

State of South Dakota

EIGHTY-NINTH SESSION
LEGISLATIVE ASSEMBLY, 2014

400V0382

HOUSE JUDICIARY ENGROSSED NO. **SB 23** - 03/05/2014

Introduced by: The Committee on Judiciary at the request of the Office of the Attorney
General

1 FOR AN ACT ENTITLED, An Act to revise certain provisions relating to deceptive trade
2 practices, including unordered property or services, lodging reservation and cancellation,
3 violation penalties, attorney's fees, entry rights for landlords and tenants, debit card theft,
4 and organized retail crime.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

6 Section 1. That § 37-24-6 be amended to read as follows:

7 37-24-6. It is a deceptive act or practice for any person to:

- 8 (1) Knowingly ~~and intentionally~~ act, use, or employ any deceptive act or practice, fraud,
9 false pretense, false promises, or misrepresentation or to conceal, suppress, or omit
10 any material fact in connection with the sale or advertisement of any merchandise,
11 regardless of whether any person has in fact been ~~mislead~~ misled, deceived, or
12 damaged thereby;
- 13 (2) Advertise price reductions without satisfying one of the following:
- 14 (a) Including in the advertisement the specific basis for the claim of a price



1 reduction; or

2 (b) Offering the merchandise for sale at the higher price from which the reduction
3 is taken for at least seven consecutive business days during the sixty-day
4 period prior to the advertisement.

5 Any person advertising consumer property or services in this state, which
6 advertisements contain representations or statements as to any type of savings claim,
7 including reduced price claims and price comparison value claims, shall maintain
8 reasonable records for a period of two years from the date of sale and advertisement,
9 which records shall disclose the factual basis for such representations or statements
10 and from which the validity of any such claim be established. However, these
11 reasonable record provisions do not apply to the sale of any merchandise which:

12 (a) Is of a class of merchandise that is routinely advertised on at least a weekly
13 basis in newspapers, shopping tabloids, or similar publications; and

14 (b) Has a sales price before price reduction that is less than fifteen dollars per
15 item;

16 (3) Represent a sale of merchandise at reduced rates due to the cessation of business
17 operations and after the date of the first advertisement remain in business under the
18 same, or substantially the same, ownership or trade name, or continue to offer for sale
19 the same type of merchandise at the same location for more than one hundred twenty
20 days;

21 (4) Give or offer a rebate, discount, or anything of value to an individual as an
22 inducement for selling consumer property or services in consideration of giving the
23 names of prospective purchasers or otherwise aiding in making a sale to another
24 person, if the earning of the rebate, discount, or other thing of value is contingent

- 1 upon the occurrence of an event subsequent to the time the individual agrees to the
2 sale;
- 3 (5) Engage in any scheme or plan for disposal or distribution of merchandise whereby
4 a participant pays a valuable consideration for the chance to receive compensation
5 primarily for introducing one or more additional persons into participation in the
6 planner's scheme or for the chance to receive compensation when the person
7 introduced by the participant introduces a new participant;
- 8 (6) Send, deliver, provide, mail, or cause to be sent, delivered, provided, or mailed ~~any~~
9 ~~unordered consumer property or service, or~~ any bill or invoice for unordered
10 ~~consumer~~ property or unordered service provided;
- 11 (7) Advertise a rate, price, or fee for a hotel, motel, campsite, or other lodging
12 accommodation which is not in fact available to the public under the terms
13 advertised. It is not a violation of this subdivision to establish contract rates which
14 are different than public rates;
- 15 (8) Charge a rate, price, or fee for a hotel, motel, campsite, or other lodging
16 accommodation which is different than the rate, price, or fee charged on the first
17 night of the guest's stay unless, at the initial registration of the guest, a written
18 notification of each price, rate, or fee to be charged during the guest's reserved
19 continuous stay is delivered to the guest and an acknowledgment of receipt of the
20 notice is signed by the guest and kept by the innkeeper for the same period of time
21 as is required by § 34-18-21;
- 22 (9) Knowingly ~~and intentionally~~ fail to mail or to deliver by electronic means to a future
23 guest a written confirmation of the date and rates of reservations made for any
24 accommodation at a hotel, motel, campsite, or other lodging accommodation when

- 1 a written request for confirmation is received from the future guest;
- 2 (10) ~~Refuse to return or reverse the charge for a deposit upon any hotel, motel, campsite,~~
3 ~~or other lodging accommodation which is canceled by the guest more than thirty days~~
4 ~~before the date of the reservation. The innkeeper may establish a policy requiring a~~
5 ~~longer time for notice of cancellation or a handling fee in the event of cancellation,~~
6 ~~which may not exceed twenty-five dollars, if the policy is in writing and is delivered~~
7 ~~or mailed to the guest at or near the making of the reservation~~ Require money in
8 advance of arrival or a handling fee in the event of cancellation of any hotel, motel,
9 campsite, or other lodging accommodation unless the innkeeper has a written policy
10 or a separate contract with the guest stating so that is mailed or delivered by
11 electronic means to the guest at or near the making of the reservation;
- 12 (11) Knowingly advertise or cause to be listed through the internet or in a telephone
13 directory a business address that misrepresents where the business is actually located
14 or that falsely states that the business is located in the same area covered by the
15 telephone directory. This subdivision does not apply to a telephone service provider,
16 an internet service provider, or a publisher or distributor of a telephone directory,
17 unless the conduct proscribed in this subdivision is on behalf of the provider,
18 publisher, or distributor;
- 19 (12) Sell, market, promote, advertise, or otherwise distribute any card or other purchasing
20 mechanism or device that is not insurance that purports to offer discounts or access
21 to discounts from pharmacies for prescription drug purchases if:
- 22 (a) The card or other purchasing mechanism or device does not expressly state in
23 bold and prominent type, prevalently placed, that discounts are not insurance;
- 24 (b) The discounts are not specifically authorized by a separate contract with each

1 pharmacy listed in conjunction with the card or other purchasing mechanism
2 or device; or

3 (c) The discount or access to discounts offered, or the range of discounts or access
4 to the range of discounts, is misleading, deceptive, or fraudulent, regardless
5 of the literal wording.

6 The provisions of this subdivision do not apply to a customer discount or
7 membership card issued by a store or buying club for use in that store or buying club,
8 or a patient access program voluntarily sponsored by a pharmaceutical manufacturer,
9 or a consortium of pharmaceutical manufacturers, that provide free or discounted
10 prescription drug products directly to low income or uninsured individuals either
11 through a discount card or direct shipment.

12 (13) Send or cause to be sent an unsolicited commercial electronic mail message that does
13 not include in the subject line of such message "ADV:" as the first four characters.
14 If the message contains information that consists of explicit sexual material that may
15 only be viewed, purchased, rented, leased, or held in possession by an individual
16 eighteen years of age and older, the subject line of each message shall include
17 "ADV:ADLT" as the first eight characters. An unsolicited commercial electronic
18 mail message does not include a message sent to a person with whom the initiator has
19 an existing personal or business relationship or a message sent at the request or
20 express consent of the recipient.

21 Each act in violation of this section under one thousand dollars is a ~~Class 2~~ Class 1
22 misdemeanor. ~~Any subsequent conviction of an~~ Each act in violation of this statute, ~~which~~
23 ~~occurs within two years is a Class 1 misdemeanor. Any subsequent conviction of an act in~~
24 ~~violation of this statute, which occurs within two years of a conviction of a Class 1~~

1 ~~misdemeanor pursuant to this statute, is a Class 6 felony over one thousand dollars but under~~
2 ~~one hundred thousand dollars is a Class 6 felony. Each act in violation of this section over one~~
3 ~~hundred thousand dollars is a Class 5 felony.~~

4 Section 2. That § 37-24-1 be amended to read as follows:

5 37-24-1. Terms used in this chapter mean:

- 6 (1) "Advertisement," the attempt by publication, dissemination, solicitation, or
7 circulation, whether oral, visual, written, or otherwise, and whether in person, by
8 telephone, or by any other means, to induce directly or indirectly any person to enter
9 into any obligation or to acquire any title or interest in any merchandise;
- 10 (2) "Business day," any calendar day except Sunday, or the following holidays: New
11 Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day,
12 Pioneers' Day, Veterans' Day, Thanksgiving Day, and Christmas Day;
- 13 (3) ~~"Consumer property or services," any personal property or services sold primarily for~~
14 ~~personal, family, or household use and not for resale or for use or consumption in a~~
15 ~~trade or business. The term "consumer property or services" includes "merchandise";~~
- 16 (4) "Documentary material," the original or a copy of any book, record, report,
17 memorandum, paper, communication, tabulation, map, chart, photograph, mechanical
18 transcription, other tangible document or recording, reproductions of information
19 stored magnetically, file lay-out, code conversion tables, computer programs to
20 convert file to readable print-out, wherever situate;
- 21 (5) "Examination" of documentary material, the inspection, study, or copying of any such
22 material, and the taking of testimony under oath or acknowledgment in respect of any
23 such documentary material or copy thereof;
- 24 (6) "Goods or services," goods or services purchased, leased, or rented, including courses

1 of instruction or training regardless of the purpose for which they are taken;

2 (7) "Merchandise," any object, wares, goods, commodity, intangible, instruction, or
3 service;

4 (7A) "Organized retail crime," the theft of retail merchandise from a retail seller with the
5 intent or purpose of reselling, distributing, or otherwise reentering the retail
6 merchandise in commerce, including the transfer of the stolen retail merchandise to
7 another retail seller or to any other person personally, through the mail, or through
8 any electronic medium, including the internet, in exchange for anything of value;

9 (8) "Person," a natural person or his legal representative, a partnership, a limited liability
10 company (domestic or foreign), a corporation (domestic or foreign), a trust, an
11 incorporated or unincorporated association, and any other legal entity;

12 (9) "Place of business," the main or permanent branch office or local address of a seller;

13 (10) "Price comparison," the comparison, whether or not expressed wholly or in part in
14 dollars, cents, fractions or percentages, in any advertisement, of a seller's current
15 price for consumer property or services with any other price or statement of value for
16 such property or services, whether or not such prices are actually stated in the
17 advertisement; or, the making of price reduction claims or savings claims with
18 respect to the seller's current price. The term includes, but is not limited to, such
19 comparisons as "50% off," "Up to 70% off," "Save 1/3," "Half-price sale," "30% to
20 70% off," "Was \$20, now half price," "Guaranteed Lowest Prices," "\$10 value, now
21 \$8," "Was \$7, now \$6," "List Price \$50, Our Price \$29," "Clearance Price," or
22 "Liquidation Price";

23 (11) "Purchase price," the total price paid or to be paid for the goods or services, including
24 all interest and service charges;

1 (11A) "Retail merchandise," any article, product, commodity, item, or component intended
2 to be sold in retail commerce;

3 (11B) "Retail seller," any person that is in the business of selling retail merchandise at
4 retail;

5 (12) "Seller," any person, partnership, corporation, or association engaged in the door to
6 door sale of goods or services;

7 (13) "Trade" and "commerce," the advertising, offering for sale, attempting to sell, selling,
8 or distributing of any services, or any property, tangible or intangible, personal, or
9 mixed, or of any other article, commodity, or thing of value wherever situate, for
10 cash, exchange of goods or services, or on credit, and shall include any trade or
11 commerce directly or indirectly affecting the people of this state;

12 (14) "Unordered," delivery of consumer property or services without prior expressed
13 request or consent from the person receiving the consumer property or services, but
14 not including consumer property sent or services performed by mistake, offered in
15 good faith in substitution for property or services by prior expressed request or
16 consent, or a bona fide gift. Unordered consumer property or services do not include
17 consumer property or services sent pursuant to an agreement which is in compliance
18 with the federal trade commission rule on use of negative option plans by sellers in
19 commerce as outlined in 16 C.F.R., section 425, as in effect on January 1, 1992.

20 Section 3. That § 37-24-23 be amended to read as follows:

21 37-24-23. ~~Whenever~~ If the attorney general has reason to believe that any person is using,
22 has used, or is about to use any act or practice declared to be unlawful by § 37-24-6 and that
23 proceedings would be in the public interest, ~~he~~ the attorney general may bring an action in the
24 name of the state against ~~such~~ the person to restrain by temporary or permanent injunction the

1 use of ~~such~~ the act or practice, upon the giving of appropriate notice to that person. The notice
2 ~~must~~ shall state generally the relief sought and be served in accordance with § 37-24-16 and at
3 least three days before any hearing in the action. The attorney general, if the prevailing plaintiff,
4 may also recover reasonable attorney's fees and costs.

5 Section 4. That chapter 43-32 be amended by adding thereto a NEW SECTION to read as
6 follows:

7 Except in case of an emergency or if it is impracticable to do so, a landlord or landlord's
8 agent shall give the tenant reasonable notice of the landlord's intent to enter and enter only at
9 reasonable times. Twenty-four hours written notice is presumed to be a reasonable notice unless
10 alternate methods of notification or times for entry are mutually agreed upon between the
11 landlord and tenant in the lease. The notice shall specify date or dates of entry, a period of time
12 during normal business hours for entry, and the purpose of intended entry. The notice shall also
13 specify a means for which the tenant may request to reschedule the entry.

14 Section 5. That § 22-30A-8.1 be amended to read as follows:

15 22-30A-8.1. Any person who, by use of a debit card or credit card issued to another person,
16 without the consent of the person to whom issued, or by use of a debit card or credit card which
17 has been revoked or canceled or has expired, or by use of a falsified, mutilated, altered, or
18 counterfeit debit card or credit card obtains property or services ~~on credit~~, is guilty of theft.

19 Section 6. That chapter 37-24 be amended by adding thereto a NEW SECTION to read as
20 follows:

21 A person is guilty of organized retail crime if that person, alone or in association with
22 another person, does any of the following:

- 23 (1) Knowingly commits an organized retail crime;
- 24 (2) Organizes, supervises, conspires, finances, or otherwise manages or assists another

1 person in committing an organized retail crime;

2 (3) Removes, destroys, deactivates, or knowingly evades any component of an anti-
3 shoplifting or inventory control device to prevent the activation of that device or to
4 facilitate another person in committing an organized retail crime; or

5 (4) Knowingly causes a fire exit alarm to sound or otherwise activate, or deactivates or
6 prevents a fire exit alarm from sounding, in the commission of an organized retail
7 crime by another person.

8 Each act in violation of this section under one thousand dollars is a Class 1 misdemeanor.

9 Each act in violation of this section over one thousand dollars but under one hundred thousand
10 dollars is a Class 6 felony. Each act in violation of this section over one hundred thousand
11 dollars is a Class 5 felony.

12 Section 7. That chapter 37-24 be amended by adding thereto a NEW SECTION to read as
13 follows:

14 The court shall order a person who is found guilty of organized retail crime to make
15 restitution to any retail seller victim and to reimburse the governmental entity for its expenses
16 incurred as a result of the violation of this Act.

17 Section 8. That chapter 37-24 be amended by adding thereto a NEW SECTION to read as
18 follows:

19 It is not a defense to a charge under this chapter that the property was not stolen, embezzled,
20 or converted property at the time of the violation if the property was explicitly represented to
21 the accused person as being stolen, embezzled, or converted property.

22 Section 9. That chapter 37-24 be amended by adding thereto a NEW SECTION to read as
23 follows:

24 This chapter does not prohibit a person from being charged with, convicted of, or sentenced

1 for any violation of statute arising out of the same criminal transaction that violates this chapter.

2 Section 10. That chapter 37-24 be amended by adding thereto a NEW SECTION to read as
3 follows:

4 In calculating the amount involved in deceptive act violations pursuant to this chapter,
5 whether from the same person or several persons, committed pursuant to one scheme or course
6 of conduct, the amount may be aggregated in determining the degree of punishment of the
7 scheme or course of conduct of the deceptive acts.

8 Section 11. That § 37-24-10 be amended to read as follows:

9 37-24-10. Nothing in this chapter ~~shall apply~~ applies to acts or practices required or
10 permitted under by or in accord with laws of this state or the United States or under rules,
11 regulations, sub-regulatory policy, or decisions interpreting ~~such laws~~ the same.