

COMMERCE AND LABOR COMMITTEE

February 27, 1975

Senator Gene Echols was in the chair.

PRESENT: Senator Gene Echols
Senator Richard Blakemore
Senator Warren Monroe
Senator Gary Sheerin
Senator Richard Bryan
Senator William Raggio
Senator Margie Foote

OTHERS PRESENT: Please see Exhibit "A".

S.B. 79: Revises and expands definitions and remedies under deceptive trade practices law. Fiscal Note: No. (BDR 52-230).

Mr. Rex Lundberg, Commissioner of Consumer Affairs, Las Vegas, testified in favor of S.B. 79. He said that in July of 1973, the division had the local support of the Nevada Retailers Association and the Chamber of Commerce. He said his basic concern was for the consumer who pays the price. He said the consumer has four basic rights. They are 1) right to be informed; 2) right of choice; 3) right of safety; 4) right to be heard. He feels it his responsibility to make sure the consumer has these rights here in the state, and also feels the business community supports this type of effort. He spoke of three booklets that were prepared by the sub-council of the National Council of Consumer Affairs in Washington, and told of the companies which they represent. They were ARCO, Proctor and Gamble, to name a few. There 104 major business firms in the country who have met and have put out guidelines for their fellow businessmen around the country. On the national level the concern is for the consumer. On the local level, he had two letters written by business groups in Las Vegas, giving their support, of the division and the FTC act which was created in 1973. He said that when the bill was drafted, he should have gotten together with this group and some of the opposition might not have been so great. He added that he was not trying to harrass the business community. Mr. Lundberg said that they are asking for some changes. They have inserted a counter for the protection of the business community. He said he understood there were four or five areas of concern to the committee. 1) Section Two, which relates to the ability of the individual to bring private redress. They have had some difficulty in the past to bring some actions to bear and if the consumer was abused, they feel that some form of redress should be available. 2) Section Three, states in essence that in addition to the civil and criminal penalties in force at present in this act, that Section Two above is included, other than the damages aspect, that the business would have an affirmative defense to any action brought, if it were shown that it was the result of a bona fide error or despite his exercise of reasonable care. Felt that since they were removing the word knowingly from the act, they should put something in to protect the innocent businesses. Senator Sheerin asked him to explain their motive for the removal of "recovery of damages." Mr. Lundberg said the reasoning was that at present they feel that if a person were wronged, if he were induced into a transaction by deception, no matter how innocent the seller was, that instead of his having to bear the burden, he should be at least

recover from that transaction. Senator Raggio said you wouldn't allow the person to recover three times his money back, if the damages weren't that much. Mr. Lundberg said the three times has only to do with a willful violation of the act. Senator Bryan asked if he was talking about actual damages in Line 18. Mr. Lundberg said he would recommend an amendment to the act because he didn't believe that if there were a bona fide error, it should be the greater of. At this time Senator Echols told Mr. Lundberg that the committee would be interested in actual cases to document what might be needed in the future. He also said the committee would like to hear the problems he was having with the bill as it is now. Mr. Lundberg said that one of the problems with the bill was that they have had in bringing an action concerning an alleged deceptive trade practice is the ambiguity of the language. He said some of the problems and concerns that have come to them, they have been limited by the language. There have been difficulties unforeseen because there was no request made in 1973 for an investigative body or for an attorney to represent them. They do have an attorney now that is assigned to them, but he is assigned to 13 other divisions. He is situated in Carson City and the major problems are in Southern Nevada. They have difficulty with investigation because of lack of money. They have difficulty bringing cases to court because of money and because they have no attorney to help them. They receive about two hours counsel a month. Senator Blakemore asked how this bill was going to help, and Mr. Lundberg said they have a separate request in their budget for an attorney and a secretary. They submitted, and they are in various stages of action pending, under consideration, no action taken, 83 cases. Some of the cases involve from as many as 4 to 24 complaints against a single firm.

Senator Bryan asked Mr. Lundberg to address himself more to the specific problems they have had with the act. He gave an example of a Roter Rooter firm in Las Vegas that operates under three different names with different phone numbers, no addresses listed. This is eliminating competition. They are also using information from other people's advertisements. There is nothing in our bill that addresses itself to that kind of problem. Senator Blakemore asked how he is being deceptive. Mr. Lundberg said it was the concept that the consumer has the right to choose. If you have six roter roter firms and three of them are, in fact, the same, you don't have the freedom of choice. Senator Blakemore asked if they had any complaints about this, and Mr. Lundberg said they had a complaint from the firm itself.

Mr. Lundberg said that in the knowingly aspect, many of the cases that come to them, for example a used car dealer, violating a truth and lending law. The way the language of the bill is written, that is one problem. Senator Bryan asked if the act was ineffective to solve that kind of deceptive practice. Mr. Lundberg said they had done everything they could to prove the facts and the case was nothing. He also said the "knowingly" aspect was putting an unfair burden on the consumer. They are asking that this be made a civil type situation because they do not have the staff and money to prosecute all cases. They are also requesting that if there are deceptive practices, that when they have a new kind of scheme come in, that they have the flexibility to move in on that type of operation.

Mr. Lundberg discussed the knowingly aspect of the bill. He said that he was having trouble with this and had gone to the dictionary to find out the definitions. He has also discussed scienter with Senator Bryan. He said the problem they are having with knowingly is in Chapter 598.640,

the last part. That is on page seven. The problem they are having even bringing a civil action is that in the process of bringing a civil or criminal action, they have got to prove criminal. The use of the word knowingly in the penalty section, the same word knowingly is used throughout the definition of deceptive trade practices. Mr. Lundberg then spoke about what happens when they get ready to go to court. He said that all he can do is present the facts. Felt it was going to take the concurrence of the Attorney General's office or District Attorney's office, who prosecutes these cases, that he has a case warranting a legal action. Senator Raggio said that he didn't know if there was any provision for action from the Attorney General's office. Mr. Lundberg said he was correct and that the District Attorney has the same power as the Commissioner of Consumer Affairs to initiate action. However, as they are a state office, aside from referring it to a District Attorney's office, only legal aide they can have represent them is the Attorney General's office, unless there is a specific provision in the law that enables them to hire private counsel. Senator Raggio said he thought that the District Attorney is indicated to the enforcer. Mr. Lundberg said because the directions given to the District Attorney in this act duplicate in most part what he was authorized to do, he presumed that it is a concurrent type thing. He said because of the way the language is written, it is giving them concurrent jurisdiction. There are now two bodies that can take action, Consumer Affairs, or the District Attorney. Mr. Lundberg said he thought they had the option of going to the District Attorney or the Attorney General. Senator Bryan asked if what he was saying was that the District Attorney's office, without ever talking to the Consumer Affairs office on their own, have the power to initiate proceedings on their own. Mr. Lundberg said that was correct. He also said that to rely totally on the District Attorney was putting a great burden on the D.A. because of their already heavy work load. After much discussion on the subject, it was decided to seek legal counsel from Mr. Burnett concerning the question of the District Attorney and the Attorney General. 117

Mr. Lundberg said there were three steps taken to protect the innocent. 1) investigation of facts; 2) prosecution; 3) decision of the judge. Said there agency was there to protect the consumer and not to harrass the businessman. He said they just want equal protection for the consumer.

Senator Raggio said again talking about whether knowingly ought to be in the act, in Chapter 598.640 that there is a distinction between a criminal and civil action; and in Subsection 3, knowingly is a necessary element for criminal prosecution. Chapter 598.570 provides for obtaining injunctive relief. That section commences with the language "not withstanding the requirement of knowledge." Senator Raggio said the laws we now have do discharge the element of knowledge. Mr. Lundberg said that then if we leave "knowingly" in there, we could either bring criminal action or get an injunctive relief, and we cannot bring a civil penalty up unless we prove the criminal element. Senator Raggio said yes, but he has looked at the deceptive trade practices that require knowledge and there are only about four of them. He also said that it was hard for him to believe that anyone could pass off goods or services without knowing about it. Senator Sheerin said that as long as we are talking about the consumer versus the businessman, he doesn't have any trouble getting rid of knowledge, but when we are talking about the state versus businessman, then he did have a concern about knowledge being there. He felt it should be there. He said in section 16 where you point out that this is a civil penalty of not more than \$10,000, I suggest that this is a legal impossibility to have a civil penalty of more than \$10,000, because a crime is defined by 193.120 as "an act or ommission forbidden by law and punishable upon

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conviction by death, imprisonment, or other penal discipline." So when you state here that the state or the District Attorney can bring an action because the businessman did something under Section 2 or 3, you are defining that he has committed a crime. Mr. Lundberg asked if he was talking about the \$10,000. Senator Sheerin said yes, that to him that's a criminal action. He said in the state versus businessman, "knowingly" should be in there. Senator Bryan asked if the bill the proposed in 1973 eliminated this knowledge. Mr. Lundberg said it included not eliminated it. Senator Bryan asked what the origin of the language was in the original bill and if he had made comparisons with other states. Mr. Lundberg said yes, there was a model act, the Uniform Deceptive Trade Practices Act, drafted by the National Conference of Commissioners, and Uniform State Laws approved by the America Bar Association at its meeting in Canada in 1966, has included in this the definition of deceptive trade practices. Senator Bryan asked about the penalty sections in this model act. Mr. Lundberg said the penalty section says, "a person liable to be damaged by a deceptive trade practice of another, may be granted an injunction against it under the principles of equity and on terms the court considers reasonable." Senator Bryan asked what was the injunctive relief. Mr. Lundberg said proof of monetary damage, loss of profits, or intent to deceive is not required. Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source. Cost shall be allowed to the prevalent party unless the court otherwise directs. Senator Bryan asked what kind of penalties the uniform act provided in the area of business violation. Mr. Lundberg said he saw no approach to the problem in the uniform act. He talked about Alaska's deceptive trade practice act. Senator Raggio said that apparently under the uniform act there is no provision for criminal penalty and there is a provision for civil penalty and injunctive relief. Mr. Lundberg said that in just glancing through the handbook, he was not prepared to answer that question. Senator Raggio asked what handbook that was. Mr. Lundberg said it was the Consumer Law Handbook, Volume II, by the National Consumer Law Center, Inc. Mr. Lundberg also asked if the remarks made by Senator Sheerin about the \$10,000 could be clarified. He said the \$10,000 refers to a violation of a court order or an injunction.

At this time there was a short recess while the Senate was in afternoon session. Recessed at 2:10 and began again at 2:25. Senator Foote was absent after the recess.

The next witness was Rusty Nash, Deputy District Attorney, Washoe County. He testified in favor of the bill. He tried to clarify what Mr. Lundberg had brought out already. He said one of the major strengths of the amendment as far as he was concerned is contained in Sections 2 and 3, the sections which give the consumer a private right of action in case of a deceptive trade practice. Felt this was important partly because it is a public expense if the District Attorney is required to act on each one of these cases. He felt that if some form private redress is available to the public, it would save them much money. He said in addition you find that many of the cases are one time situations. He felt the District Attorney should be available for those that have no one else to go to, but they should not be involved in prosecuting every single minor violation. He spoke briefly about the scienter requirement. In the case of the consumer going against business, in eliminating the knowledge requirement, they have taken away one of the private things the consumer has to prove. This might be a difficult thing to prove if you are talking about small claims action. He said he didn't see any difficulty in a district attorney's office trying to prove scienter, or intent. Senator

Monroe said he was a little suspicious of the language used in several places, such as "causes likelihood of confusion." He asked why don't we just say "causes confusion". Mr. Nash said he hadn't thought too much about that but did see the point. He also said there was no question that there was no cause of action until someone has been confused, because until someone has been damaged there is no cause of action. Senator Blakemore asked how much difficulty they had in getting rid of the bad guys in their district. Mr. Nash stated that he had only been with the office about one month, but he has spoken to the person who handled the cases before him. He stated that they had had no trouble with the knowingly language in the statute.

Senator Echols asked Mr. Nash where he was located before he came to the Washoe County District Attorney's office. Mr. Nash said he had been with the Washoe County Legal Aide Society. Senator Echols asked percentage-wise how widespread did he think these deceptive trade practices were. Mr. Nash said he wouldn't think more than five or ten percent at the most. Senator Echols asked how many consumers are causing problems. Mr. Nash said he thought that percentage was very small.

Senator Raggio asked Mr. Lundberg if they had trouble with various counties and their levels of response, and also wanted to know if it would help if they could go to the Attorney General for help. Mr. Lundberg said he didn't believe so and went on to explain why. Senator Raggio said he was talking about the lack of uniformity in the various counties and again asked if it would help if it was the Attorney General they turned to for enforcement of the various laws. Mr. Lundberg said yes. Mr. Nash said he thought it would be very helpful to have the authority for enforcing the laws to be held concurrently by the District Attorney and the Attorney General of the various counties. Senator Sheerin asked Mr. Nash if it was his interpretation of this bill that all consumer action is limited to small claims court action. Mr. Nash said no, he only mentioned it because many of the complaints involve less than \$300 in damages. If the damages are greater than \$300, then you might want a private attorney to handle it. He said he didn't mean to suggest they could only go to small claims court, but it did give the consumer with a minor complaint an easy form of redress.

Mr. Pete Kelley, Nevada Retailers Association, testified in opposition to S.B. 79. Briefly, he wanted to reiterate his association's stand. He said they are opposed because the bill as drafted is unnecessary. He said the bill was enacted less than two years ago and has not really been tested. He said the incidents that were mentioned were few because there are about 14,000 businesses in Nevada being operated properly. He objected to Section 2, page 1, which imposes strict liability for even bona fide error. He feels that minimum damage should not apply to bona fide error. Senator Sheerin asked when he was referring to bona fide error, which line was he on. Mr. Kelley said the line where it says the judge may award up to three times actual damages. Senator Sheerin asked if he thought that was strict liability. Mr. Kelley said they thought it imposes strict liability for even bona fide errors in Section 3, starting with line 16. Mr. Kelley said they would also caution the committee relative to private actions and said there should be something in there about excluding class action suits. He felt they would flood the courts with cases. The open-ended provision of subsection 17, 13, and 19, are extremely broad and ambiguous, Mr. Kelley said. He felt it is extremely difficult to understand. He thinks the bill would impose unreasonable restrictions on business at the present time. They also object to the removal of the word "knowingly" because you would remove the element of knowledge. They suggest the bill be held and considered again in two years

if necessary. Senator Raggio asked if he didn't feel the consumer needed a course of redress. Mr. Kelley said he felt that they could go to the Department of Commerce or their district attorney. Senator Raggio asked if he didn't think they needed this right. Mr. Kelley said it would open a lot of class action suits. Senator Raggio said he wasn't talking about class action suits. Mr. Kelley said that was what he was talking about. Senator Raggio and Mr. Kelley discussed this matter briefly. Senator Bryan asked Mr. Kelley if the position of the Nevada Retailers Association was that if a person has indeed suffered a loss, did they feel under the current law he was adequately remedied by having to take that loss to the Consumer Affairs Division, which gets only two hours a month legal counsel or to the District Attorney, who is already overloaded. Mr. Kelley said he was not sure, but that most states which have a Deceptive Trade Practices Act have the enforcement power in the Attorney General's office. Mr. Kelley again said he just felt there should be some safeguard against class action suits. Senator Bryan said that wasn't important because in a recent Supreme Court ruling has considerably restricted class action suits. Senator Bryan said that was not the purpose of S.B. 79. Mr. Kelley said it was his feeling that this could lead to class action suits, if you opened it up to private suits. There was a short discussion between committee members and Mr. Kelley regarding right to sue and class action suits. Mr. Rusty Nash stood from the audience and told about a suit the Washoe County District Attorney's office had brought against a toy auction for deceptive trade practices. They had four complaints and they did receive restitution for all four. There was a civil penalty in the amount of \$11,000. Senator Sheerin asked what the \$11,000 damages were for. Mr. Nash said one individual was charged with nine separate counts of violating the Deceptive Trade Practice Act and was fined so much for each count. Senator Sheerin asked if Section 2 of this bill allowed the consumer rescission. Mr. Nash said he would think rescission would be implicit in the damages aspect, although, if you are asking for damages for the money you paid, you have an obligation to return the article.

Senator Raggio said he would like to suggest some amendments. Senator Bryan said if there was any appetite to amend the bill, he would like to have a look at Mr. Lundberg's uniform act. He suggested also that the committee move on to S.B. 86.

S.B. 86: Enacts Nevada Consumer Product Safety Act. Fiscal Note: Yes.
(BDR 40-237).

Mr. Rex Lundberg testified in favor of S.B. 86. Mr. Lundberg said the act would deter the sale of defective or unsafe goods in the State of Nevada. He said the act would take up the areas that are not covered by the specific exclusion with the Consumer Product Safety Act, having to do with cars, airplanes, foods, drugs, etc. Although it did not come out in the body of the drafted form, exempted from the provisions of this act, if passed, those areas the Fire Marshall, the Health Department or any other state agency presently enforces. He said there have been 20,000,000 consumer product related injuries during a year; 30,000 of which were very severe or fatal. Presuming these items are available in Nevada, this act would help get a handle on their sale. They are just looking for a way to prevent this on a state basis or to prevent the sale of those items. He said this referred to items that are sold for use in the home. Senator Raggio asked what consumer products were. Mr. Lundberg said in general languages, it is a product used in or around the home by the individual for their own purpose and it excludes those products that are currently regulated by existing law having to do with highway traffic safety, civil or the aeronautics, so they are exempt from a broad line of consumer products. Senator Raggio asked if this

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covered the installation and repair of TV sets. Mr. Lundberg said yes. Senator Raggio asked if it covered the sale of motor vehicles. Mr. Lundberg said no and Senator Raggio asked if this was covered by Highway Safety and Mr. Lundberg said yes. Mr. Lundberg read the draft that he submitted to the bill drafter containing their definition of a consumer product. This was taken from the Consumer Product Safety Act. Senator Bryan asked if they needed a field investigator to assist them in the administration of the act and Mr. Lundberg said yes. Senator Bryan asked if this was included in the Governor's budget and Mr. Lundberg said no. He went on to say he did not know the bill went through with a "yes" not; he felt the staff they have now could handle it. He has spoken to the San Francisco office and money could be made available through them for this. He said they would not need the fiscal note. Senator Bryan asked if the federal act authorized the enforcement of those provisions by a state agency. Mr. Lundberg said yes it did. He said they would not require testing because there are testing places now that keep them up to date on standards. Senator Raggio asked if he said they would not require a fiscal note and Mr. Lundberg said that was correct. There was general discussion about the fiscal note.

Senator Raggio moved to postpone the bill indefinitely.
Senator Blakemore seconded the motion.
Motion carried unanimously.

Senator Raggio then said he felt the committee should move on S.B. 79. He said that if the committee had any appetite for the bill he would like to recommend the following amendments:

Section 2, line 6, taking out "or \$200, whichever is greater," leaving in a person could bring suit and recover actual damages. He would omit the portion on willful violation, which is the next sentence. Page 2, he would delete the brackets and leave the language the way it is. This is in Section 6. In the part that indicates deceptive trade practices, he would omit the changes in 17, 18, and 19. In other words, he would leave the section as it is. On page 4, he would omit the proposed subsection 2, beginning with line 49 that is allowing them to adopt and promulgate regulations. He would omit the change they suggested in Section 10 on page 5. He would add to the act, in those sections where the words "district attorney" appear, "or attorney general". Senator Bryan said his problem was with the first change Senator Raggio suggested. He said in the case of the small purchase, awarding actual damages may not warrant or necessitate bringing the action. Also in regard to the Attorney General, he wanted to know what the fiscal impact would be. Senator Raggio said he felt it would be very small because they have plenty in their budget now. Senator Blakemore said they were forgetting the city attorney. Senator Bryan said that was a different piece of legislation altogether and Senator Raggio said the city attorney does not do the enforcement on a state law. Senator Sheerin referred to Section 3, line 17 and 18 and said he felt the retailer should have an affirmative defense in all cases. There was discussion in the committee concerning this. There was also discussion in the committee about retaining the word knowingly in the bill and how hard it is to prove intent. Rusty Nash said his office had not had trouble proving knowledge. Senator Sheerin said that if we are talking about the elements the consumer has to prove, he wouldn't mind relaxing it, but when it comes to what the state has to prove, he doesn't want to remove the word knowingly.

Senator Echols thanked Senator Raggio for his offer of assistance. There was more committee discussion about whether to amend and do pass. Finally, it was decided to have Senator Raggio and Senator Bryan draw up the amend-

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ment as a committee amendment. Senator Echols said he had two bills for committee introduction concerning consumer affairs. The committee said to go ahead and introduce them.

There being no further business, the meeting adjourned at 4:05.

Respectfully submitted:

Kristine Zohner
Secretary

APPROVED BY

Gene Echols, Chairman

SENATE
HEARING

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COMMITTEE ON Commerce and Labor

Date ~~February 18~~ Time p.m. adj. Room 213

Bill or Resolution
to be considered

Subject

S.B. 79

Revises and expands definitions and remedies under deceptive trade practices law. Fiscal Note: No. (BDR 52-230). *Cont to 2/27*

~~S.B. 87~~

Authorizes state sealer of weights and measures to adopt emergency specifications for gasoline and clarifies provision on types of motor oil subject to S.A.E. specifications. Fiscal Note: No. (BDR 51-176).

SB 86



ROOM # 213

Y Thursday DATE February 27, 1975

NAME ORGANIZATION ADDRESS PHONE NUMBER

*NOTE: PLEASE PRINT ALL THE INFORMATION CLEARLY.

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~~Jim Hay 1801 CARLIN ST RENO, NV 791-1859~~

RAY TREASE NEV. STATE CONSUMER AFFAIRS DIV. 885-434

JOE LAWLER " " " " " (NYE BLDG)

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Ann Ehrenburg Review - Journal newspaper

Rusty Nash Washoe County D.A. office

SENATE COMMERCE AND LABOR

I N D E X

<u>DATE</u>	<u>BILL</u>	<u>ACTION TAKEN</u>
1-23-75	S.B 5	Hearing set for 1-30-75
1-30-75	S.B. 5	Set new hearing date.
	S.B. 20	Hold bill.
	S.B. 27	Hearing set for 2-6-75
	S.B. 31	Hold Bill.
	S.B. 32	Do Pass.
2-6-75	S.B. 27	Hold Bill.
2-11-75	S.B. 84	Hold Bill.
	S.B. 83	Hold Bill.
2-18-75	S.B. 79	Continue to 2-27-75.
	S.B. 87	Do pass with amendment.
2-25-75	S.B. 5	Do pass.
	A.B. 68	Do pass.