

AN ACT

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

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

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

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

- (1) Knowingly act, use, or employ any deceptive act or practice, fraud, false pretense, false promises, or misrepresentation or to conceal, suppress, or omit any material fact in connection with the sale or advertisement of any merchandise, regardless of whether any person has in fact been misled, deceived, or damaged thereby;
- (2) Advertise price reductions without satisfying one of the following:
 - (a) Including in the advertisement the specific basis for the claim of a price reduction;
or
 - (b) Offering the merchandise for sale at the higher price from which the reduction is taken for at least seven consecutive business days during the sixty-day period prior to the advertisement.

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

- (a) Is of a class of merchandise that is routinely advertised on at least a weekly basis in newspapers, shopping tabloids, or similar publications; and
 - (b) Has a sales price before price reduction that is less than fifteen dollars per item;
- (3) Represent a sale of merchandise at reduced rates due to the cessation of business operations and after the date of the first advertisement remain in business under the same, or substantially the same, ownership or trade name, or continue to offer for sale the same type of merchandise at the same location for more than one hundred twenty days;
- (4) Give or offer a rebate, discount, or anything of value to an individual as an inducement for selling consumer property or services in consideration of giving the names of prospective purchasers or otherwise aiding in making a sale to another person, if the earning of the rebate, discount, or other thing of value is contingent upon the occurrence of an event subsequent to the time the individual agrees to the sale;
- (5) Engage in any scheme or plan for disposal or distribution of merchandise whereby a participant pays a valuable consideration for the chance to receive compensation primarily for introducing one or more additional persons into participation in the planner's scheme or for the chance to receive compensation when the person introduced by the participant introduces a new participant;
- (6) Send, deliver, provide, mail, or cause to be sent, delivered, provided, or mailed any bill or invoice for unordered property or unordered service provided;
- (7) Advertise a rate, price, or fee for a hotel, motel, campsite, or other lodging accommodation which is not in fact available to the public under the terms advertised. It is not a violation of this subdivision to establish contract rates which are different than public rates;
- (8) Charge a rate, price, or fee for a hotel, motel, campsite, or other lodging accommodation

which is different than the rate, price, or fee charged on the first night of the guest's stay unless, at the initial registration of the guest, a written notification of each price, rate, or fee to be charged during the guest's reserved continuous stay is delivered to the guest and an acknowledgment of receipt of the notice is signed by the guest and kept by the innkeeper for the same period of time as is required by § 34-18-21;

- (9) Knowingly fail to mail or to deliver by electronic means to a future guest a written confirmation of the date and rates of reservations made for any accommodation at a hotel, motel, campsite, or other lodging accommodation when a written request for confirmation is received from the future guest;
- (10) Require money in advance of arrival or a handling fee in the event of cancellation of any hotel, motel, campsite, or other lodging accommodation unless the innkeeper has a written policy or a separate contract with the guest stating so that is mailed or delivered by electronic means to the guest at or near the making of the reservation;
- (11) Knowingly advertise or cause to be listed through the internet or in a telephone directory a business address that misrepresents where the business is actually located or that falsely states that the business is located in the same area covered by the telephone directory. This subdivision does not apply to a telephone service provider, an internet service provider, or a publisher or distributor of a telephone directory, unless the conduct proscribed in this subdivision is on behalf of the provider, publisher, or distributor;
- (12) Sell, market, promote, advertise, or otherwise distribute any card or other purchasing mechanism or device that is not insurance that purports to offer discounts or access to discounts from pharmacies for prescription drug purchases if:
 - (a) The card or other purchasing mechanism or device does not expressly state in bold and prominent type, prevalently placed, that discounts are not insurance;

- (b) The discounts are not specifically authorized by a separate contract with each pharmacy listed in conjunction with the card or other purchasing mechanism or device; or
- (c) The discount or access to discounts offered, or the range of discounts or access to the range of discounts, is misleading, deceptive, or fraudulent, regardless of the literal wording.

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

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

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

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

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

- (1) "Advertisement," the attempt by publication, dissemination, solicitation, or circulation, whether oral, visual, written, or otherwise, and whether in person, by telephone, or by any other means, to induce directly or indirectly any person to enter into any obligation or to acquire any title or interest in any merchandise;
- (2) "Business day," any calendar day except Sunday, or the following holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Pioneers' Day, Veterans' Day, Thanksgiving Day, and Christmas Day;
- (3)
- (4) "Documentary material," the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, other tangible document or recording, reproductions of information stored magnetically, file lay-out, code conversion tables, computer programs to convert file to readable print-out, wherever situate;
- (5) "Examination" of documentary material, the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgment in respect of any such documentary material or copy thereof;
- (6) "Goods or services," goods or services purchased, leased, or rented, including courses of instruction or training regardless of the purpose for which they are taken;
- (7) "Merchandise," any object, wares, goods, commodity, intangible, instruction, or service;
- (7A) "Organized retail crime," the theft of retail merchandise from a retail seller with the intent or purpose of reselling, distributing, or otherwise reentering the retail merchandise in commerce, including the transfer of the stolen retail merchandise to another retail seller

or to any other person personally, through the mail, or through any electronic medium, including the internet, in exchange for anything of value;

- (8) "Person," a natural person or his legal representative, a partnership, a limited liability company (domestic or foreign), a corporation (domestic or foreign), a trust, an incorporated or unincorporated association, and any other legal entity;
- (9) "Place of business," the main or permanent branch office or local address of a seller;
- (10) "Price comparison," the comparison, whether or not expressed wholly or in part in dollars, cents, fractions or percentages, in any advertisement, of a seller's current price for consumer property or services with any other price or statement of value for such property or services, whether or not such prices are actually stated in the advertisement; or, the making of price reduction claims or savings claims with respect to the seller's current price. The term includes, but is not limited to, such comparisons as "50% off," "Up to 70% off," "Save 1/3," "Half-price sale," "30% to 70% off," "Was \$20, now half price," "Guaranteed Lowest Prices," "\$10 value, now \$8," "Was \$7, now \$6," "List Price \$50, Our Price \$29," "Clearance Price," or "Liquidation Price";
- (11) "Purchase price," the total price paid or to be paid for the goods or services, including all interest and service charges;
- (11A) "Retail merchandise," any article, product, commodity, item, or component intended to be sold in retail commerce;
- (11B) "Retail seller," any person that is in the business of selling retail merchandise at retail;
- (12) "Seller," any person, partnership, corporation, or association engaged in the door to door sale of goods or services;
- (13) "Trade" and "commerce," the advertising, offering for sale, attempting to sell, selling, or distributing of any services, or any property, tangible or intangible, personal, or mixed,

or of any other article, commodity, or thing of value wherever situate, for cash, exchange of goods or services, or on credit, and shall include any trade or commerce directly or indirectly affecting the people of this state;

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

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

37-24-23. If the attorney general has reason to believe that any person is using, has used, or is about to use any act or practice declared to be unlawful by § 37-24-6 and that proceedings would be in the public interest, the attorney general may bring an action in the name of the state against the person to restrain by temporary or permanent injunction the use of the act or practice, upon the giving of appropriate notice to that person. The notice shall state generally the relief sought and be served in accordance with § 37-24-16 and at least three days before any hearing in the action. The attorney general, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.

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

Except in case of an emergency or if it is impracticable to do so, a landlord or landlord's agent shall give the tenant reasonable notice of the landlord's intent to enter and enter only at reasonable times. Twenty-four hours written notice is presumed to be a reasonable notice unless alternate

methods of notification or times for entry are mutually agreed upon between the landlord and tenant in the lease. The notice shall specify date or dates of entry, a period of time during normal business hours for entry, and the purpose of intended entry. The notice shall also specify a means for which the tenant may request to reschedule the entry.

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

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

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

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

- (1) Knowingly commits an organized retail crime;
- (2) Organizes, supervises, conspires, finances, or otherwise manages or assists another person in committing an organized retail crime;
- (3) Removes, destroys, deactivates, or knowingly evades any component of an anti-shoplifting or inventory control device to prevent the activation of that device or to facilitate another person in committing an organized retail crime; or
- (4) Knowingly causes a fire exit alarm to sound or otherwise activate, or deactivates or prevents a fire exit alarm from sounding, in the commission of an organized retail crime by another person.

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

a Class 6 felony. Each act in violation of this section over one hundred thousand dollars is a Class 5 felony.

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

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

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

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

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

This chapter does not prohibit a person from being charged with, convicted of, or sentenced for any violation of statute arising out of the same criminal transaction that violates this chapter.

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

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

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

37-24-10. Nothing in this chapter applies to acts or practices required or permitted by or in

accord with laws of this state or the United States or under rules, regulations, sub-regulatory policy,
or decisions interpreting the same.

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

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I certify that the attached Act
originated in the

SENATE as Bill No. 23

Secretary of the Senate
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President of the Senate

Attest:

Secretary of the Senate

Speaker of the House

Attest:

Chief Clerk

Senate Bill No. 23
File No. _____
Chapter No. _____

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Received at this Executive Office
this _____ day of _____ ,

20____ at _____ M.

By _____
for the Governor
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The attached Act is hereby
approved this _____ day of
_____, A.D., 20____

Governor
=====

STATE OF SOUTH DAKOTA,
ss.
Office of the Secretary of State

Filed _____, 20____
at _____ o'clock __ M.

Secretary of State

By _____
Asst. Secretary of State