

ASSEMBLY BILL NO. 366—ASSEMBLYMEN MASTROLUCA;
CONKLIN, KIRKPATRICK AND PIERCE

MARCH 16, 2009

Referred to Committee on Commerce and Labor

SUMMARY—Makes various changes regarding deceptive trade practices. (BDR 52-818)

FISCAL NOTE: Effect on Local Government: Increases or Newly
Provides for Term of Imprisonment in County or City
Jail or Detention Facility.
Effect on the State: Yes.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to deceptive trade practices; establishing a private right of action for civil remedies for a person injured by a person engaging in a deceptive trade practice; revising the definition of “deceptive trade practice”; revising provisions governing actions by victims of fraud; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

Section 1 of this bill provides that a person who is injured by a deceptive trade practice may bring a private civil action against the person who engaged in the deceptive trade practice. **Section 1** authorizes the prevailing party to recover, for each such violation, actual and consequential damages, certain punitive damages, reasonable attorney’s fees and costs and any other legal or equitable relief the court deems appropriate. **Section 1** also establishes, as statutory damages, \$1,000 for each violation that is not willful and \$5,000 for each willful violation.

Section 3 of this bill provides that a person engages in a “deceptive trade practice” if, in the course of his business or occupation, he takes advantage of another person’s inability to reasonably protect his rights because of an infirmity.

Section 9 of this bill revises provisions governing actions by victims of fraud, which includes actions by victims of certain deceptive trade practices, to authorize a court to award equitable relief.



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THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 598 of NRS is hereby amended by adding thereto a new section to read as follows:

1. Subject to any affirmative defense set forth in subsection 2, in addition to any other remedy or penalty, if a person engages in a deceptive trade practice or otherwise violates any provision of this chapter or any regulation adopted pursuant thereto, the injured person may bring a civil action against the person who violated this chapter for:

(a) If the violation was not willful, statutory damages of \$1,000 per violation;

(b) If the violation was willful, statutory damages of \$5,000 per violation;

(c) Actual and consequential damages;

(d) Punitive damages, which are subject to the provisions of NRS 42.005;

(e) Reasonable attorney's fees and costs; and

(f) Any other legal or equitable relief that the court deems appropriate.

2. A person may not be held liable in any civil action brought pursuant to this section if the person proves, by a preponderance of evidence, that the violation:

(a) Was not intentional;

(b) Was technical in nature; and

(c) Resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

3. For the purposes of subsection 2, a bona fide error includes, without limitation, clerical errors, printing errors, calculation errors and computer malfunction and programming errors, except that an error of legal judgment with respect to the person's obligations under this chapter is not a bona fide error.

Sec. 2. NRS 598.0903 is hereby amended to read as follows:

598.0903 As used in NRS 598.0903 to 598.0999, inclusive, *and section 1 of this act*, unless the context otherwise requires, the words and terms defined in NRS 598.0905 to 598.0947, inclusive, have the meanings ascribed to them in those sections.

Sec. 3. NRS 598.092 is hereby amended to read as follows:

598.092 A person engages in a "deceptive trade practice" when in the course of his business or occupation he:

1. Knowingly fails to identify goods for sale or lease as being damaged by water.



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2. Solicits by telephone or door to door as a lessor or seller, unless the lessor or seller identifies himself, whom he represents and the purpose of his call within 30 seconds after beginning the conversation.

3. Knowingly states that services, replacement parts or repairs are needed when no such services, replacement parts or repairs are actually needed.

4. Fails to make delivery of goods or services for sale or lease within a reasonable time or to make a refund for the goods or services, if he allows refunds.

5. Advertises or offers an opportunity for investment and:

(a) Represents that the investment is guaranteed, secured or protected in a manner which he knows or has reason to know is false or misleading;

(b) Represents that the investment will earn a rate of return which he knows or has reason to know is false or misleading;

(c) Makes any untrue statement of a material fact or omits to state a material fact which is necessary to make another statement, considering the circumstances under which it is made, not misleading;

(d) Fails to maintain adequate records so that an investor may determine how his money is invested;

(e) Fails to provide information to an investor after a reasonable request for information concerning his investment;

(f) Fails to comply with any law or regulation for the marketing of securities or other investments; or

(g) Represents that he is licensed by an agency of the State to sell or offer for sale investments or services for investments if he is not so licensed.

6. Charges a fee for advice with respect to investment of money and fails to disclose:

(a) That he is selling or offering to lease goods or services and, if he is, their identity; or

(b) That he is licensed by an agency of any state or of the United States to sell or to offer for sale investments or services for investments, or holds any other license related to the service he is providing.

7. Notifies any person, by any means, as a part of an advertising plan or scheme, that he has won a prize and that as a condition of receiving the prize he must purchase or lease goods or services.

8. Knowingly misrepresents the legal rights, obligations or remedies of a party to a transaction.

9. *Knowingly uses for his own advantage another person's inability to reasonably protect his rights or interests because of a*



mental or physical infirmity, including, without limitation, ignorance, illiteracy or incapability to understand the language or terms of any agreement.

10. Fails, in a consumer transaction that is rescinded, cancelled or otherwise terminated in accordance with the terms of an agreement, advertisement, representation or provision of law, to promptly restore to a person entitled to it a deposit, down payment or other payment or, in the case of property traded in but not available, the agreed value of the property, or fails to cancel within a specified time or an otherwise reasonable time an acquired security interest. This subsection does not apply to a person who is holding a deposit, down payment or other payment on behalf of another if all parties to the transaction have not agreed to the release of the deposit, down payment or other payment.

~~10.~~ **11.** Fails to inform customers, if he does not allow refunds or exchanges, that he does not allow refunds or exchanges by:

- (a) Printing a statement on the face of the lease or sales receipt;
 - (b) Printing a statement on the face of the price tag; or
 - (c) Posting in an open and conspicuous place a sign at least 8 by 10 inches in size with boldface letters,
- specifying that no refunds or exchanges are allowed.

Sec. 4. NRS 598.0955 is hereby amended to read as follows:
598.0955 1. The provisions of NRS 598.0903 to 598.0999, inclusive, *and section 1 of this act* do not apply to:

(a) Conduct in compliance with the orders or rules of, or a statute administered by, a federal, state or local governmental agency.

(b) Publishers, including outdoor advertising media, advertising agencies, broadcasters or printers engaged in the dissemination of information or reproduction of printed or pictorial matter who publish, broadcast or reproduce material without knowledge of its deceptive character.

(c) Actions or appeals pending on July 1, 1973.

2. The provisions of NRS 598.0903 to 598.0999, inclusive, *and section 1 of this act* do not apply to the use by a person of any service mark, trademark, certification mark, collective mark, trade name or other trade identification which was used and not abandoned prior to July 1, 1973, if the use was in good faith and is otherwise lawful except for the provisions of NRS 598.0903 to 598.0999, inclusive ~~1.~~, *and section 1 of this act.*

Sec. 5. NRS 598.096 is hereby amended to read as follows:

598.096 When the Commissioner, Director or Attorney General has cause to believe that any person has engaged or is engaging in any deceptive trade practice, he may:



1 1. Request the person to file a statement or report in writing
2 under oath or otherwise, on such forms as may be prescribed by the
3 Commissioner, Director or Attorney General, as to all facts and
4 circumstances concerning the sale or advertisement of property by
5 the person, and such other data and information as the
6 Commissioner, Director or Attorney General may deem necessary.

7 2. Examine under oath any person in connection with the sale
8 or advertisement of any property.

9 3. Examine any property or sample thereof, record, book,
10 document, account or paper as he may deem necessary.

11 4. Make true copies, at the expense of the Consumer Affairs
12 Division of the Department of Business and Industry, of any record,
13 book, document, account or paper examined pursuant to subsection
14 3, which copies may be offered into evidence in lieu of the originals
15 thereof in actions brought pursuant to NRS 598.097 and 598.0979.

16 5. Pursuant to an order of any district court, impound any
17 sample of property which is material to the deceptive trade practice
18 and retain the property in his possession until completion of all
19 proceedings as provided in NRS 598.0903 to 598.0999, inclusive §
20 *, and section 1 of this act.* An order may not be issued pursuant to
21 this subsection unless:

22 (a) The Commissioner, Director or Attorney General § and the
23 court give the accused full opportunity to be heard; and

24 (b) The Commissioner, Director or Attorney General proves by
25 clear and convincing evidence that the business activities of the
26 accused will not be impaired thereby.

27 **Sec. 6.** NRS 598.0971 is hereby amended to read as follows:

28 598.0971 1. If, after an investigation, the Commissioner has
29 reasonable cause to believe that any person has been engaged or is
30 engaging in any deceptive trade practice in violation of NRS
31 598.0903 to 598.0999, inclusive, *and section 1 of this act*, the
32 Commissioner may issue an order directed to the person to show
33 cause why the Commissioner should not order the person to cease
34 and desist from engaging in the practice. The order must contain a
35 statement of the charges and a notice of a hearing to be held thereon.
36 The order must be served upon the person directly or by certified or
37 registered mail, return receipt requested.

38 2. If, after conducting a hearing pursuant to the provisions of
39 subsection 1, the Commissioner determines that the person has
40 violated any of the provisions of NRS 598.0903 to 598.0999,
41 inclusive, *and section 1 of this act*, or if the person fails to appear
42 for the hearing after being properly served with the statement of
43 charges and notice of hearing, the Commissioner may make a
44 written report of his findings of fact concerning the violation and
45 cause to be served a copy thereof upon the person and any



1 intervener at the hearing. If the Commissioner determines in the
2 report that such a violation has occurred, he may order the violator
3 to:

4 (a) Cease and desist from engaging in the practice or other
5 activity constituting the violation;

6 (b) Pay the costs of conducting the investigation, costs of
7 conducting the hearing, costs of reporting services, fees for experts
8 and other witnesses, charges for the rental of a hearing room if such
9 a room is not available to the Commissioner free of charge, charges
10 for providing an independent hearing officer, if any, and charges
11 incurred for any service of process, if the violator is adjudicated to
12 have committed a violation of NRS 598.0903 to 598.0999, inclusive
13 ~~§~~, and section 1 of this act; and

14 (c) Provide restitution for any money or property improperly
15 received or obtained as a result of the violation.

16 ➔ The order must be served upon the person directly or by certified
17 or registered mail, return receipt requested. The order becomes
18 effective upon service in the manner provided in this subsection.

19 3. Any person whose pecuniary interests are directly and
20 immediately affected by an order issued pursuant to subsection 2 or
21 who is aggrieved by the order may petition for judicial review in the
22 manner provided in chapter 233B of NRS. Such a petition must be
23 filed within 30 days after the service of the order. The order
24 becomes final upon the filing of the petition.

25 4. If a person fails to comply with any provision of an order
26 issued pursuant to subsection 2, the Commissioner may, through the
27 Attorney General, at any time after 30 days after the service of
28 the order, cause an action to be instituted in the district court of the
29 county wherein the person resides or has his principal place of
30 business requesting the court to enforce the provisions of the order
31 or to provide any other appropriate injunctive relief.

32 5. If the court finds that:

33 (a) The violation complained of is a deceptive trade practice;

34 (b) The proceedings by the Commissioner concerning the
35 written report and any order issued pursuant to subsection 2 are in
36 the interest of the public; and

37 (c) The findings of the Commissioner are supported by the
38 weight of the evidence,

39 ➔ the court shall issue an order enforcing the provisions of the order
40 of the Commissioner.

41 6. Except as otherwise provided in NRS 598.0974, an order
42 issued pursuant to subsection 5 may include:

43 (a) A provision requiring the payment to the Commissioner of a
44 penalty of not more than \$5,000 for each act amounting to a failure
45 to comply with the Commissioner's order; or



(b) Such injunctive or other equitable or extraordinary relief as is determined appropriate by the court.

7. Any aggrieved party may appeal from the final judgment, order or decree of the court in a like manner as provided for appeals in civil cases.

8. Upon the violation of any judgment, order or decree issued pursuant to subsection 5 or 6, the Commissioner, after a hearing thereon, may proceed in accordance with the provisions of NRS 598.0999.

Sec. 7. NRS 598.0999 is hereby amended to read as follows:

598.0999 1. Except as otherwise provided in NRS 598.0974, a person who violates a court order or injunction issued pursuant to the provisions of NRS 598.0903 to 598.0999, inclusive, *and section 1 of this act*, upon a complaint brought by the Commissioner, the Director, the district attorney of any county of this State or the Attorney General shall forfeit and pay to the State General Fund a civil penalty of not more than \$10,000 for each violation. For the purpose of this section, the court issuing the order or injunction retains jurisdiction over the action or proceeding. Such civil penalties are in addition to any other penalty or remedy available for the enforcement of the provisions of NRS 598.0903 to 598.0999, inclusive ~~[]~~, *and section 1 of this act*.

2. Except as otherwise provided in NRS 598.0974, in any action brought pursuant to the provisions of NRS 598.0903 to 598.0999, inclusive, *and section 1 of this act*, if the court finds that a person has willfully engaged in a deceptive trade practice, the Commissioner, the Director, the district attorney of any county in this State or the Attorney General bringing the action may recover a civil penalty not to exceed \$5,000 for each violation. The court in any such action may, in addition to any other relief or reimbursement, award reasonable attorney's fees and costs.

3. A natural person, firm, or any officer or managing agent of any corporation or association who knowingly and willfully engages in a deceptive trade practice:

(a) For the first offense, is guilty of a misdemeanor.

(b) For the second offense, is guilty of a gross misdemeanor.

(c) For the third and all subsequent offenses, is guilty of a category D felony and shall be punished as provided in NRS 193.130.

➔ The court may require the natural person, firm, or officer or managing agent of the corporation or association to pay to the aggrieved party damages on all profits derived from the knowing and willful engagement in a deceptive trade practice and treble damages on all damages suffered by reason of the deceptive trade practice.



4. Any offense which occurred within 10 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of subsection 3 when evidenced by a conviction, without regard to the sequence of the offenses and convictions.

5. If a person violates any provision of NRS 598.0903 to 598.0999, inclusive, *and section 1 of this act*, 598.100 to 598.2801, inclusive, 598.305 to 598.395, inclusive, 598.405 to 598.525, inclusive, 598.741 to 598.787, inclusive, or 598.840 to 598.966, inclusive, fails to comply with a judgment or order of any court in this State concerning a violation of such a provision, or fails to comply with an assurance of discontinuance or other agreement concerning an alleged violation of such a provision, the Commissioner or the district attorney of any county may bring an action in the name of the State of Nevada seeking:

(a) The suspension of the person's privilege to conduct business within this State; or

(b) If the defendant is a corporation, dissolution of the corporation.

➤ The court may grant or deny the relief sought or may order other appropriate relief.

6. If a person violates any provision of NRS 228.500 to 228.640, inclusive, fails to comply with a judgment or order of any court in this State concerning a violation of such a provision, or fails to comply with an assurance of discontinuance or other agreement concerning an alleged violation of such a provision, the Attorney General may bring an action in the name of the State of Nevada seeking:

(a) The suspension of the person's privilege to conduct business within this State; or

(b) If the defendant is a corporation, dissolution of the corporation.

➤ The court may grant or deny the relief sought or may order other appropriate relief.

Sec. 8. NRS 11.190 is hereby amended to read as follows:

11.190 Except as otherwise provided in NRS 125B.050 and 217.007, actions other than those for the recovery of real property, unless further limited by specific statute, may only be commenced as follows:

1. Within 6 years:

(a) An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or the renewal thereof.



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(b) An action upon a contract, obligation or liability founded upon an instrument in writing, except those mentioned in the preceding sections of this chapter.

2. Within 4 years:

(a) An action on an open account for goods, wares and merchandise sold and delivered.

(b) An action for any article charged on an account in a store.

(c) An action upon a contract, obligation or liability not founded upon an instrument in writing.

(d) An action against a person alleged to have committed a deceptive trade practice in violation of NRS 598.0903 to 598.0999, inclusive, *and section 1 of this act*, but the cause of action shall be deemed to accrue when the aggrieved party discovers, or by the exercise of due diligence should have discovered, the facts constituting the deceptive trade practice.

3. Within 3 years:

(a) An action upon a liability created by statute, other than a penalty or forfeiture.

(b) An action for waste or trespass of real property, but when the waste or trespass is committed by means of underground works upon any mining claim, the cause of action shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the waste or trespass.

(c) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof, but in all cases where the subject of the action is a domestic animal usually included in the term "livestock," which has a recorded mark or brand upon it at the time of its loss, and which strays or is stolen from the true owner without his fault, the statute does not begin to run against an action for the recovery of the animal until the owner has actual knowledge of such facts as would put a reasonable person upon inquiry as to the possession thereof by the defendant.

(d) Except as otherwise provided in NRS 112.230 and 166.170, an action for relief on the ground of fraud or mistake, but the cause of action in such a case shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(e) An action pursuant to NRS 40.750 for damages sustained by a financial institution or other lender because of its reliance on certain fraudulent conduct of a borrower, but the cause of action in such a case shall be deemed to accrue upon the discovery by the financial institution or other lender of the facts constituting the concealment or false statement.

4. Within 2 years:



(a) An action against a sheriff, coroner or constable upon liability incurred by acting in his official capacity and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution.

(b) An action upon a statute for a penalty or forfeiture, where the action is given to a person or the State, or both, except when the statute imposing it prescribes a different limitation.

(c) An action for libel, slander, assault, battery, false imprisonment or seduction.

(d) An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process.

(e) Except as otherwise provided in NRS 11.215, an action to recover damages for injuries to a person or for the death of a person caused by the wrongful act or neglect of another. The provisions of this paragraph relating to an action to recover damages for injuries to a person apply only to causes of action which accrue after March 20, 1951.

(f) An action to recover damages under NRS 41.740.

5. Within 1 year:

(a) An action against an officer, or officer de facto to recover goods, wares, merchandise or other property seized by the officer in his official capacity, as tax collector, or to recover the price or value of goods, wares, merchandise or other personal property so seized, or for damages for the seizure, detention or sale of, or injury to, goods, wares, merchandise or other personal property seized, or for damages done to any person or property in making the seizure.

(b) An action against an officer, or officer de facto for money paid to the officer under protest, or seized by the officer in his official capacity, as a collector of taxes, and which, it is claimed, ought to be refunded.

Sec. 9. NRS 41.600 is hereby amended to read as follows:

41.600 1. An action may be brought by any person who is a victim of consumer fraud.

2. As used in this section, "consumer fraud" means:

(a) An unlawful act as defined in NRS 119.330;

(b) An unlawful act as defined in NRS 205.2747;

(c) An act prohibited by NRS 482.36655 to 482.36667, inclusive;

(d) An act prohibited by NRS 482.351; or

(e) A deceptive trade practice as defined in NRS 598.0915 to 598.0925, inclusive.

3. If the claimant is the prevailing party, the court shall award him:

(a) Any damages that he has sustained; ~~and~~

(b) *Any equitable relief that the court deems appropriate; and*



(c) His costs in the action and reasonable attorney's fees.

4. Any action brought pursuant to this section is not an action upon any contract underlying the original transaction.

Sec. 10. NRS 645B.189 is hereby amended to read as follows:

645B.189 1. If, in carrying on his business, a mortgage broker uses an advertisement that is designed, intended or reasonably likely to solicit money from private investors, the mortgage broker shall include in each such advertisement a statement of disclosure in substantially the following form:

Money invested through a mortgage broker is not guaranteed to earn any interest or return and is not insured.

2. A mortgage broker shall include in each advertisement that the mortgage broker uses in carrying on his business any statements of disclosure required pursuant to the regulations adopted by the Commissioner or required pursuant to an order of the Commissioner entered in accordance with subsections 7 and 8 of NRS 645B.185.

3. Each mortgage broker who has received his initial license within the past 12 months shall submit any proposed advertisement that the mortgage broker intends to use in carrying on his business to the Commissioner for approval.

4. In addition to the requirements set forth in this chapter, each advertisement that a mortgage broker uses in carrying on his business must comply with the requirements of:

(a) NRS 598.0903 to 598.0999, inclusive, *and section 1 of this act* concerning deceptive trade practices; and

(b) Any applicable federal statute or regulation concerning deceptive advertising and the advertising of interest rates.

5. If a mortgage broker violates any provision of NRS 598.0903 to 598.0999, inclusive, *and section 1 of this act* concerning deceptive trade practices or any federal statute or regulation concerning deceptive advertising or the advertising of interest rates, in addition to any sanction or penalty imposed by state or federal law upon the mortgage broker for the violation, the Commissioner may take any disciplinary action set forth in subsection 2 of NRS 645B.670 against the mortgage broker.

6. The Commissioner may adopt any regulations that are necessary to carry out the provisions of this section.

Sec. 11. This act becomes effective on July 1, 2009.

