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SENATE BILL NO. 471

Offered January 13, 2010

Prefiled January 13, 2010

A BILL to amend and reenact §§ 59.1-198 and 59.1-200 of the Code of Virginia, relating to the sale of defective drywall; penalty.

Patrons—Miller, J.C. and Petersen

Referred to Committee on General Laws and Technology

Be it enacted by the General Assembly of Virginia:**1. That §§ 59.1-198 and 59.1-200 of the Code of Virginia are amended and reenacted as follows:**

§ 59.1-198. Definitions.

As used in this chapter:

"Business opportunity" means the sale of any products, equipment, supplies or services which are sold to an individual for the purpose of enabling such individual to start a business to be operated out of his residence, but does not include a business opportunity which is subject to the Business Opportunity Sales Act, Chapter 21 (§ 59.1-262 et seq.) of this title.

"Children's product" means a consumer product designed or intended primarily for children 12 years of age or younger. In determining whether a consumer product is primarily intended for a child 12 years of age or younger, the following factors shall be considered:

1. A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable;

2. Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger;

3. Whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger; and

4. The Age Determination Guidelines issued by the staff of the Consumer Products Safety Commission in September 2002, and any successor to such guidelines.

"Consumer transaction" means:

1. The advertisement, sale, lease, license or offering for sale, lease or license, of goods or services to be used primarily for personal, family or household purposes;

2. Transactions involving the advertisement, offer or sale to an individual of a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged;

3. Transactions involving the advertisement, offer or sale to an individual of goods or services relating to the individual's finding or obtaining employment; and

4. A layaway agreement, whereby part or all of the price of goods is payable in one or more payments subsequent to the making of the layaway agreement and the supplier retains possession of the goods and bears the risk of their loss or damage until the goods are paid in full according to the layaway agreement.

"Cure offer" means a written offer of one or more things of value, including but not limited to the payment of money, that is made by a supplier and that is delivered to a person claiming to have suffered a loss as a result of a consumer transaction or to the attorney for such person. A cure offer shall be reasonably calculated to remedy a loss claimed by the person and it shall include a minimum additional amount equaling 10 percent of the value of the cure offer or \$500, whichever is greater, as compensation for inconvenience, any attorney's or other fees, expenses, or other costs of any kind that such person may incur in relation to such loss; provided, however that the minimum additional amount need not exceed \$4,000.

"Defective drywall" means drywall, or similar building material composed of dried gypsum-based plaster, that (i) as a result of containing the same or greater levels of strontium sulfide that has been found in drywall manufactured in the People's Republic of China and imported into the United States between 2004 and 2007 is capable, when exposed to heat, humidity, or both, of releasing sulfur dioxide, hydrogen sulfide, carbon disulfide, or other sulfur compounds into the air or (ii) has been designated by the U.S. Consumer Product Safety Commission as a product with a product defect that constitutes a substantial product hazard within the meaning of § 15(a)(2) of the Consumer Product Safety Act (15 U.S.C. § 2064(a)(2)).

"Goods" means all real, personal or mixed property, tangible or intangible. For purposes of this chapter, intangible property includes but shall not be limited to "computer information" and

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59 "informational rights" in computer information as defined in § 59.1-501.2.

60 "Person" means any natural person, corporation, trust, partnership, association and any other legal
61 entity.

62 "Services" includes but shall not be limited to (i) work performed in the business or occupation of
63 the supplier, (ii) work performed for the supplier by an agent whose charges or costs for such work are
64 transferred by the supplier to the consumer or purchaser as an element of the consumer transaction, or
65 (iii) the subject of an "access contract" as defined in § 59.1-501.2.

66 "Supplier" means a seller, lessor or licensor who advertises, solicits or engages in consumer
67 transactions, or a manufacturer, distributor or licensor who advertises and sells, leases or licenses goods
68 or services to be resold, leased or sublicensed by other persons in consumer transactions.

69 § 59.1-200. Prohibited practices.

70 A. The following fraudulent acts or practices committed by a supplier in connection with a consumer
71 transaction are hereby declared unlawful:

72 1. Misrepresenting goods or services as those of another;

73 2. Misrepresenting the source, sponsorship, approval, or certification of goods or services;

74 3. Misrepresenting the affiliation, connection, or association of the supplier, or of the goods or
75 services, with another;

76 4. Misrepresenting geographic origin in connection with goods or services;

77 5. Misrepresenting that goods or services have certain quantities, characteristics, ingredients, uses, or
78 benefits;

79 6. Misrepresenting that goods or services are of a particular standard, quality, grade, style, or model;

80 7. Advertising or offering for sale goods that are used, secondhand, repossessed, defective,
81 blemished, deteriorated, or reconditioned, or that are "seconds," irregulars, imperfects, or "not first
82 class," without clearly and unequivocally indicating in the advertisement or offer for sale that the goods
83 are used, secondhand, repossessed, defective, blemished, deteriorated, reconditioned, or are "seconds,"
84 irregulars, imperfects or "not first class";

85 8. Advertising goods or services with intent not to sell them as advertised, or with intent not to sell
86 at the price or upon the terms advertised.

87 In any action brought under this subdivision, the refusal by any person, or any employee, agent, or
88 servant thereof, to sell any goods or services advertised or offered for sale at the price or upon the terms
89 advertised or offered, shall be prima facie evidence of a violation of this subdivision. This paragraph
90 shall not apply when it is clearly and conspicuously stated in the advertisement or offer by which such
91 goods or services are advertised or offered for sale, that the supplier or offeror has a limited quantity or
92 amount of such goods or services for sale, and the supplier or offeror at the time of such advertisement
93 or offer did in fact have or reasonably expected to have at least such quantity or amount for sale;

94 9. Making false or misleading statements of fact concerning the reasons for, existence of, or amounts
95 of price reductions;

96 10. Misrepresenting that repairs, alterations, modifications, or services have been performed or parts
97 installed;

98 11. Misrepresenting by the use of any written or documentary material that appears to be an invoice
99 or bill for merchandise or services previously ordered;

100 12. Notwithstanding any other provision of law, using in any manner the words "wholesale,"
101 "wholesaler," "factory," or "manufacturer" in the supplier's name, or to describe the nature of the
102 supplier's business, unless the supplier is actually engaged primarily in selling at wholesale or in
103 manufacturing the goods or services advertised or offered for sale;

104 13. Using in any contract or lease any liquidated damage clause, penalty clause, or waiver of
105 defense, or attempting to collect any liquidated damages or penalties under any clause, waiver, damages,
106 or penalties that are void or unenforceable under any otherwise applicable laws of the Commonwealth,
107 or under federal statutes or regulations;

108 14. Using any other deception, fraud, false pretense, false promise, or misrepresentation in connection
109 with a consumer transaction;

110 15. Violating any provision of § 3.2-6512, 3.2-6513, or 3.2-6516, relating to the sale of certain
111 animals by pet dealers which is described in such sections, is a violation of this chapter;

112 16. Failing to disclose all conditions, charges, or fees relating to:

113 a. The return of goods for refund, exchange, or credit. Such disclosure shall be by means of a sign
114 attached to the goods, or placed in a conspicuous public area of the premises of the supplier, so as to be
115 readily noticeable and readable by the person obtaining the goods from the supplier. If the supplier does
116 not permit a refund, exchange, or credit for return, he shall so state on a similar sign. The provisions of
117 this subdivision shall not apply to any retail merchant who has a policy of providing, for a period of not
118 less than 20 days after date of purchase, a cash refund or credit to the purchaser's credit card account
119 for the return of defective, unused, or undamaged merchandise upon presentation of proof of purchase.
120 In the case of merchandise paid for by check, the purchase shall be treated as a cash purchase and any

refund may be delayed for a period of 10 banking days to allow for the check to clear. This subdivision does not apply to sale merchandise that is obviously distressed, out of date, post season, or otherwise reduced for clearance; nor does this subdivision apply to special order purchases where the purchaser has requested the supplier to order merchandise of a specific or unusual size, color, or brand not ordinarily carried in the store or the store's catalog; nor shall this subdivision apply in connection with a transaction for the sale or lease of motor vehicles, farm tractors, or motorcycles as defined in § 46.2-100;

b. A layaway agreement. Such disclosure shall be furnished to the consumer (i) in writing at the time of the layaway agreement, or (ii) by means of a sign placed in a conspicuous public area of the premises of the supplier, so as to be readily noticeable and readable by the consumer, or (iii) on the bill of sale. Disclosure shall include the conditions, charges, or fees in the event that a consumer breaches the agreement;

16a. Failing to provide written notice to a consumer of an existing open-end credit balance in excess of \$5 (i) on an account maintained by the supplier and (ii) resulting from such consumer's overpayment on such account. Suppliers shall give consumers written notice of such credit balances within 60 days of receiving overpayments. If the credit balance information is incorporated into statements of account furnished consumers by suppliers within such 60-day period, no separate or additional notice is required;

17. If a supplier enters into a written agreement with a consumer to resolve a dispute that arises in connection with a consumer transaction, failing to adhere to the terms and conditions of such an agreement;

18. Violating any provision of the Virginia Health Spa Act, Chapter 24 (§ 59.1-294 et seq.) of this title;

19. Violating any provision of the Virginia Home Solicitation Sales Act, Chapter 2.1 (§ 59.1-21.1 et seq.) of this title;

20. Violating any provision of the Automobile Repair Facilities Act, Chapter 17.1 (§ 59.1-207.1 et seq.) of this title;

21. Violating any provision of the Virginia Lease-Purchase Agreement Act, Chapter 17.4 (§ 59.1-207.17 et seq.) of this title;

22. Violating any provision of the Prizes and Gifts Act, Chapter 31 (§ 59.1-415 et seq.) of this title;

23. Violating any provision of the Virginia Public Telephone Information Act, Chapter 32 (§ 59.1-424 et seq.) of this title;

24. Violating any provision of § 54.1-1505;

25. Violating any provision of the Motor Vehicle Manufacturers' Warranty Adjustment Act, Chapter 17.6 (§ 59.1-207.34 et seq.) of this title;

26. Violating any provision of § 3.2-5627, relating to the pricing of merchandise;

27. Violating any provision of the Pay-Per-Call Services Act, Chapter 33 (§ 59.1-429 et seq.) of this title;

28. Violating any provision of the Extended Service Contract Act, Chapter 34 (§ 59.1-435 et seq.) of this title;

29. Violating any provision of the Virginia Membership Camping Act, Chapter 25 (§ 59.1-311 et seq.) of this title;

30. Violating any provision of the Comparison Price Advertising Act, Chapter 17.7 (§ 59.1-207.40 et seq.) of this title;

31. Violating any provision of the Virginia Travel Club Act, Chapter 36 (§ 59.1-445 et seq.) of this title;

32. Violating any provision of §§ 46.2-1231 and 46.2-1233.1;

33. Violating any provision of Chapter 40 (§ 54.1-4000 et seq.) of Title 54.1;

34. Violating any provision of Chapter 10.1 (§ 58.1-1031 et seq.) of Title 58.1;

35. Using the consumer's social security number as the consumer's account number with the supplier, if the consumer has requested in writing that the supplier use an alternate number not associated with the consumer's social security number;

36. Violating any provision of Chapter 18 (§ 6.1-444 et seq.) of Title 6.1;

37. Violating any provision of § 8.01-40.2;

38. Violating any provision of Article 7 (§ 32.1-212 et seq.) of Chapter 6 of Title 32.1;

39. Violating any provision of Chapter 34.1 (§ 59.1-441.1 et seq.) of this title;

40. Violating any provision of Chapter 10.2 (§ 6.1-363.2 et seq.) of Title 6.1;

41. Violating any provision of the Virginia Post-Disaster Anti-Price Gouging Act, Chapter 46 (§ 59.1-525 et seq.) of this title;

42. Violating any provision of Chapter 47 (§ 59.1-530 et seq.) of this title;

43. Violating any provision of § 59.1-443.2;

44. Violating any provision of Chapter 48 (§ 59.1-533 et seq.) of this title;

182 45. Violating any provision of Chapter 20 (§ 6.1-474 et seq.) of Title 6.1;
183 46. Violating the provisions of clause (i) of subsection B of § 54.1-1115;
184 47. Violating any provision of § 18.2-239;
185 48. Violating any provision of Chapter 26 (§ 59.1-336 et seq.);
186 49. Selling, offering for sale, or manufacturing for sale a children's product the supplier knows or has
187 reason to know was recalled by the U.S. Consumer Product Safety Commission. There is a rebuttable
188 presumption that a supplier has reason to know a children's product was recalled if notice of the recall
189 has been posted continuously at least 30 days before the sale, offer for sale, or manufacturing for sale
190 on the website of the U.S. Consumer Product Safety Commission. This prohibition does not apply to
191 children's products that are used, secondhand or "seconds"; ~~and~~
192 50. Violating any provision of Chapter 44.1 (§ 59.1-518.1 et seq.) of this title; *and*
193 51. *Selling, offering for sale, or using in the construction, remodeling, or repair of any residential*
194 *dwelling in the Commonwealth, any drywall that the supplier knows or has reason to know is defective*
195 *drywall.*
196 B. Nothing in this section shall be construed to invalidate or make unenforceable any contract or
197 lease solely by reason of the failure of such contract or lease to comply with any other law of the
198 Commonwealth or any federal statute or regulation, to the extent such other law, statute, or regulation
199 provides that a violation of such law, statute, or regulation shall not invalidate or make unenforceable
200 such contract or lease.