

MINUTES

COMMITTEE: COMMERCE

DATE: Wednesday, February 21, 1973

MEMBERS PRESENT: Chairman Prince, Messrs. Hafen, Demers, Dini, Bickerstaff, Torvinen, Capurro and Wittenberg

MEMBERS ABSENT: Dr. Robinson (excused)

GUESTS:

<u>Name</u>	<u>Representing</u>
Pete Kelly	Nevada Retail Assn.
John Garvin	Atty for Montgomery Ward
Larry Struve	Washoe Co. DA's Office;
Pete Holden	" " " "
Gene Milligan	Nev. Assn. Realtors;
Ray Schmidt	U of N intern
John Gojack	Financial Marketing, Inc
Robert Guinn	Nev. Franchised Auto Dealers
Daryl Capurro	" " "
Jim Smith	U of N intern;
Jim Bailey	U of N intern; Torvinen;
Skip Hansen	Real Estate Division;
W. H. Tarkington	Savings & Loan Division;
Dick Rottman	Insurance Division.

The meeting was called to order by Chairman Prince at 4:00 p.m. in Room 222. Mr. Wittenberg introduced Mr. Larry Struve from the Washoe County District Attorney's Office who presented his Office's comments on AB 230 which prohibits false, deceptive or misleading statements in advertising. Mr. Struve heads the Consumer Fraud unit from the District Attorney's Office. He stated that the law was first enacted in 1917 and that no prosecution had been brought under this statute. (See Exhibit "1"-attached for full content of Mr. Struve's remarks.) He also suggested taking 201.270 completely off the books and adding a new statute. He feels this new bill would be an effective tool for his office; that his office had a possible 68 cases which could have been prosecuted but because of the ineffectiveness of the present bill, none of these cases were prosecuted.

Mr. Capurro asked Mr. Struve about the division of funds collected from fines between the county and state. This portion of the bill was taken from a California law which felt that the county would be able to help defray the costs of prosecuting these offenses by sharing the fines collected with the state when

cases are prosecuted by the state and retained fully by the county when cases are prosecuted by the county. Defendants would be sued for an actual amount up to \$2,500.00. Using criminal penalties is worthless, Mr. Struve continued, because it is impossible to prove a case "beyond a reasonable doubt".

Mr. Holden, an investigator with the Consumer Fraud unit, stated that their unit has actually been in existence for only seven months. In that time he felt there were more than 80 or 90 specific instances where firms were using deceptive advertising that he hasn't been able to prosecute successfully; that criminal intent beyond a reasonable doubt cannot be proven on the basis of verbal misrepresentations. Consumers who are defrauded by deceptive advertising have no alternative but to sue civilly and recover damages. These people affected usually cannot afford legal counsel or are ineligible for legal aid. His office has been told to go "jump into the lake" when they approach the illegitimate operators. He roughly estimated that \$40,000.00 to \$50,000.00 in damages have been incurred by consumers of Washoe County. He wants the criminal penalties, Section 7, of the bill retained.

He also wants the option to proceed against illegitimate firms either criminally or civilly. Civil penalties usually would be much more appropriate. He gave examples of misleading advertising and worthless warranties brought to his attention in Washoe County, i.e., plastic pools, "loss leaders" used by used car dealers; and felt that the premise "buyer beware" not applicable because the consumer is exposed to so much deceptive advertising that he must be protected. This law would also restrict warranties.

Mr. Wittenberg asked Mr. Holden to state what efforts have been made to promote this bill. Mr. Holden stated that the Better Business Bureau in Reno has held hearings in Washoe County and fully backs the bill and that he has spoken before twenty different groups on the bill.

Mr. John Gojack of Financial Marketing, Inc., of Reno, spoke in favor of the bill, citing as an example of false advertising the use of a name similar to that of a world-famous china maker on premiums given away at banks. He also felt that the land sales companies operating in Nevada have not helped promote gambling in the State and have, in fact, done great damage to Nevada's image. He strongly used the adoption of AB 230.

Mr. John Garvin, attorney for Montgomery-Ward, representing the Retail Merchants Association, stated that the bill is "something that is needed"; suggested several changes, including clarifying the penalty of \$2,500.00; removing the criminal pen-

alties; "class action" suits possibly arising from Section 3, ss 2; that the civil penalty would be supported by legitimate retailers; that "breach of warranty" does not necessarily mean a statement if falsely made; and that a time limit should be included for telephone solicitors to identify themselves.

Chairman Prince announced the ending of the hearing. After general discussion of the bill, Mr. Bickerstaff moved, Mr. Hafen seconded to change the word "public" to "person" in Section 3, and delete Section 8, ss 2 regarding "class actions"; Mr. Capurro moved and Mr. Wittenberg seconded the District Attorney's Office suggested change in Sections 3 and 4, with some re-wording and punctuation changes. Mr. Capurro moved, Mr. Bickerstaff seconded that the bill be passed as amended. All motions were unanimously approved.

The meeting adjourned at 5:20 p.m.

Respectfully submitted,

PHYLLIS BERKSON, Assembly Attache

ASSEMBLY

AGENDA FOR COMMITTEE ON COMMERCE

Feb.

Date Wednesday, 21 Time 4:00 p.m. Room 222

Bills or Resolutions
to be considered

Subject

Counsel
requested*

AB 230

Extends prohibition of false, deceptive,
or misleading statements in advertising.

*Please do not ask for counsel unless necessary.

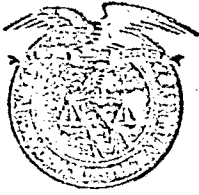
HEARINGS PENDING

Date _____ Time _____ Room _____

Subject _____

Date _____ Time _____ Room _____

Subject _____



Washoe County

Courthouse
Reno, Nevada 89505

Robert E. Rose
District Attorney

February 21, 1973

Assembly Committee on Commerce
Nevada Legislative Building
Carson City, Nevada

Re: A.B. 230 (Strengthening Nevada's False Advertising Statute)

Members of the Committee:

I am submitting the following comments on behalf of the Washoe County District Attorney's Office in support of A.B. 230 with certain minor modifications set forth below. This letter is intended to summarize the main points to be made before your Committee in its first public hearing on this bill.

Basically, our Office feels there is a need for this bill because of the weakness of the language contained in NRS 207.170, which prohibits false, deceptive, and misleading advertising. This weakness becomes apparent for the following reasons:

1. As NRS 207.170 now reads, it is "unlawful" for any person to publish, disseminate or display any "false, deceptive or misleading advertising, with knowledge of the facts which render the advertising false, deceptive or misleading . . .". Obviously, in order to take any action under this statute as now worded, it is necessary to prove that "advertising", which can include an entire ad, is false, deceptive or misleading. In addition, it is also necessary to prove that the person responsible for such advertising had actual knowledge OF THE FACTS which rendered the advertising false, deceptive or misleading. Thus, under present law, it is possible for a disseminator of false or misleading advertising to include one or two deceptive or misleading statements in an ad, which may not make the entire ad false, and then when questioned as to the facts rendering said advertising false, said disseminator can plead ignorance of its falsity or misleading character, even though any reasonable person ought to have known such facts were false or misleading. Since a public prosecutor must prove that such a disseminator knowingly engaged in false or misleading advertising beyond a reasonable doubt, in order to obtain a misdemeanor conviction, the wording of the present statute has rendered it virtually impossible to enforce.

2. Furthermore, the present statute requires that the false, deceptive or misleading advertising must be made for a business, trade or commercial purpose or "for the purpose of inducing, or which is likely to induce, directly or indirectly, the public to purchase, consume, lease, dispose of, utilize or sell any property or service, or to enter into any obligation or transaction relating thereto." This language has had the effect of requiring public prosecutors to produce a "victim" of false or misleading advertising who can establish through his testimony that he was ACTUALLY deceived or misled by such advertising. Short of this type of testimony, it is virtually impossible to establish beyond a reasonable doubt that false, deceptive or misleading advertising is "likely" to induce the public to enter into some type of commercial transaction. However, many cases have arisen in which false or deceptive advertising has clearly had a tendency to deceive or mislead the public even though no member of the public is willing to testify and admit that he was actually deceived or misled by such advertising or to come forward and volunteer evidence pertaining to his particular case. This does not mean that the advertising in question is not false, deceptive or misleading but only that the public prosecutor is unable to present a case to a court of law to make that determination.

3. The third weakness of the present language pertains to the remedy given the Attorney General or the district attorneys in this State to bring actions to restrain and prevent any person from violating any provision of NRS 207.170. Oftentimes, false or deceptive advertising does not follow a consistent pattern so that it would become an appropriate subject of an injunctive proceeding in a court of law. This means that when a public prosecutor engages in a great deal of legal work to seek injunctive relief to restrain and prevent any person from violating any provision of NRS 207.170, the person in question will either change the advertising or eliminate any false or deceptive aspects of said advertising. This renders any injunctive proceeding moot, and because there are no civil penalties available for punishing such a person in connection with an injunctive proceeding, the public prosecutor is virtually helpless to enforce the existing statute, short of obtaining a misdemeanor conviction. For the reasons stated above, criminal convictions under the current statute are extremely difficult if not impossible to obtain.

Because of the foregoing reasons, this Office has concluded there is a serious need to change the current provisions of NRS 207.170, so that it can be used as an effective remedy against false, deceptive, and misleading advertising.

Basically, this Office is in agreement with the language contained in A.B. 230. However, your Committee is invited to

consider the following modifications, which we feel will strengthen this bill:

1. Since false, deceptive and misleading advertising is used in connection with trade practices generally, it is the feeling of this Office that the statute prohibiting false, deceptive or misleading statements used in advertising would more appropriately be found in Title 52, Chapter 598 of the Nevada Revised Statutes, which relates to trade regulations and practices generally. At the present time, NRS 207.170 is in a Chapter of the Nevada Revised Statutes pertaining to "miscellaneous crimes." This Office feels the subject matter of false advertising and the remedies available to abate same would more appropriately fall within the subject matter of Chapter 598. This may be especially appropriate in view of the fact that A.B. 230 provides for civil penalties and injunctive relief, which would appear to exceed the scope of a Chapter devoted to miscellaneous crimes.

2. Section 3. of A.B. 230 could be clarified by referring to the use of false statements by means of any advertising device or by any other manner or means, which would eliminate any confusion as to the scope of the subject matter controlled by this statute. Accordingly, this Office suggests that Section 3. of A.B. be redrafted as follows, with the additions underlined and deletions appearing in brackets:

"Sec. 3. It is unlawful for any person, firm, corporation or association or any agent or employee thereof to use, publish, disseminate, display or make or cause directly or indirectly to be used, published, disseminated, displayed or made, in any newspaper, magazine or other publication, by any radio, television or other advertising medium, or by any advertising device, or by public outcry, proclamation, or declaration, or by any other manner or means, including but not limited to solicitation or dissemination by mail, telephone or door-to-door contacts, any statement which is known or through the exercise of reasonable care should be known to be false, deceptive or misleading in order to induce [the public] any person to purchase, sell, lease, dispose of [or], utilize, or acquire any title or interest in any real or personal property or any personal or professional services or to enter into any obligation or transaction relating thereto, or to include such statement as part of a plan or scheme which intentionally misstates cost or price for the purposes of producing an erroneous belief by [the public] any person that the actual cost or price is the same as stated therein."

Ex 1

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3. In Section 4. of A.B. 230, subsection 2, the comma after the word "disseminates" on line 42 should be eliminated and line 43 et seq. should be inserted immediately after the word "disseminates" without skipping a line.

4. The other language appearing in A.B. 230 is satisfactory to this Office.

The Consumer Fraud Unit of our Office has indicated that sixty-eight complaints have been filed with this Unit since July 5, 1972, which could have been construed as a violation of the spirit and intent of NRS 207.170 were it not for the difficulties in enforcing this statute as indicated above. Accordingly, none of these cases were able to be prosecuted. Furthermore, it is impractical to initiate any actions under the existing language of NRS 207.170, unless there are numerous complaints on one firm pertaining to the same advertising. Often, numerous complaints will be filed against one firm, but they relate to different products and to different misleading advertising pitches or to different misleading statements. Accordingly, no action is taken because of the time and expense involved.

Finally, our Office is unaware of any convictions having been obtained under NRS 207.170 in Washoe County, since this statute was first enacted in 1917. In addition, no cases are reported in the Annotations to the Nevada Revised Statutes as having arisen under NRS 207.170.

For the above reasons, our Office urges the passage of A.B. 230.

Very truly yours,

ROBERT E. ROSE
District Attorney

BY 

LARRY D. STROVE
Deputy District Attorney

LDS:ph