SPONSOR: Rep. Bentz & Sen. Paradee
Reps. Baumbach, Brady, Griffith, Heffernan, K. Johnson, Lambert, Mitchell, Morrison, Osienski, K. Williams, Wilson-Anton; Sens. Ennis, Lockman, Sturgeon, Townsend, Walsh

HOUSE OF REPRESENTATIVES
151st GENERAL ASSEMBLY

HOUSE BILL NO. 91

AN ACT TO AMEND TITLE 6 OF THE DELAWARE CODE RELATING TO PROHIBITED TRADE PRACTICES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 2511, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2511 Definitions.

As used in this subchapter, unless the context otherwise requires:

(9) "Unfair practice" means any practice which may be construed as any of the following:

a. Offensive to established public policy.

b. Unethical, oppressive, or unscrupulous.

c. Substantially injurious to consumers.

Interpretations of similar unfair practice definitions in other United States jurisdictions should be considered in determining whether a practice constitutes an unfair practice under this section.

Section 2. Amend §2513, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2513. Unlawful practice

(a) The act, use, or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression, or omission, in connection with the sale, lease, receipt, or advertisement of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is an unlawful practice. It shall also be an unlawful practice to misrepresent the geographic location of a business or supplier which raises or sells flowers and/or ornamental plants ~~by:~~ by any of the following:

SYNOPSIS

This Act amends Delaware's Consumer Fraud Act (Subchapter II, Chapter 25, Title 6 of the Code), to give Delaware consumers and businesses the protection against unfair acts or practices in commerce that the General Assembly intended to give them when it enacted the Consumer Fraud Act.

When the General Assembly enacted the Consumer Fraud Act in 1965, it stated, in what is now § 2512 of Title 6 of the Code, that the purpose of the Consumer Fraud Act is "to protect consumers and legitimate business enterprises from unfair or deceptive merchandising practices in the conduct of any trade or commerce in part or wholly within this State," and that "[i]t is the intent of the General Assembly that such practices be swiftly stopped." However, § 2513(a) of the Consumer Fraud Act, as enacted, prohibits only deceptive practices, and does not protect consumers and businesses from unfair practices as the General Assembly intended.

To address this, the Act amends § 2513(a) of the Consumer Fraud Act to include the term "unfair practice" among the activities explicitly prohibited by the Consumer Fraud Act. This aligns Delaware with the 7 states in the Top 10 of the U.S. Chamber of Commerce Institute for Legal Reform's 2017 Lawsuit Climate Survey, and the 44 states overall (plus the District of Columbia), which prohibit the use of unfair or unconscionable acts or practices in commerce. It will also align Delaware with federal law, which since 1938 has prohibited unfair practices in commerce in the Federal Trade Commission Act (15 U.S.C. § 45).

In order to provide guidance as to the meaning of "unfair practice," this Act uses the most common definition of unfairness or unfair practice used by states where unfairness has been defined either by statute or court decision (based on information published by the National Consumer Law Center) including California, Florida, Hawaii, Illinois, Massachusetts, Minnesota, Nebraska, New Hampshire, North Carolina, Oklahoma, Rhode Island, and South Carolina, and provides that interpretations of similar language in other jurisdictions should be considered in determining its meaning. The word "immoral" was purposely omitted from the definition of "unfair practice" despite its use in the definition of unfair practice in many other jurisdictions.

Prohibiting unfair practices will protect honest businesses by enabling them to compete fairly and effectively in the marketplace, in addition to protecting individual consumers (and businesses acting as consumers) harmed by such practices. Prohibiting unfair practices will also protect consumers in situations that may not be readily or easily addressed by current Delaware law, such as the Facebook/Cambridge Analytica scandal, price gouging during a state or national emergency, and other situations in which consumers are being unfairly taken advantage of and they are unable to reasonably avoid injury. Finally, prohibiting unfair practices will also enable the Delaware Attorney General to participate more effectively and robustly with other state attorneys general in multistate investigations and litigation seeking to protect consumers and remediate harm on a nationwide basis.

The act also amends § 2513(a) to add the term "receipt," to clarify that persons who provide goods or services at no charge to consumers—such as social media companies funded by advertising revenue—are not precluded from being held liable for engaging in consumer fraud simply because they may not directly sell or lease their goods or services to consumers.