

LEGISLATURE OF NEBRASKA

ONE HUNDRED FIRST LEGISLATURE

SECOND SESSION

LEGISLATIVE BILL 801

Introduced by Fulton, 29.

Read first time January 08, 2010

Committee: Judiciary

A BILL

1 FOR AN ACT relating to consumer protection; to amend sections
2 87-301, 87-303, 87-303.02, 87-303.03, 87-303.10, and
3 87-306, Reissue Revised Statutes of Nebraska, and section
4 87-302, Revised Statutes Supplement, 2009; to change
5 provisions relating to the Uniform Deceptive Trade
6 Practices Act; to harmonize provisions; and to repeal
7 the original sections.

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

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

3 87-301 For purposes of the Uniform Deceptive Trade
4 Practices Act, unless the context otherwise requires:

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

15 (1) (2) Article shall mean means a product as
16 distinguished from its trademark, label, or distinctive dress in
17 packaging;

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

21 (2) (4) Certification mark shall mean means a mark used
22 in connection with the goods or services of a person other than
23 the certifier to indicate geographic origin, material, mode of
24 manufacture, quality, accuracy, or other characteristics of the
25 goods or services or to indicate that the work or labor on the

1 goods or services was performed by members of a union or other
2 organization;

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

8 (6) Commercially reasonable terms means the repurchase of
9 current and marketable inventory within twelve months from the date
10 of purchase at not less than ninety percent of the original net
11 cost, less appropriate set-offs and legal claims, if any;

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

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

20 (9) Covered file-sharing program means a computer
21 program, application, or software that enables the computer on
22 which such program, application, or software is installed to
23 designate files as available for searching by and copying to one or
24 more other computers, to transmit such designated files directly to
25 one or more other computers, and to request the transmission of

1 such designated files directly from one or more other computers.

2 Covered file-sharing program does not mean a program, application,

3 or software designed primarily to operate as a server that is

4 accessible over the Internet using the Internet Domain Name System,

5 to transmit or receive email messages, instant messaging, real-time

6 audio or video communications, or real-time voice communications,

7 or to provide network or computer security, network management,

8 hosting and backup services, maintenance, diagnostics, technical

9 support or repair, or to detect or prevent fraudulent activities;

10 (10) Current and marketable has its plain and ordinary

11 meaning but excludes inventory that is no longer within its

12 commercially reasonable use or shelf-life period, was clearly

13 described to salespersons prior to purchase as seasonal,

14 discontinued, or special promotion products not subject to the plan

15 or operation's inventory repurchase program, or has been used or

16 opened;

17 (11) Inventory includes both goods and services,

18 including company-produced promotional materials, sales aids,

19 and sales kits that the plan or operation requires independent

20 salespersons to purchase;

21 (12) Inventory loading means that the plan or operation

22 requires or encourages its independent salespersons to purchase

23 inventory in an amount which exceeds that which the salesperson can

24 expect to resell for ultimate consumption or to a consumer in a

25 reasonable time period, or both;

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

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

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

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

24 (7) (20) Trademark shall mean means any word, name,
25 symbol, or device or any combination thereof adopted and used by a

1 person to identify goods made or sold by ~~him or her~~ such person and
2 to distinguish ~~them~~ such goods from goods made or sold by others;
3 and

4 (8) (21) Trade name shall mean means a word or a name, or
5 any combination of the foregoing in any form or arrangement used by
6 a person to identify ~~his or her~~ such person's business, vocation,
7 or occupation and distinguish ~~it~~ such business, vocation, or
8 occupation from the business, vocation, or occupation of others.†

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

20 (10) Investment shall be any acquisition, for a
21 consideration other than personal services, of personal property,
22 tangible or intangible, for profit or business purposes, and shall
23 include, without limitation, franchises, business opportunities,
24 and services. It shall not include real estate, securities
25 registered under the Securities Act of Nebraska, or sales

1 demonstration equipment and materials furnished at cost for use in
2 making sales and not for resale;

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

14 (12) Attorney General shall mean the Attorney General of
15 the State of Nebraska or the county attorney of any county with the
16 consent and advice of the Attorney General.

17 Sec. 2. Section 87-302, Revised Statutes Supplement,
18 2009, is amended to read:

19 87-302 (a) A person engages in a deceptive trade
20 practice when, in the course of his or her business, vocation,
21 or occupation, he or she:

22 (1) Passes off goods or services as those of another;
23 (2) Causes likelihood of confusion or of misunderstanding
24 as to the source, sponsorship, approval, or certification of goods
25 or services;

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

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

6 (5) Represents that goods or services have sponsorship,
7 approval, characteristics, ingredients, uses, benefits, or
8 quantities that they do not have or that a person has a
9 sponsorship, approval, status, affiliation, or connection that he
10 or she does not have;

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

16 (7) Represents that goods or services are of a particular
17 standard, quality, or grade, or that goods are of a particular
18 style or model, if they are of another;

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

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

24 (10) Advertises goods or services with intent not
25 to supply reasonably expectable public demand, unless the

1 advertisement discloses a limitation of quantity;

2 (11) Makes false or misleading statements of fact
3 concerning the reasons for, existence of, or amounts of price
4 reductions;

5 (12) Uses or promotes the use of or establishes,
6 operates, or participates in a chain distributor pyramid
7 promotional scheme in connection with the solicitation of business
8 or personal investments from such scheme to members of the
9 public. This subdivision shall not be construed to prohibit a
10 plan or operation, or to define a plan or operation as a pyramid
11 promotional scheme, based on the fact that participants in the
12 plan or operation give consideration in return for the right to
13 receive compensation based upon purchases of goods, services, or
14 intangible property by participants for personal use, consumption,
15 or resale so long as the plan or operation does not promote or
16 induce inventory loading and the plan or operation implements an
17 appropriate inventory repurchase program;

18 (13) With respect to a sale or lease to a natural person
19 of goods or services purchased or leased primarily for personal,
20 family, household, or agricultural purposes, uses or employs any
21 referral or chain referral sales technique, plan, arrangement, or
22 agreement;

23 (14) Knowingly makes a false or misleading statement in a
24 privacy policy, published on the Internet or otherwise distributed
25 or published, regarding the use of personal information submitted

1 by members of the public;

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

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

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

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

12 (17) Mails or causes to be sent an unsolicited billing
13 statement, invoice, or other document that appears to obligate the
14 consumer to make a payment for services or merchandise he or she
15 did not order; or

16 (18)(i) Installs, offers to install, or makes available
17 for installation or download a covered file-sharing program on
18 a computer not owned by such person without providing clear and
19 conspicuous notice to the owner or authorized user of the computer
20 that files on that computer will be made available to the public
21 and without requiring intentional and affirmative activation of the
22 file-sharing function of such covered file-sharing program by the
23 owner or authorized user of the computer; or

24 (ii) Prevents reasonable efforts to block the
25 installation, execution, or disabling of a covered file-sharing

1 program;

2 (19) Submits a document containing a false or misleading
3 material statement or omitting material information required to
4 be contained in the document to local, state, or the federal
5 government; or

6 (18) (20) Violates any provision of the Nebraska
7 Foreclosure Protection Act.

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

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

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

16 87-303 (a) A person likely to be damaged by a deceptive
17 trade practice of another may be granted an injunction against
18 it under the principles of equity and on terms that the court
19 considers reasonable. bring an action for, and the court may grant,
20 an injunction under the principles of equity against the person
21 committing the deceptive trade practice. The court may order such
22 additional equitable relief as it deems necessary to protect the
23 public from further violations, including temporary and permanent
24 injunctive relief. Proof of monetary damage, loss of profits, or
25 intent to deceive is not required. Relief granted for the copying

1 of an article shall be limited to the prevention of confusion or
2 misunderstanding as to source.

3 (b) Costs shall be allowed to the prevailing party unless
4 the court otherwise directs. The court in its discretion may
5 award attorneys' fees to the prevailing party if (1) the party
6 complaining of a deceptive trade practice has brought an action
7 which he knew to be groundless or (2) the party charged with
8 a deceptive trade practice has willfully engaged in the trade
9 practice knowing it to be deceptive.

10 (b) A person who suffers damage or injury as the result
11 of a prohibited practice or act in violation of the Uniform
12 Deceptive Trade Practices Act may bring an action for, and the
13 court may award, actual damages in an action at law against the
14 person who committed the prohibited practice or act in violation of
15 the act.

16 (c) If the court finds that a person has violated the
17 act, the court shall award to the prevailing party the costs of the
18 action and to the prevailing party's attorney, reasonable fees.

19 (d) A claim filed for a violation of the act shall be
20 proved by a preponderance of the evidence.

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

24 Sec. 4. (1) A party filing a petition, counterclaim,
25 cross-petition, or pleading in intervention alleging a violation

1 under the Uniform Deceptive Trade Practices Act, within seven days
2 following the date of filing such pleading, shall provide a copy
3 to the Attorney General and, within seven days following entry of
4 any final judgment in the action, shall provide a copy of the
5 judgment to the Attorney General. This subsection does not apply to
6 small claims actions, except as provided in subsection (2) of this
7 section.

8 (2) A party appealing a small claims order or judgment
9 to district court involving an issue raised under the act, within
10 seven days of providing notice of the appeal, shall notify the
11 Attorney General in writing and provide a copy of the pleading
12 raising the issue and a copy of the small claims court order or
13 judgment.

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

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

1 (5) All copies of pleadings, orders, judgments, and
2 notices required by this section to be sent to the Attorney General
3 shall be sent by certified mail unless the Attorney General has
4 previously been provided such copies of the pleadings, orders,
5 judgments, or notices in the same action by certified mail, in
6 which case subsequent mailings may be made by regular mail. Failure
7 to provide the required mailings to the Attorney General shall not
8 be grounds for dismissal of an action under the act, but may be
9 grounds for a subsequent action by the Attorney General to vacate
10 or modify the judgment.

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

13 87-303.02 When the Attorney General has cause to believe
14 that any person has engaged in or is engaging in any deceptive
15 trade practice or unconscionable act listed in section 87-302 or
16 87-303.01, the Attorney General may:

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

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

25 (c) Examine any property or sample thereof, record,

1 book, document, account, or paper as the Attorney General deems
2 necessary; and or

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

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

10 87-303.03 (1) The Attorney General, in addition to other
11 powers conferred upon him or her by the Uniform Deceptive Trade
12 Practices Act:

13 (a) May ~~7~~ may issue subpoenas to require the attendance
14 of witnesses or the production of documents, administer oaths,
15 conduct hearings in aid of any investigation or inquiry, and
16 prescribe such forms and adopt and promulgate such rules as may be
17 necessary to administer the Uniform Deceptive Trade Practices Act.

18 act; and

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

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

25 Sec. 7. Section 87-303.10, Reissue Revised Statutes of

1 Nebraska, is amended to read:

2 87-303.10 A civil action arising under the Uniform
3 Deceptive Trade Practices Act may be brought only within four
4 years from the date of the purchase of goods or services or within
5 four years from the occurrence of the last event giving rise to
6 the cause of action under the act or within four years from the
7 discovery of the violation of the act by the person bringing the
8 action, whichever is later.

9 Sec. 8. Section 87-306, Reissue Revised Statutes of
10 Nebraska, is amended to read:

11 87-306 Sections 87-301 to 87-306 and section 4 of this
12 act shall be known and may be cited as the Uniform Deceptive Trade
13 Practices Act.

14 Sec. 9. Original sections 87-301, 87-303, 87-303.02,
15 87-303.03, 87-303.10, and 87-306, Reissue Revised Statutes of
16 Nebraska, and section 87-302, Revised Statutes Supplement, 2009,
17 are repealed.