

LEGISLATIVE BILL 781

Approved by the Governor April 21, 2008

Introduced by Rogert, 16; McGill, 26; Pirsch, 4.

FOR AN ACT relating to the Uniform Deceptive Trade Practices Act; to amend sections 87-303.01, 87-303.02, 87-303.03, 87-303.04, 87-303.05, 87-303.06, 87-303.07, 87-304, and 87-305, Reissue Revised Statutes of Nebraska, and section 87-302, Revised Statutes Cumulative Supplement, 2006; to change provisions relating to deceptive trade practices; to harmonize provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 87-302, Revised Statutes Cumulative Supplement, 2006, is amended to read:

87-302 (a) A person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she:

- (1) Passes off goods or services as those of another;
- (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (4) Uses deceptive representations or designations of geographic origin in connection with goods or services;
- (5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;
- (6) Represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand, except that sellers may repair damage to and make adjustments on or replace parts of otherwise new goods in an effort to place such goods in compliance with factory specifications;
- (7) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- (8) Disparages the goods, services, or business of another by false or misleading representation of fact;
- (9) Advertises goods or services with intent not to sell them as advertised;
- (10) Advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- (11) Makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions;
- (12) Uses or promotes the use of a chain distributor scheme in connection with the solicitation of business or personal investments from members of the public;
- (13) With respect to a sale or lease to a natural person of goods or services purchased or leased primarily for personal, family, household, or agricultural purposes, uses or employs any referral or chain referral sales technique, plan, arrangement, or agreement; ~~or~~
- (14) Knowingly makes a false or misleading statement in a privacy policy, published on the Internet or otherwise distributed or published, regarding the use of personal information submitted by members of the public;
- (15) Uses any scheme or device to defraud by means of:
 - (i) Obtaining money or property by knowingly false or fraudulent pretenses, representations, or promises; or
 - (ii) Selling, distributing, supplying, furnishing, or procuring any property for the purpose of furthering such scheme;
- (16) Offers an unsolicited check, through the mail or by other means, to promote goods or services if the cashing or depositing of the check obligates the endorser or payee identified on the check to pay for goods or services. This subdivision does not apply to an extension of credit or an offer to lend money; or
- (17) Mails or causes to be sent an unsolicited billing statement, invoice, or other document that appears to obligate the consumer to make a payment for services or merchandise he or she did not order.

(b) In order to prevail in an action under the Uniform Deceptive Trade Practices Act, a complainant need not prove competition between the

parties.

(c) This section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this state.

Sec. 2. Section 87-303.01, Reissue Revised Statutes of Nebraska, is amended to read:

87-303.01 (1) An unconscionable act or practice by a supplier in connection with a consumer transaction shall be a violation of ~~sections 87-301 to 87-306,~~ the Uniform Deceptive Trade Practices Act.

(2) The unconscionability of an act or practice shall be a question of law for the court. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.

Sec. 3. Section 87-303.02, Reissue Revised Statutes of Nebraska, is amended to read:

87-303.02 When the Attorney General has cause to believe that any person has engaged in or is engaging in any deceptive trade practice or unconscionable act listed in section 87-302 or 87-303.01, ~~he~~ the Attorney General may:

(a) Require such person to file a statement or report in writing under oath or otherwise, on such forms as shall be prescribed by ~~him,~~ the Attorney General, as to all facts and circumstances concerning the sale, offer, or advertisement of property by such person, and such other data and information as ~~he may deem~~ the Attorney General deems necessary;

(b) Examine under oath any person in connection with the sale or advertisement of any property;

(c) Examine any property or sample thereof, record, book, document, account, or paper as ~~he may deem~~ the Attorney General deems necessary; and

(d) Pursuant to an order of any district court, impound any record, book, document, account, paper, or sample of property which is material to such practice and retain the same in his or her possession until the completion of all proceedings undertaken under ~~sections 87-301 to 87-306,~~ the Uniform Deceptive Trade Practices Act.

Sec. 4. Section 87-303.03, Reissue Revised Statutes of Nebraska, is amended to read:

87-303.03 (1) The Attorney General, in addition to other powers conferred upon ~~him~~ or her by ~~sections 87-301 to 87-306,~~ the Uniform Deceptive Trade Practices Act, may issue subpoenas to require the attendance of witnesses or the production of documents, administer oaths, conduct hearings in aid of any investigation or inquiry, and prescribe such forms and adopt and promulgate such rules as may be necessary to administer the ~~provisions of sections 87-301 to 87-306,~~ Uniform Deceptive Trade Practices Act.

(2) Service of any notice or subpoena may be made in the manner prescribed by the rules of civil procedure.

Sec. 5. Section 87-303.04, Reissue Revised Statutes of Nebraska, is amended to read:

87-303.04 (1) If any person fails or refuses to obey any order of the Attorney General to file any statement or report, or to obey any subpoena issued by the Attorney General, pursuant to the ~~provisions of sections 87-301 to 87-306,~~ Uniform Deceptive Trade Practices Act, the Attorney General may apply to any district court in this state for relief until such person obeys such order or subpoena or files such statement or report.

(2) The court, in its order, may:

(a) Grant injunctive relief restraining the sale or advertisement of any property by such person;

(b) Require the attendance of or the production of documents by such person, or both;

(c) Suspend or revoke any license, permit, or certificate issued pursuant to law to any such person, which may be used to further the alleged unlawful practice; or

(d) Grant such other or further relief as may be necessary to obtain compliance by such person.

Sec. 6. Section 87-303.05, Reissue Revised Statutes of Nebraska, is amended to read:

87-303.05 (1) Whenever the Attorney General has cause to believe that a person has engaged in or is engaging in any deceptive trade practice or unconscionable act listed in section 87-302 or 87-303.01, ~~he~~ the Attorney General may apply for and obtain, in an action in any district court of this state, a temporary restraining order, or injunction, or both, pursuant to the rules of civil procedure, prohibiting such person from continuing such practices, or engaging therein, or doing any act in furtherance thereof. The court may make such orders or judgments as may be necessary to prevent the use

or employment by such person of any such deceptive trade practice, or which may be necessary to restore to any other person any money or real or personal property which may have been acquired by means of any such practice.

(2) When the Attorney General has authority to institute a civil action or other proceeding pursuant to the ~~provisions of sections 87-301 to 87-306,~~ Uniform Deceptive Trade Practices Act, in lieu thereof, ~~he~~ the Attorney General may accept an assurance of discontinuance of any deceptive trade practice or unconscionable act listed in section 87-302 or 87-303.01. Such assurance may include a stipulation for the voluntary payment by the alleged violator of the costs of investigation by the Attorney General and of any amount or amounts necessary to restore to any person any money or real or personal property which may have been acquired by such alleged violator by means of any such practice. Proof by a preponderance of evidence of a violation of such assurance shall constitute prima facie evidence of a deceptive practice as listed in section 87-302 or 87-303.01 in any civil action or proceeding thereafter commenced by the Attorney General.

Sec. 7. Section 87-303.06, Reissue Revised Statutes of Nebraska, is amended to read:

87-303.06 ~~The provisions of sections 87-301 to 87-306~~ Uniform Deceptive Trade Practices Act shall not bar any claim against any person who has acquired any money or real or personal property by means of any deceptive trade practice or unconscionable act listed in section 87-302 or 87-303.01.

Sec. 8. Section 87-303.07, Reissue Revised Statutes of Nebraska, is amended to read:

87-303.07 If a buyer or lessee is induced by a violation of section 87-302 or 87-303.01 to enter into a sale or lease, the agreement is unenforceable by the seller or lessor and the buyer or lessee, at his or her option, may rescind the agreement or retain the merchandise delivered and the benefit of any services performed without any obligation to pay for them.

Sec. 9. Section 87-304, Reissue Revised Statutes of Nebraska, is amended to read:

87-304 (a) ~~Sections 87-301 to 87-306 of~~ The Uniform Deceptive Trade Practices Act does not apply to:

(1) Conduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency;

(2) Publishers, broadcasters, printers, or other persons engaged in the dissemination of information or reproduction of printed or pictorial matters who publish, broadcast, or reproduce material without knowledge of its deceptive character; or

(3) Actions or appeals pending (a) on December 25, 1969, under ~~sections 87-301 to 87-306 as they~~ the Uniform Deceptive Trade Practices Act as such act existed immediately prior to March 25, 1974, or (b) under such ~~sections~~ act as amended and sections 87-303.01 to 87-303.09 on March 25, 1974.

(b) Subdivisions (a)(2) and (a)(3) of section 87-302 do not apply to the use of a service mark, trademark, certification mark, collective mark, trade name, or other trade identification that was used and not abandoned before December 25, 1969, if the use was in good faith and is otherwise lawful except for ~~sections 87-301 to 87-306.~~ the Uniform Deceptive Trade Practices Act.

(c) The Uniform Deceptive Trade Practices Act shall apply to deceptive trade practices conducted in whole or in part within the State of Nebraska against residents or nonresidents of this state. The act shall also apply to deceptive trade practices conducted outside of Nebraska against residents of this state if there is a direct connection to any deceptive trade practices conducted in whole or in part within this state.

Sec. 10. Section 87-305, Reissue Revised Statutes of Nebraska, is amended to read:

87-305 ~~Sections 87-301 to 87-306~~ The Uniform Deceptive Trade Practices Act shall be construed to effectuate ~~their~~ its general purpose to make uniform the law of those states which enact ~~them.~~ it.

Sec. 11. Original sections 87-303.01, 87-303.02, 87-303.03, 87-303.04, 87-303.05, 87-303.06, 87-303.07, 87-304, and 87-305, Reissue Revised Statutes of Nebraska, and section 87-302, Revised Statutes Cumulative Supplement, 2006, are repealed.