownership. For example, a low-end stereo may be priced at $15.99 a week for seventy-eight weeks for a total of $1247.22.

A widespread abuse involves the inclusion of so-called "optional fees," such as liability damage waivers (LDW). LDW programs purport to relieve customers of any further responsibility for the fair market value of the property if the property is stolen or destroyed by certain specified acts.

The value of LDW is highly questionable.[28] RTO dealers rarely if ever sue customers. They expect their customers to be judgment proof. Further, many RTO dealers report that 95% or more of contracts include so called "optional" fees. In fact, it appears that the fee in many cases is not truly optional but mandatory. RTO contracts are frequently prepared at the store and taken to the customer's home with the goods. The contract may have the liability damage waiver fee already added to the rental rate. If the customer objects to the fee, the delivery person states that the contract will have to be rewritten and threatens that the goods cannot be delivered. Faced with this alternative the customer may elect to sign the contract with the optional fee included.

Repossession Tactics

Even if the state RTO statute exempts the transaction from UCC Article 9 applicability, some repossession tactics remain suspect. The term "repossession" is used generally here to include collection-related conduct by an RTO dealer. The more outrageous examples include: RTO employees struggling with the customer in the home over possession of the television set, picking up a nearby object and smashing the set;[29] an employee breaking and entering a customer's home only to be shot and killed as a result.[30]

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[27] *See, e.g.*, NBC Nightly News, *"The Fleecing of America"* Feb. 25, 1998.

[28] There is a detailed discussion of LDW and other miscellaneous charges such as processing fees and reinstatement fees in James Nehf, *Effective Regulation of Rent-to-Own Contract*, 42 Ohio St. L.J. 751, 824 (1991). Nehf recognizes that these miscellaneous charges can present some of the most offensive aspects of RTO contracts because even a capable customer who has read the contract will have difficulty understanding these fees.

[29] *See, e.g., State v. Action TV Rentals,* 467 A.2d 1000 (Md. 1983).

[30] *See, e.g., State v. Stewart,* 288 N.W.2d 751 (Neb. 1980).

In a number of instances, RTO dealers have been found liable for tort claims such as assault, battery, and trespass.[31]

Legal status of RTO contracts

RTO transactions attempt to circumvent numerous consumer protection statutes and therefore have been attacked on many different levels. Leases under which the lessee agrees to pay a sum equal to or exceeding the value of goods, and under which the lessee acquires an option to purchase for nominal consideration, may constitute security interests under the UCC and may thus be subject to UCC repossession limitations.[32] Similarly, RTO transactions may be held to constitute security agreements rather than true leases under the Bankruptcy Code, thereby giving bankrupt consumers greater rights than normal lessees.[33] Last, but not least, RTO agreements may be subject to usury limitations under state

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[31] *See, e.g., Botello v. Remco,* No. 300,458, Clearinghouse No. 52,036 (Tex. Dist. Ct. 1985). Jury returned a verdict for nearly $130,000 against a rental company for injuries to a customer which occurred during an attempted repossession.

Many RTO dealers when faced with an incident of wrongful repossession will attempt to accuse the employee of unforeseen misconduct. While most RTO companies are going to have written policies that prohibit the use of force during a repossession, in most cases it has been proven that the employer knew or should have known that force and threats of force are commonly used and approved during repossessions. Many RTO contracts have clauses which attempt to sanction entry into the customer's residence even when the customer is not home. The contract currently used by a large company provides: "Lessor shall have the right forthwith and without prior notice to enter any premises where said property is located and take immediate possession of said property without the necessity of any legal or judicial process and the Lessee shall be obligated to reimburse Lessor for any and all expenses related to any reasonable effort to repossess its property including reasonable attorneys fees." Similar contract language was in the RTO contract in *Kimble v. Universal TV Rental, Inc.,* 65 Ohio Misc. 17, 417 N.E.2d 597 (1980). Despite the contract language, the court rejected the argument that the repossession was in fact peaceful since the customer was not home at the time and concluded that the entry of locked premises constituted a trespass. Other courts have similarly found a dealer's attempt to use right of entry clauses in a contract as not a defense to wrongful repossession claims. In *Fassitt v. United TV Rental, Inc.,* 297 So. 2d 283 (La. Ct. App. 1974), the RTO contract had similar reentry language. The dealer entered the house and repossessed a stereo when the only person in the house was the customer's eleven year old daughter. The court in *Fassitt* held that the reentry language was void as against public policy.

Despite these cases, many RTO dealers use similar waiver language in their RTO contracts that should be construed as evidence that dealers know, anticipate and even sanction wrongful repossessions despite company manual language to the contrary. The industry often incorporates each individual store as a separate entity which may have no assets to pay a judgment. The parent corporation will deny responsibility for the misconduct of its subsidiaries.

[32] *See Sight & Sound of Ohio, Inc. v. Wright,* 36 B.R. 885 (S.D. Ohio 1983); *Murphy v. McNamara,* 416 A.2d 170 (Conn. Super. Ct. 1979) (RTO agreement was unconscionable sale); *Broad v. Curtis Mathes Sales Co.,* Clearinghouse No. 36,376 (CV-82-1254 Me. Sup. Ct., Feb. 6, 1984). *See generally* National Consumer Law Center, *Repossessions and Foreclosures* § 19.3 (4th ed. 1999).

[33] *See In re Puckett,* 60 B.R. 223 (Bankr. M.D. Tenn. 1986), *aff'd,* 838 F.2d 470 (6th Cir. 1988). *See also Michaels v. Ford Motor Credit Co.,* 156 B.R. 584 (Bankr. E.D. Wis. 1993) (court found that the intent of the parties determined that the agreement was a disguised security agreement even though it was called a "Rental Agreement").

installment sales acts.[34]

For the past twenty years legal service attorneys, state attorneys general, and other consumer advocates have made these arguments with mixed success.[35] The most recent successful cases are primarily from three states, Wisconsin, New Jersey and Minnesota.[36] In addition, a Vermont court upheld a state attorney general rule requiring RTO companies to disclose the effective annual percentage rate of their RTO transactions.[37]

During this same period, the RTO industry has aggressively (and successfully in most cases in the states) lobbied state legislatures and the Congress for a statutory exemption from consumer protection

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[34] *See Burney v. Thorn America, Inc.*, 944 F. Supp. 762 (D. Minn. 1996) (measure of damages is the difference between the finance charge and a 5% interest rate; finance charge includes everything except the retail price); In re Rose, 94 B.R. 103 (Bankr. S.D. Ohio 1988); *Murphy v. McNamara*, 416 A.2d 170 (Conn. Super. Ct. 1979); Miller v. Colortyme, Inc., 518 N.W.2d 544 (Minn. 1994); *Starks v. Rent-A-Center*, Clearinghouse No. 45,215 (Minn. Dist. Ct. 1990); *Robinson v. Thorn Americas, Inc.*, #L-003697-94, Clearinghouse No. 52,047 (N.J. Super. Ct. Dec. 19, 1997); *Green v. Continental Rentals*, Clearinghouse No. 50,403 (N.J. Super. Ct. Law Div., Passaic County, Mar. 25, 1994); *Commonwealth of Pennsylvania v. Riverview Leasing, Inc.*, Clearinghouse No. 50,401, No. 325 M.D. 1993 (Pa. Commw. Ct. Aug. 5, 1994); *Chandler v. Riverview Leasing, Inc.*, Clearinghouse No. 40,628 (Pa. C.P. Northampton Cty. May 15, 1986); *State v. Rentavision Corp. of America*, Clearinghouse No. 35,731 (Tenn. Chanc. Ct. 1983); *Palacios v. ABC TV & Stereo Retail*, 123 Wis. 2d 79, 365 N.W.2d 882 (Ct. App. 1985). *Cf. Fogie v. Rent-A-Center, Inc.*, 1995 WL 649575 (D. Minn. 1995) (RTO contracts are credit sales for all purposes, and are subject to general contract usury ceiling), *aff'd sub nom., Fogie v. Thorn Americas, Inc.*, 95 F.3d 645 (8th Cir. 1996), *subsequent appeal on different grounds*, 190 F.3d 889 (8th Cir. 1999) (RICO claim dismissed).

[35] The following law review articles discuss the case law regarding rent-to-own and the application of credit sales law. Adoption of the RTO industry's state laws make much of this material of historical interest only. Susan Lorde Martin & Nancy White Huckins, *Consumer Advocates v. The Rent-to-Own Industry: Reaching a Reasonable Accommodation*, 34 American Bus. L.J. 385, 389 (1997); James Nehf, *Effective Regulation of Rent-to-Own Contracts*, 42 Ohio St. L.J. 751, 758 (1991); Scott J. Burnham, *The Regulation of Rent-to-own Transactions*, 3 Loy. Consumer L. Rep. 40, 41 (1991); David L. Ramp, *Renting To Own in the U.S.*, 24 Clearinghouse Rev. 797 (1990); Karen F. Meenan, Note, *The Applicability of the Federal Truth in Lending Act to Rental Purchase Contracts*, Cornell L. Rev. 118, 132/-/133 (1980).

[36] The Wisconsin cases include *Rent-A-Center, Inc. v. Hall*, 510 N.W.2d 789 (Wis. Ct. App. 193), *rev. denied*, 115 N.W.2d 715 (Wis. 1994). The Minnesota cases include *Fogie v. Thorn Americas, Inc.*, 95 F.3d 645 (8th Cir. 1996), *subsequent appeal on different grounds*, 190 F.3d 889 (8th Cir. 1999) (RICO claim dismissed) and *Miller v. Colortyme, Inc.*, 518 N.W.2d 544 (Minn. 1994). The New Jersey cases include *Robinson v. Thorn Americas, Inc.*, #L-003697-94, Clearinghouse No. 52,047 (N.J. Super. Dec. 19, 1997) (after plaintiffs won summary judgment on the merits, the damage portion of the case (and two other related suits) was settled for almost $60 million); *Green v. Continental Rentals*, 678 A.2d 759 (N.J. Super. 1994).

[37] *Thorn, Americas, Inc. v. Vermont Attorney General*, Clearinghouse No. 51,957 (Vt. Super. Ct. Mar. 7, 1997).

statutes, from annual percentage rate disclosure requirements, and from usury rate limitations.[38] In nearly every state there are now RTO statutes which were carefully drafted by the industry to insulate dealers from claims of consumer abuse.[39] H.R. 1701 is similar in this perspective – its primary aim is to protect the industry from litigation, not to provide protections for consumers.

The specific exemption of RTO transactions from other state and federal laws is the essential feature of these RTO statutes. All of the RTO laws provide that transactions that comply with their provisions are not "credit sales." Many statutes explicitly exempt RTOs from the state's home solicitation sales laws and from UCC Article 9 security interest definitions.

Although there are variations, nearly all RTO statutes require certain disclosures in the contract including: the number and timing of the payments necessary to acquire ownership of the property; a statement declaring that the consumer will not own the property until the consumer has made the total payment necessary to acquire ownership; the cash price of the property (most commonly defined as whatever price the lessor sets); and a statement as to whether the property is new or used. Although many state statutes provide that these disclosures must be made clearly and conspicuously, none require that the information be given on a separate document or separately segregated. The mandated disclosures, therefore, often appear scattered throughout the contract. State statutes generally do not mandate in-store price tag disclosures.

All RTO statutes contain "consumer remedy" provisions but these generally are as meaningless as is the provision in H.R. 1701 – Section 1012. For example, like H.R. 1701, Florida provides for

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[38] For a discussion of the RTO industry's legislative efforts between 1983/-/1991, see James Nehf, *Effective Regulation of Rent-to-Own Contracts,* 42 Ohio State L.J. 751, 821 (1991). (It should be noted that prior to becoming a law professor, James Nehf was a member of a law firm that represented Rent-A-Center and the Association of Progressive Rental Organizations (APRO), the RTO trade association. This law firm wrote most of the industry's model RTO bills. N.Y. Times, June 4, 1988, at 56. Prof. Nehf does not acknowledge his previous connection with the rent-to-own industry and the effect it had on his observations in his article.)

[39] Ala. Code §§ 8.25.1 to 8.25.6; Ariz. Rev. Stat. Ann. §§ 44.6801 to 44.6814; Ark. Code Ann. §§ 4.92.101 to 4.92.107 (Michie); Cal. Civ. Code §§ 1812.620 to 1812.649; Colo. Rev. Stat. §§ 5.10.101 to 5.10.1001; Conn. Gen. Stat. §§ 42-240 to 42-253; Del. Code Ann. tit. 6, §§ 7601 to 7616; Fla. Stat. §§ 559.9231 to 559.9241; Ga. Code Ann. §§ 10.1.680 to 10.1.689; Haw. Rev. Stat. §§ 481M-1 to 481M-18; Idaho Code, §§ 28.36.101 to 28-36-111; 815 Ill. Comp. Stat. §§ 655/.0.01 to 655/5; Ind. Code §§ 24-7-1-1 to 24-7-9-7; Iowa Code §§ 537.3601 to 537.3624; Kan. Stat. Ann. §§ 50.680 to 560.690; Ky. Rev. Stat. Ann. §§ 367.976 to 367.985; La. Rev. Stat. §§ 9:3351 to 9:3362; Me. Rev. Stat. Ann. tit. 9-A, § 11-1101 (West); Md. Code Ann., Com. Law II, §§ 12-1101 to 12-1112; Mass. Gen. Laws Ann. ch. 93 §§ 90 to 94; Mich. Comp. Law Ann. §§ 445.951 to 445.970 (West); Minn. Stat. Ann. §§ 325F.84 to 325F.97; Miss. Code §§ 75-24-1-51 to 75-24-175; Mo. Rev. Stat. §§ 407.660 to 407.665; Neb. Rev. Stat. §§ 69-2101 to 69.2119; Nev. Rev. Stat. §§ 597.010 to 597.110; N.H. Rev. Stat. Ann. §§ 358-P:1 to 358-P.12; N.M. Stat. Ann. §§ 57-26-1 to 57-26-12; N.Y. Pers. Prop. Law §§ 500/-/507; N.D. Cent. Code §§ 47-15.1-01 to 47-15.1-08; Ohio Rev. Code Ann. §§ 1351.01 to 1351.09; Okla. Stat. tit. 59, §§ 1950 to 1957; Or. Rev. Stat. §§ 646-245 to 646-259; 42 Pa. Cons. Stat. Ann. §§ 6901 to 6911; R.I. Gen. Law §§ 6-44-1 to 6-44-10; S.C. Code Ann. §§ 37-2-701 to 37-2-714 (Law. Coop.); S.D. Codified Laws §§ 54-6A-1 to 54-6A-10; Tenn. Code Ann. §§ 47-18-601 to 47-18-614; Tex. Bus. & Com. §§ 35.71 to 35.74; Utah Code Ann. § 15-8.1; Vt. Stat. Ann. tit. 9, § 41b and Rule C.F. § 115.04; Va. Code Ann. §§ 59.1-207.17 to 59.1-207.27; Wash. Rev. Code §§ 63.19.010 to 63.19.901; W. Va. Code §§ 46B-1-1 to 46B-1-5; Wyo. Stat. Ann. §§ 40-19-101 to 40-19-120.

statutory damages with attorney's fees and costs. Dealers, however, are only liable if they were notified of the violation in writing and failed to correct it within thirty days.[40] In H.R. 1701, dealers are even better protected, they have sixty days. Some states provide for a mandatory minimum recovery of, say, $100 which is not permitted if the case is filed as a class action.[41] Other states' statutes do not include a minimum statutory award.[42] In these regards, H.R. 1701 appears on first blush to have better provisions. However, although there may be better remedies for violations, the statutory protections themselves are often considerably less protective of consumers than the state laws being preempted, and the right to cure in Section 1012 (c) undermines compliance incentives.

Conclusion

H.R. 1701 is an industry bill, designed to protect the RTO industry from challenges to its practices. It does not provide meaningful protection to consumers. If H.R. 1701 were to pass, with its massive preemption provision, the majority of consumers in the U.S. would have significantly fewer consumer protections than they have currently when dealing with the RTO industry.

[40] Fla. Stat. § 559.9239.

[41] *See, e.g.,* Ky. Rev. Stat. Ann. § 367.983(c).

[42] *See, e.g.,* Iowa Code § 537.3621.