

**AMENDMENTS RELATING TO DECEPTIVE
PRACTICES INVOLVING CONSUMERS**

2010 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Marie H. Poulson

Senate Sponsor: Wayne L. Niederhauser

LONG TITLE

General Description:

This bill modifies provisions relating to deceptive practices involving consumers.

Highlighted Provisions:

This bill:

► provides that certain false expressions in an advertisement are deceptive acts or practices for purposes of the Utah Consumer Sales Practices Act and truth in advertising provisions.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

13-11-4, as last amended by Laws of Utah 2008, Chapter 232

13-11a-3, as last amended by Laws of Utah 2009, Chapter 133

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **13-11-4** is amended to read:

13-11-4. Deceptive act or practice by supplier.



28 (1) A deceptive act or practice by a supplier in connection with a consumer transaction
29 violates this chapter whether it occurs before, during, or after the transaction.

30 (2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or
31 practice if the supplier knowingly or intentionally:

32 (a) indicates that the subject of a consumer transaction has sponsorship, approval,
33 performance characteristics, accessories, uses, or benefits, if it has not;

34 (b) indicates that the subject of a consumer transaction is of a particular standard,
35 quality, grade, style, or model, if it is not;

36 (c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or
37 has been used to an extent that is materially different from the fact;

38 (d) indicates that the subject of a consumer transaction is available to the consumer for
39 a reason that does not exist[?], including any of the following reasons falsely used in an
40 advertisement:

41 (i) "going out of business";

42 (ii) "bankruptcy sale";

43 (iii) "lost our lease";

44 (iv) "building coming down";

45 (v) "forced out of business";

46 (vi) "final days";

47 (vii) "liquidation sale";

48 (viii) "fire sale";

49 (ix) "quitting business"; or

50 (x) an expression similar to any of the expressions in Subsections (2)(d)(i) through
51 (ix);

52 (e) indicates that the subject of a consumer transaction has been supplied in accordance
53 with a previous representation, if it has not;

54 (f) indicates that the subject of a consumer transaction will be supplied in greater
55 quantity than the supplier intends;

56 (g) indicates that replacement or repair is needed, if it is not;

57 (h) indicates that a specific price advantage exists, if it does not;

58 (i) indicates that the supplier has a sponsorship, approval, or affiliation the supplier

59 does not have;

60 (j) (i) indicates that a consumer transaction involves or does not involve a warranty, a
61 disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations, if
62 the representation is false; or

63 (ii) fails to honor a warranty or a particular warranty term;

64 (k) indicates that the consumer will receive a rebate, discount, or other benefit as an
65 inducement for entering into a consumer transaction in return for giving the supplier the names
66 of prospective consumers or otherwise helping the supplier to enter into other consumer
67 transactions, if receipt of the benefit is contingent on an event occurring after the consumer
68 enters into the transaction;

69 (l) after receipt of payment for goods or services, fails to ship the goods or furnish the
70 services within the time advertised or otherwise represented or, if no specific time is advertised
71 or represented, fails to ship the goods or furnish the services within 30 days, unless within the
72 applicable time period the supplier provides the buyer with the option to:

73 (i) cancel the sales agreement and receive a refund of all previous payments to the
74 supplier if the refund is mailed or delivered to the buyer within 10 business days after the day
75 on which the seller receives written notification from the buyer of the buyer's intent to cancel
76 the sales agreement and receive the refund; or

77 (ii) extend the shipping date to a specific date proposed by the supplier;

78 (m) except as provided in Subsection (3)(b), fails to furnish a notice meeting the
79 requirements of Subsection (3)(a) of the purchaser's right to cancel a direct solicitation sale
80 within three business days of the time of purchase if:

81 (i) the sale is made other than at the supplier's established place of business pursuant to
82 the supplier's personal contact, whether through mail, electronic mail, facsimile transmission,
83 telephone, or any other form of direct solicitation; and

84 (ii) the sale price exceeds \$25;

85 (n) promotes, offers, or grants participation in a pyramid scheme as defined under Title
86 76, Chapter 6a, Pyramid Scheme Act;

87 (o) represents that the funds or property conveyed in response to a charitable
88 solicitation will be donated or used for a particular purpose or will be donated to or used by a
89 particular organization, if the representation is false;

90 (p) if a consumer indicates the consumer's intention of making a claim for a motor
91 vehicle repair against the consumer's motor vehicle insurance policy:

92 (i) commences the repair without first giving the consumer oral and written notice of:

93 (A) the total estimated cost of the repair; and

94 (B) the total dollar amount the consumer is responsible to pay for the repair, which
95 dollar amount may not exceed the applicable deductible or other copay arrangement in the
96 consumer's insurance policy; or

97 (ii) requests or collects from a consumer an amount that exceeds the dollar amount a
98 consumer was initially told the consumer was responsible to pay as an insurance deductible or
99 other copay arrangement for a motor vehicle repair under Subsection (2)(p)(i), even if that
100 amount is less than the full amount the motor vehicle insurance policy requires the insured to
101 pay as a deductible or other copay arrangement, unless:

102 (A) the consumer's insurance company denies that coverage exists for the repair, in
103 which case, the full amount of the repair may be charged and collected from the consumer; or

104 (B) the consumer misstates, before the repair is commenced, the amount of money the
105 insurance policy requires the consumer to pay as a deductible or other copay arrangement, in
106 which case, the supplier may charge and collect from the consumer an amount that does not
107 exceed the amount the insurance policy requires the consumer to pay as a deductible or other
108 copay arrangement;

109 (q) includes in any contract, receipt, or other written documentation of a consumer
110 transaction, or any addendum to any contract, receipt, or other written documentation of a
111 consumer transaction, any confession of judgment or any waiver of any of the rights to which a
112 consumer is entitled under this chapter;

113 (r) charges a consumer for a consumer transaction that has not previously been agreed
114 to by the consumer;

115 (s) solicits or enters into a consumer transaction with a person who lacks the mental
116 ability to comprehend the nature and consequences of:

117 (i) the consumer transaction; or

118 (ii) the person's ability to benefit from the consumer transaction;

119 (t) solicits for the sale of a product or service by providing a consumer with an
120 unsolicited check or negotiable instrument the presentment or negotiation of which obligates

121 the consumer to purchase a product or service, unless the supplier is:

122 (i) a depository institution under Section 7-1-103;

123 (ii) an affiliate of a depository institution; or

124 (iii) an entity regulated under Title 7, Financial Institutions Act;

125 (u) sends an unsolicited mailing to a person that appears to be a billing, statement, or
126 request for payment for a product or service the person has not ordered or used, or that implies
127 that the mailing requests payment for an ongoing product or service the person has not received
128 or requested;

129 (v) issues a gift certificate, instrument, or other record in exchange for payment to
130 provide the bearer, upon presentation, goods or services in a specified amount without printing
131 in a readable manner on the gift certificate, instrument, packaging, or record any expiration
132 date or information concerning a fee to be charged and deducted from the balance of the gift
133 certificate, instrument, or other record; or

134 (w) misrepresents the geographical origin or location of the supplier's business in
135 connection with the sale of cut flowers, flower arrangements, or floral products.

136 (3) (a) The notice required by Subsection (2)(m) shall:

137 (i) be a conspicuous statement written in dark bold with at least 12 point type on the
138 first page of the purchase documentation; and

139 (ii) read as follows: "YOU, THE BUYER, MAY CANCEL THIS CONTRACT AT
140 ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY (or time period
141 reflecting the supplier's cancellation policy but not less than three business days) AFTER THE
142 DATE OF THE TRANSACTION OR RECEIPT OF THE PRODUCT, WHICHEVER IS
143 LATER".

144 (b) A supplier is exempt from the requirements of Subsection (2)(m) if the supplier's
145 cancellation policy:

146 (i) is communicated to the buyer; and

147 (ii) offers greater rights to the buyer than Subsection (2)(m).

148 (4) (a) A gift certificate, instrument, or other record that does not print an expiration
149 date in accordance with Subsection (2)(v) does not expire.

150 (b) A gift certificate, instrument, or other record that does not include printed
151 information concerning a fee to be charged and deducted from the balance of the gift

152 certificate, instrument, or other record is not subject to the charging and deduction of the fee.

153 (c) Subsections (2)(v) and (4)(b) do not apply to a gift certificate, instrument, or other
154 record useable at multiple, unaffiliated sellers of goods or services if an expiration date is
155 printed on the gift certificate, instrument, or other record.

156 Section 2. Section **13-11a-3** is amended to read:

157 **13-11a-3. Deceptive trade practices enumerated -- Records to be kept -- Defenses.**

158 (1) Deceptive trade practices occur when, in the course of a person's business,
159 vocation, or occupation that person:

160 (a) passes off goods or services as those of another;

161 (b) causes likelihood of confusion or of misunderstanding as to the source,
162 sponsorship, approval, or certification of goods or services;

163 (c) causes likelihood of confusion or of misunderstanding as to affiliation, connection,
164 association with, or certification by another;

165 (d) uses deceptive representations or designations of geographic origin in connection
166 with goods or services;

167 (e) represents that goods or services have sponsorship, approval, characteristics,
168 ingredients, uses, benefits, or qualities that they do not have or that a person has a sponsorship,
169 approval, status, affiliation, or connection that the person does not have;

170 (f) represents that goods are original or new if they are deteriorated, altered,
171 reconditioned, reclaimed, used, or second-hand;

172 (g) represents that goods or services are of a particular standard, quality, or grade, or
173 that goods are of a particular style or model, if they are of another;

174 (h) disparages the goods, services, or business of another by false or misleading
175 representation of fact;

176 (i) advertises goods or services or the price of goods and services with intent not to sell
177 them as advertised;

178 (j) advertises goods or services with intent not to supply a reasonable expectable public
179 demand, unless:

180 (i) the advertisement clearly and conspicuously discloses a limitation of quantity; or

181 (ii) the person issues rainchecks for the advertised goods or services;

182 (k) makes false or misleading statements of fact concerning the reasons for, existence

183 of, or amounts of price reductions[;], including the false use of any of the following
184 expressions in an advertisement:

185 (i) "going out of business";

186 (ii) "bankruptcy sale";

187 (iii) "lost our lease";

188 (iv) "building coming down";

189 (v) "forced out of business";

190 (vi) "final days";

191 (vii) "liquidation sale";

192 (viii) "fire sale";

193 (ix) "quitting business"; or

194 (x) an expression similar to any of the expressions in Subsections (1)(k)(i) through
195 (ix);

196 (l) makes a comparison between the person's own sale or discount price and a
197 competitor's nondiscounted price without clearly and conspicuously disclosing that fact;

198 (m) without clearly and conspicuously disclosing the date of the price assessment
199 makes a price comparison with the goods of another based upon a price assessment performed
200 more than seven days prior to the date of the advertisement or uses in an advertisement the
201 results of a price assessment performed more than seven days prior to the date of the
202 advertisement without disclosing, in a print ad, the date of the price assessment, or in a radio or
203 television ad, the time frame of the price assessment;

204 (n) advertises or uses in a price assessment or comparison a price that is not that
205 person's own unless this fact is:

206 (i) clearly and conspicuously disclosed; and

207 (ii) the representation of the price is accurate;

208 (o) represents as independent an audit, accounting, price assessment, or comparison of
209 prices of goods or services, when the audit, accounting, price assessment, or comparison is not
210 independent;

211 (p) represents, in an advertisement of a reduction from the supplier's own prices, that
212 the reduction is from a regular price, when the former price is not a regular price as defined in
213 Subsection 13-11a-2(14);

214 (q) advertises a price comparison or the result of a price assessment or comparison that
215 uses, in any way, an identified competitor's price without clearly and conspicuously disclosing
216 the identity of the price assessor and any relationship between the price assessor and the
217 supplier;

218 (r) makes a price comparison between a category of the supplier's goods and the same
219 category of the goods of another, without randomly selecting the individual goods or services
220 upon whose prices the comparison is based;

221 (s) makes a comparison between similar but nonidentical goods or services unless the
222 nonidentical goods or services are of essentially similar quality to the advertised goods or
223 services or the dissimilar aspects are clearly and conspicuously disclosed in the advertisements;
224 or

225 (t) engages in any other conduct which similarly creates a likelihood of confusion or of
226 misunderstanding.

227 (2) (a) For purposes of Subsection (1)(i), if a specific advertised price will be in effect
228 for less than one week from the advertisement date, the advertisement must clearly and
229 conspicuously disclose the specific time period during which the price will be in effect.

230 (b) For purposes of Subsection (1)(n), with respect to the price of a competitor, the
231 price must be one at which the competitor offered the goods or services for sale in the product
232 area at the time of the price assessment, and must not be an isolated price.

233 (c) For purposes of Subsection (1)(o), an audit, accounting, price assessment, or
234 comparison shall be independent if the price assessor randomly selects the goods to be
235 compared, and the time and place of the comparison, and no agreement or understanding exists
236 between the supplier and the price assessor that could cause the results of the assessment to be
237 fraudulent or deceptive. The independence of an audit, accounting, or price comparison is not
238 invalidated merely because the advertiser pays a fee for the audit, accounting, or price
239 comparison, but is invalidated if the audit, accounting, or price comparison is done by a full or
240 part-time employee of the advertiser.

241 (d) Examples of a disclosure that complies with Subsection (1)(q) are:

242 (i) "Price assessment performed by Store Z";

243 (ii) "Price assessment performed by a certified public accounting firm"; or

244 (iii) "Price assessment performed by employee of Store Y".

245 (e) For the purposes of Subsection (1)(r), goods or services are randomly selected when
246 the supplier has no advance knowledge of what goods and services will be surveyed by the
247 price assessor, and when the supplier certifies its lack of advance knowledge by an affidavit to
248 be retained in the supplier's records for one year.

249 (f) (i) It is prima facie evidence of compliance with Subsection (1)(s) if:

250 (A) the goods compared are substantially the same size; and

251 (B) the goods compared are of substantially the same quality, which may include
252 similar models of competing brands of goods, or goods made of substantially the same
253 materials and made with substantially the same workmanship.

254 (ii) It is prima facie evidence of a deceptive comparison under this section when the
255 prices of brand name goods and generic goods are compared.

256 (3) Any supplier who makes a comparison with a competitor's price in advertising shall
257 maintain for a period of one year records that disclose the factual basis for such price
258 comparisons and from which the validity of such claim can be established.

259 (4) It is a defense to any claim of false or deceptive price representations under this
260 chapter that a person:

261 (a) has no knowledge that the represented price is not genuine; and

262 (b) has made reasonable efforts to determine whether the represented price is genuine.

263 (5) Subsections (1)(m) and (q) do not apply to price comparisons made in catalogs in
264 which a supplier compares the price of a single item of its goods or services with those of
265 another.

266 (6) To prevail in an action under this chapter, a complainant need not prove
267 competition between the parties or actual confusion or misunderstanding.

268 (7) This chapter does not affect unfair trade practices otherwise actionable at common
269 law or under other statutes of this state.

Legislative Review Note
as of 1-13-10 4:17 PM

Office of Legislative Research and General Counsel

H.B. 97 - Amendments Relating to Deceptive Practices Involving Consumers

Fiscal Note

2010 General Session

State of Utah

State Impact

Enactment of this bill will not require additional appropriations.

Individual, Business and/or Local Impact

Enactment of this bill likely will not result in direct, measurable costs and/or benefits for individuals, businesses, or local governments.
