

CHAPTER 129

HOUSE Substitute for SENATE BILL No. 269

AN ACT concerning the Kansas consumer protection act; relating to advertising and conducting certain live musical performances or productions; certain restrictions, enforcement and penalties; enhanced civil penalties for certain victims; amending K.S.A. 50-676, 50-677, 50-678, 50-679 and 50-679a and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. Sections 1 through 5, and amendments thereto, shall be known and may be cited as the truth in musical performance advertising act. Sections 1 through 5, and amendments thereto, shall be part of and supplemental to the Kansas consumer protection act.

New Sec. 2. The following words and phrases when used in the truth in musical performance advertising act, shall have the meanings given to them in this section unless the context clearly indicates otherwise:

(a) "Performing group" means a vocal or instrumental group seeking to use the name of another group that has previously released a commercial sound recording under that name.

(b) "Recording group" means a vocal or instrumental group at least one of whose members has previously released a commercial sound recording under that group's name and in which the member or members have a legal right by virtue of use or operation under the group name without having abandoned the name or affiliation with the group.

(c) "Sound recording" means a work that results from the fixation on a material object of a series of musical, spoken or other sounds regardless of the nature of the material object, such as a disk, tape or other phonorecord, in which the sounds are embodied.

New Sec. 3. It shall be unlawful for any person to advertise or conduct a live musical performance or production in this state through the use of a false, deceptive or misleading affiliation, connection or association between a performing group and a recording group. This section does not apply if any of the following apply:

(a) The performing group is the authorized registrant and owner of a federal service mark for that group registered in the United States patent and trademark office.

(b) At least one member of the performing group was a member of the recording group and has a legal right by virtue of use or operation under the group name without having abandoned the name or affiliation with the group.

(c) The live musical performance or production is identified in all advertising and promotion as a salute or tribute.

(d) The advertising does not relate to a live musical performance or production taking place in this state.

(e) The performance or production is expressly authorized by the recording group.

(f) The newspaper, magazine, news wire service, television station or radio station which advertises or promotes the live musical performance or production and is not aware that such performance or production is using a false, deceptive or misleading affiliation, connection or association with another group.

New Sec. 4. (a) Whenever the attorney general or a county or district attorney has reason to believe that any person is advertising or conducting or is about to advertise or conduct a live musical performance or production in violation of section 3, and amendments thereto, and that proceedings would be in the public interest, the attorney general or county or district attorney may bring an action against the person to restrain by temporary or permanent injunction that practice.

(b) Whenever any court issues a permanent injunction to restrain and prevent violations of the truth in musical performance advertising act as authorized in subsection (a), the court may direct that the defendant restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any violation of the truth in musical performance advertising act, under terms and conditions to be established by the court.

(c) Any person who violates the truth in musical performance advertising act shall be liable for a civil penalty as provided in subsection (a) of K.S.A. 50-636, and amendments thereto, which civil penalty shall be in

addition to any other relief which may be granted. Each performance or production declared unlawful shall constitute a separate violation.

New Sec. 5. It shall be an affirmative defense to a violation of the truth in musical performance advertising act if the person described in section 3, and amendments thereto, has a written contract with the performing or recording group, that states that:

(a) The performing group is an authorized registrant pursuant to subsection (a) of section 3, and amendments thereto; or

(b) at least one member of the performing group was a member of the recording group pursuant to subsection (b) of section 3, and amendments thereto.

Sec. 6. K.S.A. 50-676 is hereby amended to read as follows: 50-676. As used in ~~this act~~ K.S.A. 50-676 through 50-679, and amendments thereto:

(a) "Elder person" means a person who is 60 years of age or older.

(b) "Disabled person" means a person who has physical or mental impairment, or both, which substantially limits one or more of such person's major life activities.

(c) "Immediate family member" means parent, child, stepchild or spouse.

~~(d)~~ (d) "Major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(e) "Member of the military" means a member of the armed forces or national guard on active duty or a member of an active reserve unit in the armed forces or national guard.

~~(f)~~ (f) "Physical or mental impairment" means the following:

(1) Any physiological disorder or condition, cosmetic disfigurement or anatomical loss substantially affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine; or

(2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation and emotional illness.

(g) "Protected consumer" means:

(1) An elder person;

(2) a disabled person;

(3) a veteran;

(4) the surviving spouse of a veteran; and

(5) an immediate family member of a member of the military.

~~(h)~~ (h) "Substantially limits" means:

(1) Unable to perform a major life activity that the average person in the general population can perform; or

(2) significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity. Minor temporary ailments or injuries shall not be considered physical or mental impairments which substantially limit a person's major life activities. Minor temporary ailments include, but are not limited to, colds, influenza or sprains or minor injuries.

(i) "Veteran" means a person who has served in the armed forces of the United States of America and separated from the armed forces under honorable conditions.

Sec. 7. K.S.A. 50-677 is hereby amended to read as follows: 50-677. If any person is found to have violated any provision of the Kansas consumer protection act, and such violation is committed against ~~elder or disabled persons~~ a protected consumer, in addition to any civil penalty otherwise provided by law, the court may impose an additional civil penalty not to exceed \$10,000 for each such violation.

Sec. 8. K.S.A. 50-678 is hereby amended to read as follows: 50-678. In determining whether to impose a civil penalty as provided in ~~this act~~ K.S.A. 50-676 through 50-679, and amendments thereto, and the amount

of such civil penalty, the court shall consider the extent to which one or more of the following factors are present:

(a) Whether the defendant's conduct was in disregard of the rights of the ~~elder or disabled person~~ *protected consumer*;

(b) whether the defendant knew or should have known that the defendant's conduct was directed to ~~an elder or disabled person~~ *a protected consumer*;

(c) whether the ~~elder or disabled person~~ *protected consumer* was more vulnerable to the defendant's conduct because of age, poor health, infirmity, impaired understanding, restricted mobility or disability than other persons and actually suffered substantial physical, emotional or economic damage resulting from the defendant's conduct;

(d) whether the defendant's conduct caused ~~an elder or disabled person~~ *a protected consumer* to suffer any of the following:

(1) Mental or emotional anguish;

(2) loss of or encumbrance upon a primary residence of the ~~elder or disabled person~~ *protected consumer*;

(3) loss of or encumbrance upon the ~~elder or disabled person's~~ *protected consumer's* principal employment or principal source of income;

(4) loss of funds received under a pension or retirement plan or a government benefits program;

(5) loss of property set aside for retirement or for personal or family care and maintenance; or

(6) loss of assets essential to the health and welfare of the ~~elder or disabled person~~ *protected consumer*; or

(e) any other factors the court deems appropriate.

Sec. 9. K.S.A. 50-679 is hereby amended to read as follows: 50-679. ~~An elder or disabled person~~ *A protected consumer* who suffers damage or injury as a result of a violation of the Kansas consumer protection act has a cause of action to recover actual damages, punitive damages, if appropriate, and reasonable attorney fees. Restitution ordered pursuant to this section has priority over a civil penalty imposed pursuant to K.S.A. 50-677, *and amendments thereto*.

Sec. 10. K.S.A. 50-679a is hereby amended to read as follows: 50-679a. The provisions of K.S.A. 50-676 through 50-679, *and amendments thereto*, shall be part of and supplemental to the consumer protection act.

Sec. 11. K.S.A. 50-676, 50-677, 50-678, 50-679 and 50-679a are hereby repealed.

Sec. 12. This act shall take effect and be in force from and after its publication in the statute book.

Approved April 19, 2010.
