

LEGISLATIVE BILL 801

Approved by the Governor April 13, 2010

Introduced by Fulton, 29; Pirsch, 4.

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

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

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

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

(1) Access software provider means a provider of software, including client or server software, or enabling tools that do any one or more of the following: (a) Filter, screen, allow, or disallow content; (b) pick, choose, analyze, or digest content; or (c) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content;

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

~~(1)~~ (3) Article shall mean means a product as distinguished from its trademark, label, or distinctive dress in packaging;

(4) Attorney General means the Attorney General of the State of Nebraska or the county attorney of any county with the consent and advice of the Attorney General;

(5) Cable operator means any person or group of persons (a) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system or (b) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

~~(2)~~ (6) Certification mark shall mean 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)~~ (7) Collective mark shall mean 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;

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

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

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

(11) Covered file-sharing program means a computer program, application, or software that enables the computer on which such program, application, or software is installed to designate files as available for searching by and copying to one or more other computers, to transmit such designated files directly to one or more other computers, and to request the transmission of such designated files directly from one or more other computers. Covered file-sharing program does not mean a program, application, or software designed primarily to operate as a server that is accessible over the Internet using the Internet Domain Name System, to transmit or receive email messages, instant messaging, real-time audio or video communications, or

real-time voice communications, or to provide network or computer security, network management, hosting and backup services, maintenance, diagnostics, technical support or repair, or to detect or prevent fraudulent activities;

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

(13) Information content provider means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service;

(14) Interactive computer service means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions;

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

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

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

~~(4)~~ (18) Mark shall mean means a word, name, symbol, device, or any combination of the foregoing a word, name, symbol, or device in any form or arrangement;

~~(5)~~ (19) Person shall mean an individual, means a natural person, a corporation, a government, or a governmental subdivision or agency, a business trust, an estate, a trust, a partnership, a joint venture, a limited liability company, an unincorporated association, a sole proprietorship, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity;

(20) Pyramid promotional scheme means any plan or operation in which a participant gives consideration for the right to receive compensation that is derived primarily from the recruitment of other persons as participants in the plan or operation rather than from the sales of goods, services, or intangible property to participants or by participants to others. A limitation as to the number of persons who may participate, or the presence of additional conditions affecting eligibility, or upon payment of anything of value by a person whereby the person obtains any other property in addition to the right to receive consideration, does not change the identity of the scheme as a pyramid promotional scheme;

(21) Referral or chain referral sales or leases means 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;

~~(6)~~ (22) Service mark shall mean means 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;

(23) Telecommunications service means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used;

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

~~(8)~~ (25) Trade name shall mean means a word or a name, or any combination of the foregoing in any form or arrangement used by a person

to identify ~~his or her~~ such person's business, vocation, or occupation and distinguish it such business, vocation, or occupation from the business, vocation, or occupation of others; and

(26) Use or promote the use of, for purposes of subdivision (a) (12) of section 87-302, means contrive, prepare, establish, plan, operate, advertise, or otherwise induce or attempt to induce another person to participate in a pyramid promotional scheme, including a pyramid promotional scheme run through the Internet, email, or other electronic communications.

~~(9) Chain distributor scheme also known as pyramid sales shall mean a sales device whereby a person, upon a condition that he or she 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, securities registered under the Securities Act of Nebraska, 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. Section 87-302, Revised Statutes Supplement, 2009, 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 or advertises the price in any manner calculated or tending to mislead or in any way deceive a person;
- (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 or establishes, operates, or participates in a chain distributor pyramid promotional scheme in connection

with the solicitation of ~~business or personal investments from such scheme to~~ members of the public. This subdivision shall not be construed to prohibit a plan or operation, or to define a plan or operation as a pyramid promotional scheme, based on the fact that participants in the plan or operation give consideration in return for the right to receive compensation based upon purchases of goods, services, or intangible property by participants for personal use, consumption, or resale so long as the plan or operation does not promote or induce inventory loading and the plan or operation implements an appropriate inventory repurchase program;

(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;

(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;

(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; ~~or~~

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

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

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

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

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

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

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

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

(e) Subdivision (a)(12) of section 87-302 shall not be construed to authorize a civil action against an interactive computer service, provider of telecommunications service, or cable operator for the actions of an information content provider.

Sec. 4. (1) A party filing a petition, counterclaim, cross-petition, or pleading in intervention alleging a violation under the Uniform Deceptive Trade Practices Act, within seven days following the date of filing such pleading, shall provide a copy to the Attorney General and, within seven days following entry of any final judgment in the action, shall provide a copy of the judgment to the Attorney General. This subsection does not apply to Small Claims Court actions, except as provided in subsection (2) of this section.

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

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

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

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

Sec. 5. 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, 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 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 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 the Attorney General deems necessary; ~~and or~~

(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 the Uniform Deceptive Trade Practices Act.

Sec. 6. 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 the Uniform Deceptive Trade Practices Act:

(a) May ~~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 Uniform Deceptive Trade Practices Act. act; and

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

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

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

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

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