

LEGISLATIVE BILL 327

Approved by the Governor March 25, 1974

Introduced by Interim on Advertising, Murphy, 17

AN ACT to amend sections 87-301, 87-302, 87-304, 87-305, and 87-306, Reissue Revised Statutes of Nebraska, 1943, relating to the Uniform Deceptive Trade Practices Act; to define terms; to make certain acts unlawful; to provide for procedures, enforcement, and remedies; to provide penalties; to provide for pending actions or appeals; to provide severability; to repeal the original sections, and also Chapter 69, article 14, Reissue Revised Statutes of Nebraska, 1943; and to declare an emergency.

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

Section 1. That section 87-301, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

87-301. As used in sections 87-301 to 87-306 and sections 3 to 11 of this act, unless the context otherwise requires:

(1) Article means a product as distinguished from its trade-mark, label, or distinctive dress in packaging;

(2) Certification mark means a mark used in connection with the goods or services of a person other than the certifier to indicate geographic origin, material, mode of manufacture, quality, accuracy, or other characteristics of the goods or services or to indicate that the work or labor on the goods or services was performed by members of a union or other organization;

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

(4) Mark means a word, name, symbol, device, or any combination of the foregoing in any form or arrangement;

(5) Person means an individual, corporation, government, or governmental subdivision or agency,

business trust, estate, trust, partnership, unincorporated association, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity;

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

(7) Trade-mark shall mean any word, name, symbol, or device or any combination thereof adopted and used by a person to identify goods made or sold by him and to distinguish them from goods made or sold by others; and

(8) Trade name means a word or a name, or any combination of the foregoing in any form or arrangement used by a person to identify his business, vocation, or occupation and distinguish it from the business, vocation, or occupation of others; -

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

(10) Investment shall be any acquisition, for a consideration other than personal services, of personal property, tangible or intangible, for profit or business purposes, and shall include, without limitation, franchises, business opportunities, and services. It shall not include real estate or securities registered under Chapter 8, article 11, or sales demonstration equipment and materials furnished at cost for use in making sales and not for resale;

(11) Referral or chain referral sales or leases shall mean any sales technique, plan, arrangement, or agreement whereby the seller or lessor gives or offers to give a rebate or discount or otherwise pays or offers to pay value to the buyer or lessee as an inducement for a sale or lease in consideration of the buyer or lessee giving to the seller or lessor the names of prospective buyers or lessees or otherwise aiding the seller or

lessor in making a sale or lease to another person if the earning of the rebate, discount, or other value is contingent upon the occurrence of an event subsequent to the time the buyer or lessee agrees to buy or lease; and

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

Sec. 2. That section 87-302, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

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

(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 does not have;

(6) Represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(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 advertiser discloses a limitation of quantity;

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

(12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding;

(13) 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; or

(14) 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.

(b) In order to prevail in an action under sections 87-301 to 87-306 and sections 3 to 11 of this act, a complainant need not prove competition between the parties or actual confusion or misunderstanding.

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

Sec. 3. (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 and sections 3 to 11 of this 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. 4. 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 section 3 of this act, he 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, 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 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 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 possession until the completion of all proceedings undertaken under sections 87-301 to 87-306 and sections 3 to 11 of this act.

Sec. 5. (1) The Attorney General, in addition to other powers conferred upon him by sections 87-301 to 87-306 and sections 3 to 11 of this 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 promulgate such rules as may be necessary to administer the provisions of sections 87-301 to 87-306 and sections 3 to 11 of this act.

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

Sec. 6. (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 and sections 3 to 11 of this 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. 7. (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 section 3 of this act, he 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 and sections 3 to 11 of this act, in lieu thereof, he may accept an assurance of discontinuance of any deceptive trade practice or unconscionable act listed in section 87-302 or section 3 of this act. 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 section 3 of this act in any civil action or proceeding thereafter commenced by the Attorney General.

Sec. 8. The provisions of sections 87-301 to 87-306 and sections 3 to 11 of this 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 section 3 of this act.

Sec. 9. If a buyer or lessee is induced by a violation of section 87-302 or section 3 of this act to enter into a sale or lease, the agreement is unenforceable by the seller or lessor and the buyer or lessee, at his 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. 10. Any person who violates the provisions of section 87-302 or section 3 of this act shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for a period not to exceed six months, or by both such fine and imprisonment.

Sec. 11. Any person who willfully violates the terms of an injunction or declaratory judgment of the court or the terms of a written assurance of voluntary compliance entered into pursuant to sections 87-301 to 87-306 and sections 3 to 11 of this act shall be guilty of a felony and shall, upon conviction thereof, be punished by a fine of not more than five thousand dollars, or by imprisonment in the Nebraska Penal and Correctional Complex not more than five years, or by both such fine and imprisonment.

Sec. 12. That section 87-304, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

87-304. (a) Sections 87-301 to 87-306 and sections 3 to 11 of this act do 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 existed immediately prior to the effective date of this act, or (b) under such sections as amended and sections 3 to 11 of this act on the effective date of this act.

(b) Subsections 2 (a) (2) and 2 (a) (3) do not apply to the use of a service mark, trade-mark, 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 and sections 3 to 11 of this act.

Sec. 13. That section 87-305, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

87-305. Sections 87-301 to 87-306 and sections 3 to 11 of this act shall be construed to effectuate its their general purpose to make uniform the law of those states which enact it them.

Sec. 14. That section 87-306, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

87-306. Sections 87-301 to 87-306 and sections 3 to 11 of this act may be cited as the Uniform Deceptive Trade Practices Act.

Sec. 15. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions thereof.

Sec. 16. That original sections 87-301, 87-302, 87-304, 87-305, and 87-306, Reissue Revised Statutes of Nebraska, 1943, and also Chapter 69, article 14, Reissue Revised Statutes of Nebraska, 1943, are repealed.

Sec. 17. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.