

As Engrossed: 3/23/95

1 **State of Arkansas**
2 **80th General Assembly**
3 **Regular Session, 1995**
4 **By: Representative Lynn**

A Bill

ACT 836 OF 1995
HOUSE BILL 1486

For An Act To Be Entitled

8 "AN ACT TO AMEND VARIOUS SECTIONS OF THE _DECEPTIVE TRADE
9 PRACTICES ACT, _ ARKANSAS CODE ANNOTATED §§ 4-88-101 ET
10 SEQ.; AND FOR OTHER PURPOSES."

Subtitle

13 "TO AMEND VARIOUS SECTIONS OF THE
14 DECEPTIVE TRADE PRACTICES ACT."

16 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

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18 SECTION 1. Arkansas Code Annotated § 4-88-104 is amended to read as
19 follows:

20 "4-88-104. Injunctions.

21 In addition to the criminal penalty imposed hereunder, the Attorney
22 General of this state shall have authority, acting through the Consumer
23 Counsel, to file an action in the court designated in § 4-88-112, for civil
24 enforcement of the provisions of this chapter, including but not limited to
25 the seeking of restitution and the seeking of an injunction prohibiting any
26 person from engaging in any deceptive or unlawful practice prohibited by this
27 chapter."

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29 SECTION 2. Arkansas Code Annotated § 4-88-108 is amended to read as
30 follows:

31 "4-88-108. Concealment, suppression, or omission of material facts.

32 When utilized in connection with the sale or advertisement of any goods,
33 services, or charitable solicitation, the following shall be unlawful:

34 (1) The act, use, or employment by any person of any deception, fraud,
35 or false pretense; or

36 (2) The concealment, suppression, or omission of any material fact with

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1 intent that others rely upon the concealment, suppression, or omission."

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3 SECTION 3. Arkansas Code Annotated § 4-88-112 is amended to read as
4 follows:

5 "4-88-112. Failure to cooperate in investigations - Proceedings.

6 (a) In the event any person fails or refuses to file a statement,
7 appear, or produce records as required by § 4-88-111, the Attorney General,
8 acting through the Consumer Counsel, may file, in the circuit or chancery
9 court of the county in which the person resides or transacts business or of
10 the judicial district in which the State Capitol is located, a petition for an
11 order of such court for the civil enforcement of such section.

12 (b) Upon the filing of the petition and service upon the person, the
13 court shall have jurisdiction to hear and determine the matter so presented
14 and to enter such order, including temporary injunctions, as may be required
15 to effectuate this chapter.

16 (c) Willful concealment, destruction, alteration, or falsification of
17 any documentary material which would be subject to subpoena by the court or
18 the disobedience of any order of the court is declared to be unlawful and
19 shall be punished as contempt of court.

20 (d) Any final order shall be subject to appeal to the Supreme Court of
21 Arkansas."

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23 SECTION 4. Arkansas Code Annotated § 4-88-113 is amended to read as
24 follows:

25 "4-88-113. Civil enforcement and remedies - Suspension or forfeiture of
26 charter, franchise, etc.

27 (a) In any proceeding brought by the Attorney General for civil
28 enforcement of the provisions of this chapter, prohibiting unlawful practices
29 as defined in this chapter, the circuit or chancery court may make such orders
30 or judgments as may be necessary to:

31 (1) Prevent the use or employment by such person of any
32 prohibited practices.

33 (2)(A) Restore to any purchaser who has suffered any
34 ascertainable loss by reason of the use or employment of the prohibited
35 practices any moneys or real or personal property, which may have been

1 acquired by means of any practice declared to be unlawful by this chapter,
2 together with other damages sustained.

3 (B) In determining the amount of restitution to be awarded
4 under this section, the court shall consider affidavits from non-testifying
5 purchasers, provided that:

6 (i) the affidavits are offered as evidence of a
7 material fact;

8 (ii) the affidavits are more probative on the point
9 for which they are offered than any other evidence which the Attorney General
10 can procure through reasonable efforts;

11 (iii) the interests of justice will be best served by
12 admission of the affidavits; and

13 (iv) the Attorney General makes the names and
14 addresses of the affiants available to the adverse party sufficiently in
15 advance to provide the adverse party with a fair opportunity to communicate
16 with them.

17 (3) Assess penalties to be paid to the state not to exceed ten
18 thousand dollars (\$10,000) per violation against persons found to have
19 violated this chapter.

20 (4) Upon petition of the Attorney General, the court may order the
21 suspension or forfeiture of franchises, corporate charters, or other licenses
22 or permits or authorization to do business in this state.

23 (b) As compensation for his services under this chapter, the Attorney
24 General shall be entitled to all expenses reasonably incurred in the
25 investigation and prosecution of suits, including, but not limited to,
26 expenses for expert witnesses, to be paid by the defendant when judgment is
27 rendered for the state, and in addition shall recover attorney's fees and
28 costs.

29 (c) Any person who violates the terms of an injunction issued under
30 this chapter shall forfeit and pay to the state a civil penalty of not more
31 than ten thousand dollars (\$10,000) for any single action brought by the
32 Attorney General.

33 (d) (1) Every person who directly or indirectly controls another person
34 who is in violation of or liable under this chapter, and every partner,
35 officer, or director of another person who is in violation of or liable under

1 this chapter shall be jointly and severally liable for any penalties assessed
2 and any monetary judgments awarded in any proceeding for civil enforcement of
3 the provisions of the chapter; provided, that the persons to be held jointly
4 and severally liable knew or reasonably should have known of the existence of
5 the facts by reason of which the violation or liability exists.

6 (2) There is contribution as in cases of contract among the
7 several persons so liable.

8 (3) Every person subject to liability under subsection (d)(1) of
9 this section shall be deemed as a matter of law, to have purposefully availed
10 himself of the privileges of conducting activities within Arkansas, sufficient
11 to subject the person to the personal jurisdiction of the circuit or chancery
12 court hearing an action brought pursuant to this chapter."

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14 SECTION 5. Arkansas Code Annotated § 4-88-114 is amended to read as
15 follows:

16 "4-88-114. Voluntary compliance.

17 (a)(1) In the administration of this chapter, the Attorney General may
18 accept an assurance of voluntary compliance with respect to any method, act,
19 or practice deemed to be violative of the provisions of this chapter from any
20 person who has engaged or was about to engage in such method, act, or
21 practice.

22 (2) Any such assurance shall be in writing and may be enforced by
23 petitioning the circuit or chancery court of the county in which the alleged
24 violator resides or had his principal place of business, or the Circuit or
25 Chancery Court of Pulaski County.

26 (3) Such assurance of voluntary compliance shall not be
27 considered an admission of violation for any purpose.

28 (b)(1) The assurance of voluntary compliance shall provide for the
29 discontinuance by the person entering into the same of any method, act, or
30 practice alleged to be a violation of this chapter, and it may include a
31 stipulation for the payment by such person of reasonable expenses,
32 investigative costs, and attorney's fees incurred by the Attorney General.

33 (2) The assurance may also include a stipulation for payment to
34 consumers of actual damages or for restitution of money, property, or other
35 things received from consumers in connection with a violation of the

1 provisions of this chapter, and a stipulation for specific performance.

2 (c) A finding by a circuit or chancery court that a violation of such
3 assurance of voluntary compliance has occurred shall prima facie establish
4 that the person subject thereto knows, or in the exercise of due care should
5 know, that he has in the past violated or is violating the provisions of this
6 chapter.

7 (d) The assurance of voluntary compliance shall not be admissible into
8 evidence in any separate criminal proceeding within the meaning of this
9 chapter."

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11 SECTION 6. Arkansas Code 4-88-101 is amended to read as follows:

12 "4-88-101. Applicability of chapter

13 This chapter does not apply to:

14 (1) Advertising or practices which are subject to and which comply with
15 any rule, order, or statute administered by the Federal Trade Commission;

16 (2) Broadcasters, printers, publishers, and other persons engaging in
17 the dissemination of information who do not have actual knowledge of the
18 intent, design, purpose, or deceptive nature of the advertising or practice;

19 (3) Actions or transactions permitted under laws administered by the
20 State Insurance Commissioner, Arkansas Securities Commissioner, Arkansas State
21 Highway Commission, Bank Commissioner, or other regulatory body or officer
22 acting under statutory authority of this state or the United States, unless a
23 director of these divisions specifically requests the Attorney General to
24 implement the powers of this chapter;

25 (4) Actions or transactions of a public utility which have been
26 authorized by the Arkansas Public Service Commission, a municipal authority,
27 the Federal Energy Regulatory Commission, the Federal Communications
28 Commission, or other regulatory body or officer acting under statutory
29 authority of the United States."

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31 SECTION 7. All provisions of this act of a general and permanent nature
32 are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code
33 Revision Commission shall incorporate the same in the Code.

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35 SECTION 8. If any provision of this act or the application thereof to

1 any person or circumstance is held invalid, such invalidity shall not affect
2 other provisions or applications of the act which can be given effect without
3 the invalid provision or application, and to this end the provisions of this
4 act are declared to be severable.

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6 SECTION 9. All laws and parts of laws in conflict with this act are
7 hereby repealed.

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/s/Rep. Lynn

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APPROVED: 3-31-95

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