A consumer may rescind (cancel) a transaction resulting from any direct marketing without reason or penalty within the cooling-off period. The consumer must within 5 business days of the latter of the date on which the transaction or agreement was entered into or the date on which the goods were delivered to the consumer, advise the supplier in writing or another recorded manner and form that he is rescinding the agreement. The consumer must then return any goods delivered within 10 business days of the delivery of such goods. The supplier must refund the consumer within 15 business days of the latter of notice of cancellation or return of the goods. Goods are returned at the risk and expense of the consumer.

The supplier must refund to the consumer the price paid for the goods, less any amount allowable in terms of the following:

- Returned in original unopened packaging – no charge to consumer.
- Returned in original condition and repackaged in their original packaging – a reasonable charge for use, consumption or depletion of the goods unless the consumption or depletion was reasonable and required for the consumer to determine the acceptability of the goods.
- In all other cases – a reasonable amount for necessary restoration costs to render the goods fit for re-stocking may be charged, unless where the packaging was reasonably destroyed in order to allow for the consumer to determine whether the goods conformed to the sample or brochure description in cases where the goods were not examined by the consumer before delivery or were fit for the intended purpose communicated to the supplier.

In terms of the above, a reasonable supplier recovery is thus allowable in certain instances where a consumer exercises his cooling-off right.

The above cooling-off period applies to all transactions or agreements that resulted from any direct marketing, irrespective of where the transaction or agreement was concluded. It is not a requirement that the transaction must be entered into at the home of the consumer.

A consumer would lose his right of return in terms of the cooling-off period if the goods concerned have been disassembled, altered, permanently installed, affixed or combined with other goods; or a public regulation for reasons of public health or other prohibits the return of such goods.

This section does not apply to transactions which are governed by section 44 of the Electronic Communications and Transactions Act, 2002 (in terms of which consumers have a seven day cooling off period).

The right to rescind transactions or agreements resulting from any direct marketing in terms of the Consumer Protection Act is in addition to any other legal right to rescind an agreement that may exist between consumer and supplier.

Annexure C of the Regulations contains a form for use by a consumer when exercising his right of rescission.
Commentary:

The consumer’s right to rescind a transaction or agreement resulting from direct marketing is clearly aimed at emotional or impulsive purchases or where buyer’s remorse sets in after making the fateful purchase. No problem, if a consumer bought goods or services and then experiences remorse, gives notice of rescission within the required time period, and returns the goods delivered in its original condition – then no supplier recovery will be allowed. In all other instances most suppliers are likely to, and rightly so, impose a reasonable supplier recovery as explained above.

Where the purchase of goods have been financed through a credit agreement in terms of the National Credit Act, 34 of 2005, the consumer would remain liable for the settlement of the credit agreement with the financier.

The problem with the cooling-off period in terms of the Consumer Protection Act is that it is currently all encompassing. What about property transactions where delivery of the property purchased only takes place at registration of such transfer in the Deeds Registry? Does it mean that the consumer has 5 days to cool off at the pool of his new home without any regard of the consequences of rescinding the agreement or transaction? This will give rise to a number of legal, practical and procedural difficulties. At that stage transfer duties, bond registration costs, etc. have all been paid and would have to be undone.

The CPA cooling-off period is in contrast to the stands in contrast to a purchaser’s right to cool-off under the Alienation of Land Act. Under this legislation, a purchaser of immovable property has, in certain defined circumstances, the right, within five business days after signature of an offer to purchase, to revoke the offer by giving written notice to the seller. Internationally, property transactions are not subject to consumer legislation cooling-off periods. Maybe we should do the same in South Africa. I understand that organisations such a s SAPOA and the EAAB are engaging the DTI on property related CPA issues.

Another example is a person who purchases a new car as a result of being invited to a new product launch. They sign the relevant documents, make application for finance, etc. The dealership orders the vehicle from the manufacturer and upon arrival registers the vehicle in the name of the consumer. The consumer for whatever reason then decides to rescind the agreement in terms of the cooling-off right. The dealership would no longer be able to sell the vehicle as new as it has already been registered in the name of the consumer. No delivery of the vehicle took place and thus the dealership would not be able to impose any charge on the consumer. No drawdown took place under the credit agreement, so therefore the consumer has nothing to settle with the bank.

Surely the above situations, and there are many more, are untenable and it could not possibly have been the intention of the legislator to cause situations like these to arise. It is suggested that industry codes address the cooling-off right in a manner to prevent the cooling-off right being abused.

Surely the time lapse between entering into the transaction and delivery of the goods should be considered when ascertaining whether the consumer should have the right to cancel merely because the transaction resulted from direct marketing. I would suggest that supplier agreements make provision that should, for example, the offer to purchase, the delivery receipt, etc. be signed at the dealership, then the transaction cannot be regarded as one which resulted from direct marketing and therefore the consumer would not have the cooling-off right. Alternatively, the above should be addressed in industry codes.

© Rynardt Olivier 2011 - 2021

Rynardt Olivier can be contacted at rynardt@edutrain.co.za
For information on other Consumer Protection Act related topics, go to www.edutrain.co.za

The views and opinions expressed above do not represent qualified legal opinion, but is merely a personal view based on my understanding and interpretation of the Consumer Protection Act.