

E AND R AMENDMENTS TO LB 801

Introduced by Enrollment and Review Committee: Nordquist, 7,
Chairperson

1 1. Strike the original sections and all amendments
2 thereto and insert the following new sections:

3 Section 1. Section 87-301, Reissue Revised Statutes of
4 Nebraska, is amended to read:

5 87-301 For purposes of the Uniform Deceptive Trade
6 Practices Act, unless the context otherwise requires:

7 (1) Appropriate inventory repurchase program means a
8 program by which a plan or operation repurchases, upon request
9 and upon commercially reasonable terms, when the salesperson's
10 business relationship with the company ends, current and marketable
11 inventory in the possession of the salesperson that was purchased
12 by the salesperson for resale. Any such plan or operation shall
13 clearly describe the program in its recruiting literature, sales
14 manual, or contract with independent salespersons, including the
15 disclosure of any inventory that is not eligible for repurchase
16 under the program;

17 ~~(1)~~ (2) Article shall mean means a product as
18 distinguished from its trademark, label, or distinctive dress in
19 packaging;

20 (3) Attorney General means the Attorney General of the
21 State of Nebraska or the county attorney of any county with the
22 consent and advice of the Attorney General;

23 ~~(2)~~ (4) Certification mark shall mean means a mark used

1 in connection with the goods or services of a person other than
2 the certifier to indicate geographic origin, material, mode of
3 manufacture, quality, accuracy, or other characteristics of the
4 goods or services or to indicate that the work or labor on the
5 goods or services was performed by members of a union or other
6 organization;

7 ~~(3)~~ (5) Collective mark shall mean means a mark used by
8 members of a cooperative, association, or other collective group
9 or organization to identify goods or services and distinguish them
10 from those of others, or to indicate membership in the collective
11 group or organization;

12 (6) Commercially reasonable terms means the repurchase of
13 current and marketable inventory within twelve months from the date
14 of purchase at not less than ninety percent of the original net
15 cost, less appropriate setoffs and legal claims, if any;

16 (7) Compensation means a payment of any money, thing of
17 value, or financial benefit;

18 (8) Consideration means anything of value, including the
19 payment of cash or the purchase of goods, services, or intangible
20 property. The term does not include the purchase of goods or
21 services furnished at cost to be used in making sales and not for
22 resale or time and effort spent in pursuit of sales or recruiting
23 activities;

24 (9) Covered file-sharing program means a computer
25 program, application, or software that enables the computer on
26 which such program, application, or software is installed to
27 designate files as available for searching by and copying to one or

1 more other computers, to transmit such designated files directly to
2 one or more other computers, and to request the transmission of
3 such designated files directly from one or more other computers.

4 Covered file-sharing program does not mean a program, application,
5 or software designed primarily to operate as a server that is
6 accessible over the Internet using the Internet Domain Name System,
7 to transmit or receive email messages, instant messaging, real-time
8 audio or video communications, or real-time voice communications,
9 or to provide network or computer security, network management,
10 hosting and backup services, maintenance, diagnostics, technical
11 support or repair, or to detect or prevent fraudulent activities;

12 (10) Current and marketable has its plain and ordinary
13 meaning but excludes inventory that is no longer within its
14 commercially reasonable use or shelf-life period, was clearly
15 described to salespersons prior to purchase as seasonal,
16 discontinued, or special promotion products not subject to the plan
17 or operation's inventory repurchase program, or has been used or
18 opened;

19 (11) Inventory includes both goods and services,
20 including company-produced promotional materials, sales aids,
21 and sales kits that the plan or operation requires independent
22 salespersons to purchase;

23 (12) Inventory loading means that the plan or operation
24 requires or encourages its independent salespersons to purchase
25 inventory in an amount which exceeds that which the salesperson can
26 expect to resell for ultimate consumption or to a consumer in a
27 reasonable time period, or both;

1 (13) Investment means any acquisition, for a
2 consideration other than personal services, of personal property,
3 tangible or intangible, for profit or business purposes, and
4 includes, without limitation, franchises, business opportunities,
5 and services. It does not include real estate, securities
6 registered under the Securities Act of Nebraska, or sales
7 demonstration equipment and materials furnished at cost for use in
8 making sales and not for resale;

9 ~~(4)~~ (14) Mark shall mean means a word, name, symbol,
10 device, or any combination of the foregoing a word, name, symbol,
11 or device in any form or arrangement;

12 ~~(5)~~ (15) Person shall mean an individual, means a natural
13 person, a corporation, a government, or a governmental subdivision
14 or agency, a business trust, an estate, a trust, a partnership,
15 a joint venture, a limited liability company, an unincorporated
16 association, a sole proprietorship, two or more of any of the
17 foregoing having a joint or common interest, or any other legal or
18 commercial entity;

19 (16) Promote means contrive, prepare, establish, plan,
20 operate, advertise, or otherwise induce or attempt to induce
21 another person to participate in a pyramid promotional scheme,
22 including a pyramid promotional scheme run through the Internet,
23 email, or other electronic communications;

24 (17) Pyramid promotional scheme means any plan or
25 operation in which a participant gives consideration for the
26 right to receive compensation that is derived primarily from
27 the recruitment of other persons as participants in the plan

1 or operation rather than from the sales of goods, services, or
2 intangible property to participants or by participants to others.
3 A limitation as to the number of persons who may participate, or
4 the presence of additional conditions affecting eligibility, or
5 upon payment of anything of value by a person whereby the person
6 obtains any other property in addition to the right to receive
7 consideration, does not change the identity of the scheme as a
8 pyramid promotional scheme;

9 (18) Referral or chain referral sales or leases means any
10 sales technique, plan, arrangement, or agreement whereby the seller
11 or lessor gives or offers to give a rebate or discount or otherwise
12 pays or offers to pay value to the buyer or lessee as an inducement
13 for a sale or lease in consideration of the buyer or lessee giving
14 to the seller or lessor the names of prospective buyers or lessees
15 or otherwise aiding the seller or lessor in making a sale or lease
16 to another person if the earning of the rebate, discount, or other
17 value is contingent upon the occurrence of an event subsequent to
18 the time the buyer or lessee agrees to buy or lease;

19 ~~(6)~~ (19) Service mark shall mean means a mark used in the
20 sale or advertising of services to identify the services of one
21 person and distinguish them from the services of others;

22 ~~(7)~~ (20) Trademark shall mean means any word, name,
23 symbol, or device or any combination thereof adopted and used by a
24 person to identify goods made or sold by him or her such person and
25 to distinguish them such goods from goods made or sold by others;
26 and

27 ~~(8)~~ (21) Trade name shall mean means a word or a name, or

1 any combination of the foregoing in any form or arrangement used by
2 a person to identify ~~his or her~~ such person's business, vocation,
3 or occupation and distinguish it such business, vocation, or
4 occupation from the business, vocation, or occupation of others.†

5 (9) Chain distributor scheme also known as pyramid sales
6 shall mean a sales device whereby a person, upon a condition
7 that he or she make an investment, is granted a license or right
8 to recruit for profit one or more additional persons who also
9 are granted such license or right upon condition of making an
10 investment and may further perpetuate the chain of persons who are
11 granted such license or right upon such condition. A limitation
12 as to the number of persons who may participate, or the presence
13 of additional conditions affecting eligibility for such license or
14 right to recruit or the receipt of profits therefrom, shall not
15 change the identity of the scheme as a chain distributor scheme;

16 (10) Investment shall be any acquisition, for a
17 consideration other than personal services, of personal property,
18 tangible or intangible, for profit or business purposes, and shall
19 include, without limitation, franchises, business opportunities,
20 and services. It shall not include real estate, securities
21 registered under the Securities Act of Nebraska, or sales
22 demonstration equipment and materials furnished at cost for use in
23 making sales and not for resale;

24 (11) Referral or chain referral sales or leases shall
25 mean any sales technique, plan, arrangement, or agreement whereby
26 the seller or lessor gives or offers to give a rebate or discount
27 or otherwise pays or offers to pay value to the buyer or lessee

1 as an inducement for a sale or lease in consideration of the buyer
2 or lessee giving to the seller or lessor the names of prospective
3 buyers or lessees or otherwise aiding the seller or lessor in
4 making a sale or lease to another person if the earning of the
5 rebate, discount, or other value is contingent upon the occurrence
6 of an event subsequent to the time the buyer or lessee agrees to
7 buy or lease, and

8 ~~(12) Attorney General shall mean the Attorney General of~~
9 ~~the State of Nebraska or the county attorney of any county with the~~
10 ~~consent and advice of the Attorney General.~~

11 Sec. 2. Section 87-302, Revised Statutes Supplement,
12 2009, is amended to read:

13 87-302 (a) A person engages in a deceptive trade
14 practice when, in the course of his or her business, vocation,
15 or occupation, he or she:

16 (1) Passes off goods or services as those of another;

17 (2) Causes likelihood of confusion or of misunderstanding
18 as to the source, sponsorship, approval, or certification of goods
19 or services;

20 (3) Causes likelihood of confusion or of misunderstanding
21 as to affiliation, connection, or association with, or
22 certification by, another;

23 (4) Uses deceptive representations or designations of
24 geographic origin in connection with goods or services;

25 (5) Represents that goods or services have sponsorship,
26 approval, characteristics, ingredients, uses, benefits, or
27 quantities that they do not have or that a person has a

1 sponsorship, approval, status, affiliation, or connection that he
2 or she does not have;

3 (6) Represents that goods are original or new if they
4 are deteriorated, altered, reconditioned, reclaimed, used, or
5 secondhand, except that sellers may repair damage to and make
6 adjustments on or replace parts of otherwise new goods in an effort
7 to place such goods in compliance with factory specifications;

8 (7) Represents that goods or services are of a particular
9 standard, quality, or grade, or that goods are of a particular
10 style or model, if they are of another;

11 (8) Disparages the goods, services, or business of
12 another by false or misleading representation of fact;

13 (9) Advertises goods or services with intent not to sell
14 them as advertised or advertises the price in any manner calculated
15 or tending to mislead or in any way deceive a person;

16 (10) Advertises goods or services with intent not
17 to supply reasonably expectable public demand, unless the
18 advertisement discloses a limitation of quantity;

19 (11) Makes false or misleading statements of fact
20 concerning the reasons for, existence of, or amounts of price
21 reductions;

22 (12) Uses or promotes the use of or establishes,
23 operates, or participates in a chain distributor pyramid
24 promotional scheme in connection with the solicitation of ~~business~~
25 ~~or personal investments from~~ such scheme to members of the
26 public. This subdivision shall not be construed to prohibit a
27 plan or operation, or to define a plan or operation as a pyramid

1 promotional scheme, based on the fact that participants in the
2 plan or operation give consideration in return for the right to
3 receive compensation based upon purchases of goods, services, or
4 intangible property by participants for personal use, consumption,
5 or resale so long as the plan or operation does not promote or
6 induce inventory loading and the plan or operation implements an
7 appropriate inventory repurchase program;

8 (13) With respect to a sale or lease to a natural person
9 of goods or services purchased or leased primarily for personal,
10 family, household, or agricultural purposes, uses or employs any
11 referral or chain referral sales technique, plan, arrangement, or
12 agreement;

13 (14) Knowingly makes a false or misleading statement in a
14 privacy policy, published on the Internet or otherwise distributed
15 or published, regarding the use of personal information submitted
16 by members of the public;

17 (15) Uses any scheme or device to defraud by means of:

18 (i) Obtaining money or property by knowingly false or
19 fraudulent pretenses, representations, or promises; or

20 (ii) Selling, distributing, supplying, furnishing, or
21 procuring any property for the purpose of furthering such scheme;

22 (16) Offers an unsolicited check, through the mail or
23 by other means, to promote goods or services if the cashing or
24 depositing of the check obligates the endorser or payee identified
25 on the check to pay for goods or services. This subdivision does
26 not apply to an extension of credit or an offer to lend money;

27 (17) Mails or causes to be sent an unsolicited billing

1 statement, invoice, or other document that appears to obligate the
2 consumer to make a payment for services or merchandise he or she
3 did not order; ~~or~~

4 (18)(i) Installs, offers to install, or makes available
5 for installation or download a covered file-sharing program on
6 a computer not owned by such person without providing clear and
7 conspicuous notice to the owner or authorized user of the computer
8 that files on that computer will be made available to the public
9 and without requiring intentional and affirmative activation of the
10 file-sharing function of such covered file-sharing program by the
11 owner or authorized user of the computer; or

12 (ii) Prevents reasonable efforts to block the
13 installation, execution, or disabling of a covered file-sharing
14 program; or

15 ~~(18)~~ (19) Violates any provision of the Nebraska
16 Foreclosure Protection Act.

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

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

23 Sec. 3. Section 87-303, Reissue Revised Statutes of
24 Nebraska, is amended to read:

25 87-303 (a) A person likely to be damaged by a deceptive
26 trade practice of another may be granted an injunction against
27 it under the principles of equity and on terms that the court

1 ~~considers reasonable.~~ bring an action for, and the court may grant,
2 an injunction under the principles of equity against the person
3 committing the deceptive trade practice. The court may order such
4 additional equitable relief as it deems necessary to protect the
5 public from further violations, including temporary and permanent
6 injunctive relief. Proof of monetary damage, loss of profits, or
7 intent to deceive is not required. Relief granted for the copying
8 of an article shall be limited to the prevention of confusion or
9 misunderstanding as to source.

10 (b) Costs shall be allowed to the prevailing party unless
11 the court otherwise directs. The court in its discretion may
12 award attorneys' fees to the prevailing party if (1) the party
13 complaining of a deceptive trade practice has brought an action
14 which he knew to be groundless or (2) the party charged with
15 a deceptive trade practice has willfully engaged in the trade
16 practice knowing it to be deceptive.

17 (c) A claim filed for a violation of the Uniform
18 Deceptive Trade Practices Act shall be proved by a preponderance of
19 the evidence.

20 ~~(e)~~ (d) The relief provided in this section is in
21 addition to remedies otherwise available against the same conduct
22 under the common law or other statutes of this state.

23 Sec. 4. (1) A party filing a petition, counterclaim,
24 cross-petition, or pleading in intervention alleging a violation
25 under the Uniform Deceptive Trade Practices Act, within seven days
26 following the date of filing such pleading, shall provide a copy to
27 the Attorney General and, within seven days following entry of any

1 final judgment in the action, shall provide a copy of the judgment
2 to the Attorney General. This subsection does not apply to Small
3 Claims Court actions, except as provided in subsection (2) of this
4 section.

5 (2) A party appealing a Small Claims Court order or
6 judgment to district court involving an issue raised under the act,
7 within seven days of providing notice of the appeal, shall notify
8 the Attorney General in writing and provide a copy of the pleading
9 raising the issue and a copy of the Small Claims Court order or
10 judgment.

11 (3) A party appealing an order or judgment involving an
12 issue raised under the act, within seven days following the date
13 such notice of appeal is filed with the court, shall notify the
14 Attorney General in writing and provide a copy of the pleading
15 raising the issue and a copy of the court order or judgment being
16 appealed.

17 (4) Upon timely application to the court in which an
18 action involving an issue raised under the act is pending, the
19 Attorney General may intervene as a party at any time or may be
20 heard at any time. The Attorney General's failure to intervene
21 shall not preclude the Attorney General from bringing a separate
22 enforcement action.

23 (5) All copies of pleadings, orders, judgments, and
24 notices required by this section to be sent to the Attorney General
25 shall be sent by certified mail unless the Attorney General has
26 previously been provided such copies of the pleadings, orders,
27 judgments, or notices in the same action by certified mail, in

1 which case subsequent mailings may be made by regular mail. Failure
2 to provide the required mailings to the Attorney General shall not
3 be grounds for dismissal of an action under the act, but may be
4 grounds for a subsequent action by the Attorney General to vacate
5 or modify the judgment.

6 Sec. 5. Section 87-303.02, Reissue Revised Statutes of
7 Nebraska, is amended to read:

8 87-303.02 When the Attorney General has cause to believe
9 that any person has engaged in or is engaging in any deceptive
10 trade practice or unconscionable act listed in section 87-302 or
11 87-303.01, the Attorney General may:

12 (a) Require such person to file a statement or report
13 in writing under oath or otherwise, on such forms as shall
14 be prescribed by the Attorney General, as to all facts and
15 circumstances concerning the sale, offer, or advertisement of
16 property by such person, and such other data and information as the
17 Attorney General deems necessary;

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

20 (c) Examine any property or sample thereof, record,
21 book, document, account, or paper as the Attorney General deems
22 necessary; and or

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

1 Sec. 6. Section 87-303.03, Reissue Revised Statutes of
2 Nebraska, is amended to read:

3 87-303.03 (1) The Attorney General, in addition to other
4 powers conferred upon him or her by the Uniform Deceptive Trade
5 Practices Act:

6 (a) May ~~may~~ issue subpoenas to require the attendance
7 of witnesses or the production of documents, administer oaths,
8 conduct hearings in aid of any investigation or inquiry, and
9 prescribe such forms and adopt and promulgate such rules as may be
10 necessary to administer the ~~Uniform Deceptive Trade Practices Act.~~
11 act; and

12 (b) May issue a cease and desist order, with or
13 without prior hearing, against any person engaged in activities
14 in violation of the act, directing such person to cease and desist
15 from such activity.

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

18 Sec. 7. Section 87-306, Reissue Revised Statutes of
19 Nebraska, is amended to read:

20 87-306 Sections 87-301 to 87-306 and section 4 of this
21 act shall be known and may be cited as the Uniform Deceptive Trade
22 Practices Act.

23 Sec. 8. Original sections 87-301, 87-303, 87-303.02,
24 87-303.03, and 87-306, Reissue Revised Statutes of Nebraska, and
25 section 87-302, Revised Statutes Supplement, 2009, are repealed.

26 2. On page 1, line 2, strike "87-303.10,".