

ENGROSSED SENATE
BILL NO. 635

By: Stipe, Brown and Muegge of
the Senate

and

Glover of the House

[consumer protection - consumer transactions - false,
misleading or
deceptive acts or
practices -
codification -
effective date]

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 15 O.S. 1991, Section 752, as last amended by Section 1, Chapter 235, O.S.L. 1994 (15 O.S. Supp. 1994, Section 752), is amended to read as follows:

Section 752. As used in ~~the Oklahoma Consumer Protection Act~~
Section 751 et seq. of this title:

1. "Person" means a natural person, corporation, trust, partnership, limited liability company, incorporated or unincorporated association, or any other legal entity;

2. "Consumer transaction" means the advertising, offering for sale, sale, or distribution of any services or any property, tangible or intangible, real, personal, or mixed, or any other article, commodity, or thing of value wherever located, for purposes that are personal, household, or business oriented;

3. "Documentary material" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever located;

4. "Examination" when used in reference to documentary material includes the inspection, study, or copying of any such material, and the taking of testimony under oath, or acknowledgment in respect to any such documentary material or copy thereof;

5. "Merchandise" includes any object, ware, good, commodity, intangible, real estate, or service;

6. "Closing out sale" means any offer to sell, or actual sale, to the public of goods, wares, or merchandise on the implied or direct representation that the sale is in anticipation of the termination of a business at its present location, or that the sale is being held other than in the ordinary course of business. It also shall mean but shall not be limited to any sale held or advertised as a "closing out sale", "going out of business sale", "discontinuance of business sale", "quitting business sale", "sell out", "liquidation", "loss of lease sale", "must vacate sale", "forced out of business sale", "fire sale", "smoke and water damage sale", "adjustment sale", "creditor's sale", "bankrupt sale", "insolvent sale", "mortgage sale", or other like or similar title;

7. "Advertisement" means any advertisement or announcement published in the news media including but not limited to the radio, television, newspapers, handbills, and mailers;

8. "License" means the written authorization issued by the court clerk of the district court in any county in this state to any person to conduct a closing out sale;

9. "Clerk" means the court clerk of the district court of any county of this state in which a person applying for a license intends to conduct a closing out sale;

10. "Automatic dial announcing device" means automatic equipment that:

- a. stores telephone numbers to be called, or has a random or sequential number generator capable of producing numbers to be called,
- b. conveys a prerecorded or synthesized voice message to the number called, and
- c. is used for the purpose of offering any goods or services for sale or conveying information regarding such goods or services;

11. "Deceptive trade practice" means a misrepresentation, omission or other practice that has deceived or could reasonably be expected to deceive or mislead a person to the detriment of that person. Such a practice may occur before, during or after a consumer transaction is entered into and may be written or oral; and

12. "Unfair trade practice" means any practice which offends established public policy or if the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

SECTION 2. AMENDATORY 15 O.S. 1991, Section 753, as last amended by Section 2, Chapter 235, O.S.L. 1994 (15 O.S. Supp. 1994, Section 753), is amended to read as follows:

~~Section 753. A person engages in a practice which is declared to be unlawful under the Oklahoma Consumer Protection Act, Section 751 et seq. of this title, when, in the course of his business, he~~
A. False, misleading or deceptive acts or practices in the conduct of any consumer transaction are hereby declared unlawful and are subject to action by any district attorney or the Attorney General of this state.

B. The term "false, misleading or deceptive acts or practices" as used in Section 751 et seq. of this title includes the following acts:

1. ~~Represents, knowingly or with reason to know,~~ Representing that the subject of a consumer transaction is of a particular make or brand, when it is of another;

2. ~~Makes Making~~ a false or misleading representation, ~~knowingly or with reason to know,~~ as to the source, sponsorship, approval, or certification of the subject of a consumer transaction;

3. ~~Makes Making~~ a false or misleading representation, ~~knowingly or with reason to know,~~ as to affiliation, connection, association with, or certification by another;

4. ~~Makes Making~~ a false or misleading representation or designation, ~~knowingly or with reason to know,~~ of the geographic origin of the subject of a consumer transaction;

5. ~~Makes Making~~ a false representation, ~~knowingly or with reason to know,~~ as to the characteristics, ingredients, uses, benefits, alterations, or quantities of the subject of a consumer transaction or a false representation as to the sponsorship, approval, status, affiliation or connection of a person therewith;

6. ~~Represents, knowingly or with reason to know,~~ Representing that the subject of a consumer transaction is original or new if ~~he~~ the person knows that it is reconditioned, reclaimed, used, or secondhand;

7. ~~Represents, knowingly or with reason to know,~~ Representing that the subject of a consumer transaction is of a particular standard, style or model, if it is of another;

8. ~~Advertises, knowingly or with reason to know,~~ Advertising the subject of a consumer transaction with intent not to sell it as advertised;

9. ~~Advertises, knowingly or with reason to know,~~ Advertising the subject of a consumer transaction with intent not to supply reasonably expected public demand, unless the advertisement discloses a limitation of quantity;

10. ~~Advertises~~ Advertising under the guise of obtaining sales personnel when in fact the purpose is to sell the subject of a consumer transaction to the sales personnel applicants;

11. ~~Makes~~ Making false or misleading statements of fact, ~~knowingly or with reason to know,~~ concerning the price of the subject of a consumer transaction or the reason for, existence of, or amounts of price reduction;

12. ~~Employs~~ Employing "bait and switch" advertising, which consists of an offer to sell the subject of a consumer transaction which the seller does not intend to sell, which advertising is accompanied by one or more of the following practices:

- a. refusal to show the subject of a consumer transaction advertised,
- b. disparagement of the advertised subject of a consumer transaction or the terms of sale,
- c. requiring undisclosed tie-in sales or other undisclosed conditions to be met prior to selling the advertised subject of a consumer transaction,
- d. refusal to take orders for the subject of a consumer transaction advertised for delivery within a reasonable time,
- e. showing or demonstrating defective subject of a consumer transaction which the seller knows is unusable or impracticable for the purpose set forth in the advertisement,
- f. accepting a deposit for the subject of a consumer transaction and subsequently charging the buyer for a higher priced item, or
- g. willful failure to make deliveries of the subject of a consumer transaction within a reasonable time or to make a refund therefor upon the request of the purchaser;

~~13. Conducts~~ Disparaging the goods, services or business of another by false or misleading representations of facts;

14. Representing that an agreement confers or involves rights, remedies or obligations which it does not have or which are prohibited by law;

15. Making false or misleading statements of fact concerning the need for services, parts, replacement or repair services;

16. Misrepresenting the authority of a salesperson, representative or agent to negotiate the final terms of a consumer transaction;

17. Disconnecting, turning back or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge;

18. Representing that work or services have been performed on or parts replaced in goods when the work or services were not performed or the parts replaced;

19. Using the term "corporation" or "incorporated", or an abbreviation of either of those terms, in the name of a business entity that is not incorporated under the laws of this state or another jurisdiction;

20. Conducting a closing out sale without having first obtained a license as required in this act, Section 751 et seq. of this title;

~~14. Resumes~~ 21. Resuming the business for which the closing out sale was conducted within one (1) year from the expiration date of the closing out sale license;

~~15. Falsely states, knowingly or with reason to know, that services, replacements or repairs are needed;~~

~~16. Violates~~ 22. Violating any provision of the Oklahoma Health Spa Act, Section 2000 et seq. of Title 59 of the Oklahoma Statutes;

~~17. Violates~~ 23. Violating any provision of the Home Repair Fraud Act, Section 765.1 et seq. of this title;

~~18. Violates~~ 24. Violating any provision of the Consumer Disclosure of Prizes and Gifts Act, Section 996.1 et seq. of Title 21 of the Oklahoma Statutes;

~~19. Violates~~ 25. Violating any provision of Section 755.1 of this title or Section 1847a of Title 21 of the Oklahoma Statutes; ~~or~~

~~20. Commits~~ 26. Committing an unfair or deceptive trade practice as defined in Section 752 of this title; or

27. Violating any provision of Sections 775A.1 through 775A.4 of this title.

SECTION 3. AMENDATORY 15 O.S. 1991, Section 754, is amended to read as follows:

Section 754. A. Nothing in ~~this act~~ Section 751 et seq. of this title shall apply to:

~~1. Publishers, broadcasters, printers, or other persons insofar as an unlawful practice as defined in Section 3 of this act involves information that has been disseminated or reproduced on behalf of others without knowledge that it is an unlawful practice.~~

~~2. Actions or transactions regulated under laws administered by the Corporation Commission or any other regulatory body or officer acting under statutory authority of this state or the United States, or to acts done by retailers or other persons acting in good faith on the basis of information or matter supplied by others and without knowledge of the deceptive character of such information or matter~~
the owner or employees of a regularly published newspaper, magazine or telephone directory, or of a broadcast station or billboard, wherein any advertisement in violation of this act is published or disseminated, unless it is established that the owner or employees of the advertising medium have knowledge of the false, deceptive or misleading acts or practices described in Section 753 of this title, or had a direct or substantial financial interest in the sale or

distribution of the unlawfully advertised goods, property or services. Financial interest as used in this section relates to an expectation which would be the direct result of such advertisement.

B. 1. Nothing in Section 751 et seq. of this title shall apply to acts or practices authorized under specific rules or regulations promulgated by the Federal Trade Commission under Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)).

2. The provisions of Section 751 et seq. of this title do apply to any act or practice prohibited or not specifically authorized by a rule or regulation of the Federal Trade Commission. An act or practice is not specifically authorized if no rule or regulation has been issued on the act or practice.

SECTION 4. AMENDATORY 15 O.S. 1991, Section 756.1, as amended by Section 3, Chapter 235, O.S.L. 1994 (15 O.S. Supp. 1994, Section 756.1), is amended to read as follows:

Section 756.1 A. ~~The~~ Whenever the Attorney General or a district attorney of this state has reason to believe that any person is engaged in, has engaged in, or is about to engage in any act or practice which is described in Section 753 of this title and which is misleading to a reasonably prudent person, and that proceedings would be in the public interest, the Attorney General or district attorney may bring an action in the name of the state against the person to restrain by temporary restraining order, temporary injunction or permanent injunction the use of such method, act or practice.

B. Nothing herein shall require the Attorney General or a district attorney to notify such person that court action is or may be under consideration. Provided, however, the Attorney General or district attorney shall, at least seven (7) days prior to instituting such court action, contact such person to inform the

person in general of the complained-of practices. Cessation of the complained-of practices after such prior contact shall not render the court action moot under any circumstances, and injunctive relief shall lie even if the person has ceased the complained-of practices after such prior contact. Such prior contact shall not be required if:

1. There is good cause to believe that the person would evade service of process if prior contact were made;

2. That the person could destroy relevant records if prior contact were made; or

3. The person engaged, is engaging or is likely to engage in the complained-of practices, knowingly or with reason to know, or with criminal intent.

C. Whenever the Attorney General or a district attorney has reason to believe that any person has, knowingly or with reason to know, engaged in, is engaging in or is likely to engage in activities described in Section 753 of this section and that proceedings would be in the public interest, the Attorney General or a district attorney may bring an action:

1. To obtain a declaratory judgment that an act or practice violates ~~the Consumer Protection Act~~ Section 751 et seq. of this title;

2. To enjoin, or to obtain a restraining order against a person who has violated, is violating, or is likely to violate ~~the Consumer Protection Act~~ Section 751 et seq. of this title;

3. To recover actual damages and, in the case of unconscionable conduct, penalties as provided by ~~this act~~ Section 751 et seq. of this title, on behalf of an aggrieved consumer, in an individual action only, for violation of ~~the Consumer Protection Act~~ Section 751 et seq. of this title; or

4. To recover civil penalties, reasonable expenses and investigation fees.

~~B.~~ D. In lieu of instigating or continuing an action or proceeding, the Attorney General or a district attorney may accept a consent judgment or assurance of voluntary discontinuance with respect to any act or practice declared to be a violation of ~~the Consumer Protection Act~~ Section 751 et seq. of this title. Such a consent judgment shall provide for the discontinuance by the person entering the same of any act or practice declared to be a violation of ~~the Consumer Protection Act~~ Section 751 et seq. of this title, and it may include a stipulation for the payment by such person of reasonable expenses and investigation fees incurred by the Attorney General or a district attorney. The consent judgment also may include a stipulation for restitution to be made by such person to consumers of money, property or other things received from such consumers in connection with a violation of ~~this act~~ Section 751 et seq. of this title and also may include a stipulation for specific performance. Any consent judgment or assurance of voluntary discontinuance entered into pursuant to this section shall not be deemed to admit the violation, unless it does so by its terms. Before any consent judgment entered into pursuant to this section shall be effective, it must be approved by the district court and an entry made thereof in the manner required for making an entry of judgment. Once such approval is received, any breach of the conditions of such consent judgment shall be treated as a violation of a court order, and shall be subject to all the penalties provided by law therefor.

~~C.~~ E. In any action brought by the Attorney General or a district attorney under subsection C of this section, the court may:

1. Make such orders or judgments as may be necessary to prevent the use or employment by a person of any practice declared to be a violation of the Consumer Protection Act;

2. Make such orders or judgments as may be necessary to compensate any person for damages sustained;

3. Make such orders or judgments as may be necessary to carry out a transaction in accordance with consumers' reasonable expectations;

4. Appoint a master or receiver or order sequestration of assets to prevent the use or enjoyment of proceeds derived through illegal means and assess the expenses of a master or receiver against the defendant;

5. Revoke any license or certificate authorizing that person to engage in business in this state;

6. Enjoin any person from engaging in business in this state;
or

7. Grant other appropriate relief.

~~D.~~ F. When an action is filed under the Consumer Protection Act by a district attorney or the Attorney General, no action seeking an injunction or declaratory judgment shall be filed in any other county or district in this state based upon the same transaction or occurrence, series of transactions or occurrences, or allegations which form the basis of the first action filed.

SECTION 5. AMENDATORY 15 O.S. 1991, Section 761.1, as amended by Section 4, Chapter 235, O.S.L. 1994 (15 O.S. Supp. 1994, Section 761.1), is amended to read as follows:

Section 761.1 A. The commission of any act or practice declared to be a violation of the Consumer Protection Act which is committed knowingly or with reason to know shall render the violator liable to the aggrieved consumer for the payment of actual damages sustained by the customer and costs of litigation including reasonable attorney's fees, and the aggrieved consumer shall have a private right of action for damages, including but not limited to, costs and attorney's fees. In any private action for damages for a violation of the Consumer Protection Act the court shall, subsequent to adjudication on the merits and upon motion of the prevailing party, determine whether a claim or defense asserted in the action

by a nonprevailing party was asserted in bad faith, was not well grounded in fact, or was unwarranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Upon so finding, the court shall enter a judgment ordering such nonprevailing party to reimburse the prevailing party an amount not to exceed Ten Thousand Dollars (\$10,000.00) for reasonable costs, including attorney's fees, incurred with respect to such claim or defense.

B. The commission of any act or practice declared to be a violation of the Consumer Protection Act, if such act or practice is also found to be unconscionable, shall render the violator liable to the aggrieved customer for the payment of a civil penalty, recoverable in an individual action only, in a sum set by the court of not more than Two Thousand Dollars (\$2,000.00) for each violation. In determining whether an act or practice is unconscionable the following circumstances shall be taken into consideration by the court: (1) whether the violator knowingly or with reason to know, took advantage of a consumer reasonably unable to protect his or her interests because of his or her age, physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor; (2) whether, at the time the consumer transaction was entered into, the violator knew or had reason to know that price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by like consumers; (3) whether, at the time the consumer transaction was entered into, the violator knew or had reason to know that there was no reasonable probability of payment of the obligation in full by the consumer; (4) whether the violator knew or had reason to know that the transaction he or she induced the consumer to enter into was excessively one-sided in favor of the violator.

C. Any person who is found to be in violation of the Oklahoma Consumer Protection Act in a civil action or who willfully violates the terms of any injunction or court order issued pursuant to the Consumer Protection Act shall forfeit and pay a civil penalty of not more than Ten Thousand Dollars (\$10,000.00) per violation, in addition to other penalties that may be imposed by the court, as the court shall deem necessary and proper. For the purposes of this section, the district court issuing an injunction shall retain jurisdiction, and in such cases, the Attorney General, acting in the name of the state, or a district attorney may petition for recovery of civil penalties.

D. In administering and pursuing actions under this act, the Attorney General and a district attorney are authorized to sue for and collect reasonable expenses, attorney's fees, and investigation fees as determined by the court. Civil penalties or contempt penalties sued for and recovered by the Attorney General or a district attorney shall be used for the furtherance of their duties and activities under the Consumer Protection Act.

E. In addition to other penalties imposed by the Oklahoma Consumer Protection Act, any person ~~convicted in a criminal proceeding of violating the Oklahoma Consumer Protection Act~~ who intentionally and willfully commits the conduct described in Section 753 of this title shall be guilty of a misdemeanor for the first offense and upon conviction thereof shall be subject to a fine not to exceed One Thousand Dollars (\$1,000.00), or imprisonment in the county jail for not more than one (1) year, or both such fine and imprisonment. If the value of the money, property or valuable thing referred to in this section is Five Hundred Dollars (\$500.00) or more or if the conviction is for a second or subsequent violation of the provisions of the Oklahoma Consumer Protection Act, any person convicted pursuant to this subsection shall be deemed guilty of a felony and shall be subject to imprisonment in the State

Penitentiary, for not more than ten (10) years, or a fine not to exceed Five Thousand Dollars (\$5,000.00), or both such fine and imprisonment.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 761.2 of Title 15, unless there is created a duplication in numbering, reads as follows:

An action brought under Section 751 et seq. of Title 15 of the Oklahoma Statutes which alleges a claim to relief may be commenced in:

1. The district court of the county in which the person against whom it is brought resides, has a principal place of business or has done business;

2. The district court of the county where the transaction occurred; or

3. On the consent of the parties, a district court of Oklahoma County.

SECTION 7. AMENDATORY Section 8, Chapter 235, O.S.L. 1994 (15 O.S. Supp. 1994, Section 775A.4), is amended to read as follows:

Section 775A.4 A. A commercial telephone seller engages in an unlawful telemarketing practice when, in the course of any commercial telephone solicitation, the seller:

1. Conducts business as a commercial telephone seller without having registered with the Attorney General, as required by Section 7 775A.3 of this ~~act~~ title;

2. Fails to allow the purchaser in any telephone sales transaction to cancel any purchase or agreement to purchase goods, services or property at any time before the expiration of three (3) business days after the purchaser's receipt of such goods, services or property by delivering or mailing to the commercial telephone seller written notice of cancellation. Notice of cancellation, if

sent by mail, is deemed to be given as of the date the mailed notice was postmarked;

3. Fails to refund all payments made by any purchaser in any telephone sales transaction within thirty (30) days after the commercial telephone seller receives notice of cancellation from the purchaser, except that:

- a. if the purchaser has received goods or property from the commercial telephone seller, other than an item represented as free, the commercial telephone seller shall refund all payments made by the purchaser within thirty (30) days after the commercial telephone seller's receipt of the returned goods or property, and
- b. if the purchaser has received services during the course of a pay-per-call service call, which services cannot, by their nature, be returned, the commercial telephone seller is not required to refund payments to the purchaser;

4. Fails to disclose to the purchaser during a telephone solicitation that the purchaser has the cancellation rights set forth in paragraph 2 of this subsection;

5. Misrepresents to any person that the person has won a contest, sweepstakes or drawing, or that the person will receive free goods, services or property;

6. Represents that the seller's goods, services or property are "free" if the commercial telephone seller charges or collects a fee from the purchaser in exchange for providing or delivering such goods, services or property;

7. Makes any reference to the commercial telephone seller's compliance with this act to any purchaser without also disclosing that compliance with this act does not constitute approval by any

governmental agency of the seller's marketing, advertisements, promotions, goods or services; or

8. Engages in any deceptive trade practice defined in Section 752 of this title.

B. Paragraphs 2 and 4 of subsection A of this section do not apply to a transaction in which the consumer obtains a full refund for the return of undamaged or unused goods or a cancellation of services by giving notice to the seller within seven (7) days after receipt by the consumer and the seller processes the refund or cancellation within thirty (30) days after receipt of the returned merchandise or the consumer's request for refund for services not performed or a pro rata refund for any services not yet performed for the consumer. The availability and terms of the return and refund privilege shall be disclosed to the consumer orally by telephone and in writing with any advertising or promotional material or with the delivery of the product or service. If a seller offers consumers an unconditional guarantee, a clear disclosure of such guarantee by using the words "satisfaction guaranteed", "free inspection" or "no-risk guarantee" satisfy the disclosure requirements of this subsection.

C. The unlawful telemarketing practices listed in this section are in addition to and do not limit the types of unfair trade practices actionable at common law or under other civil and criminal statutes of this state.

~~D. Any violations of Sections 5 through 7 of this act are violations of the Oklahoma Consumer Protection Act.~~

SECTION 8. This act shall become effective November 1, 1995.

Passed the Senate the 14th day of March, 1995.

President of the Senate

Passed the House of Representatives the ____ day of
_____, 1995.

Speaker of the House of
Representatives