

ASSEMBLY BILL

No. 1360

Introduced by Assembly Member Kaloogian

February 26, 1999

An act to amend Section 1812.201 and 1812.218 of the Civil Code, relating to seller assisted marketing plans.

LEGISLATIVE COUNSEL'S DIGEST

AB 1360, as introduced, Kaloogian. Seller assisted marketing plans: exemptions: limitation of actions.

Existing law imposes requirements on seller assisted marketing plans, as defined. Existing law also specifies certain types of business transactions that are not deemed to be seller assisted marketing plans for the purposes of those requirements.

This bill would add to the list of exempted business transactions any marketing plans or contracts where the seller has a specified net worth and meets specified criteria relating to prior business experience or where the sale or lease of the marketing plan is made in conjunction with the licencing of a trademark or service mark.

Existing law defines the "initial payment" under a seller assisted marketing plan contract as the total amount the purchaser is obligated to pay under the contract prior to, at the time of, or within 6 months after, delivery of the equipment, supplies, products, or services by the seller.

This bill would exclude from that definition the bona fide wholesale price for products and make a related clarifying change.

Existing law authorizes a purchaser who is injured by a violation of law or breach of contract relating to a seller assisted marketing plan to bring an action for damages, as specified.

This bill would require that those actions be brought within the earlier of 3 years after the execution of the contract by the purchaser or one year after the plaintiff discovers facts giving rise to the violation or breach.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 1812.201 of the Civil Code is
2 amended to read:

3 1812.201. For the purposes of this title, the following
4 definitions shall apply:

5 (a) "Seller assisted marketing plan" means any sale or
6 lease or offer to sell or lease any product, equipment,
7 supplies, or services ~~which~~ *that* requires a total initial
8 payment exceeding five hundred dollars (\$500), but
9 requires an initial cash payment of less than fifty thousand
10 dollars (\$50,000), ~~which~~ *that* will aid a purchaser or will
11 be used by or on behalf of the purchaser in connection
12 with or incidental to beginning, maintaining, or
13 operating a business when the seller assisted marketing
14 plan seller has advertised or in any other manner solicited
15 the purchase or lease of the seller assisted marketing plan
16 and done any of the following acts:

17 (1) Represented that the purchaser will earn, is likely
18 to earn, or can earn an amount in excess of the initial
19 payment paid by the purchaser for participation in the
20 seller assisted marketing plan.

21 (2) Represented that there is a market for the product,
22 equipment, supplies, or services, or any product
23 marketed by the user of the product, equipment,
24 supplies, or services sold or leased or offered for sale or
25 lease to the purchaser by the seller, or anything, be it
26 tangible or intangible, made, produced, fabricated,
27 grown, bred, modified, or developed by the purchaser



1 using, in whole or in part, the product, supplies,
2 equipment, or services ~~which~~ *that* were sold or leased or
3 offered for sale or lease to the purchaser by the seller
4 assisted marketing plan seller.

5 (3) Represented that the seller will buy back or is
6 likely to buy back any product made, produced,
7 fabricated, grown, or bred by the purchaser using, in
8 whole or in part, the product, supplies, equipment, or
9 services ~~which~~ *that* were initially sold or leased or offered
10 for sale or lease to the purchaser by the seller assisted
11 marketing plan seller.

12 (b) A “seller assisted marketing plan” shall not
13 include:

14 (1) A security, as defined in the Corporate Securities
15 Law of 1968 (Division 1 (commencing with Section
16 25000) of Title 4 of the Corporations Code) ~~which~~, *that*
17 has been qualified for sale by the Department of
18 Corporations, or is exempt under Chapter 1
19 (commencing with Section 25100) of Part 2 of Division 1
20 of Title 4 of the Corporations Code from the necessity to
21 qualify.

22 (2) A franchise defined by the Franchise Investment
23 Law (Division 5 (commencing with Section 31000) of
24 Title 4 of the Corporations Code) ~~which~~ *that* is registered
25 with the Department of Corporations or is exempt under
26 Chapter 1 (commencing with Section 31100) of Part 2 of
27 Division 5 of Title 4 of the Corporations Code from the
28 necessity of registering.

29 (3) Any transaction in which either the seller or
30 purchaser or the lessor or lessee is licensed pursuant to
31 and the transaction is governed by the Real Estate Law,
32 Division 4 (commencing with Section 10000) of the
33 Business and Professions Code.

34 (4) A license granted by a general merchandise
35 retailer ~~which~~ *that* allows the licensee to sell goods,
36 equipment, supplies, products, or services to the general
37 public under the retailer’s trademark, trade name, or
38 service mark if all of the following criteria are satisfied:



1 (A) The general merchandise retailer has been doing
2 business in this state continually for five years prior to the
3 granting of the license.

4 (B) The general merchandise retailer sells diverse
5 kinds of goods, equipment, supplies, products, or services.

6 (C) The general merchandise retailer also sells the
7 same goods, equipment, supplies, products, or services
8 directly to the general public.

9 (D) During the previous 12 months the general
10 merchandise retailer's direct sales of the same goods,
11 equipment, supplies, products, or services to the public
12 account for at least 50 percent of its yearly sales of these
13 goods, equipment, supplies, products, or services made
14 under the retailer's trademark, trade name, or service
15 mark.

16 (5) A newspaper distribution system distributing
17 newspapers as defined in Section 6362 of the Revenue and
18 Taxation Code.

19 (6) A sale or lease to an existing or beginning business
20 enterprise—~~which~~ *that* also sells or leases equipment,
21 products, supplies, or performs services that are not
22 supplied by the seller and that the purchaser does not
23 utilize with the equipment, products, supplies, or services
24 of the seller, if the equipment, products, supplies, or
25 services not supplied by the seller account for more than
26 25 percent of the purchaser's gross sales.

27 (7) The sale in the entirety of an "ongoing business."
28 For purposes of this paragraph, an "ongoing business"
29 means a business ~~which~~ *that* for at least six months
30 previous to the sale has been operated from a particular
31 specific location, has been open for business to the
32 general public, and has had all equipment and supplies
33 necessary for operating the business located at that
34 location. The sale shall be of the entire "ongoing business"
35 and not merely a portion of the ongoing business.

36 (8) A sale or lease or offer to sell or lease to a purchaser
37 (A) who has for a period of at least six months previously
38 bought products, supplies, services, or equipment ~~which~~
39 *that* were sold under the same trademark or trade name
40 or ~~which~~ *that* were produced by the seller and, (B) who



1 has received on resale of the product, supplies, services,
2 or equipment an amount ~~which~~ *that* is at least equal to the
3 amount of the initial payment.

4 (9) The renewal or extension of an existing seller
5 assisted marketing plan contract.

6 *(10) Any contract or marketing plan that otherwise*
7 *meets the criteria of a “seller assisted marketing plan”*
8 *described in subdivision (a), but where the seller (A) has*
9 *a net worth on a consolidated basis of not less than five*
10 *million dollars (\$5,000,000), according to audited*
11 *financial statements of the seller for the most recent full*
12 *fiscal year, and (B) during the five fiscal years preceding*
13 *the sale, has had at least 25 purchasers of the seller’s*
14 *marketing plan conducting a seller assisted marketing*
15 *business or has conducted the business that is the subject*
16 *of the marketing plan.*

17 *(11) The sale or lease of a marketing plan that*
18 *otherwise meets the criteria of a “seller assisted*
19 *marketing plan” described in subdivision (a), but where*
20 *that sale or lease is made in conjunction with the licensing*
21 *of a trademark or service mark registered under federal*
22 *law.*

23 (c) “Person” includes an individual, corporation,
24 partnership, limited liability company, joint venture, or
25 any business entity.

26 (d) “Seller” means a person who sells or leases or offers
27 to sell or lease a seller assisted marketing plan and who
28 meets either of the following conditions:

29 (1) Has sold or leased or represents or implies that the
30 seller has sold or leased, whether in California or
31 elsewhere, at least five seller assisted marketing plans
32 within 24 months prior to a solicitation.

33 (2) Intends or represents or implies that the seller
34 intends to sell or lease, whether in California or
35 elsewhere, at least five seller assisted marketing plans
36 within 12 months following a solicitation.

37 For purposes of this title, the seller is the person to
38 whom the purchaser becomes contractually obligated. A
39 “seller” does not include a licensed real estate broker or
40 salesman who engages in the sale or lease of a “business



1 opportunity” as that term is used in Sections 10000 to
2 10030, inclusive, of the Business and Professions Code, or
3 elsewhere in Chapter 1 (commencing with Section
4 10000), Chapter 2 (commencing with Section 10050), or
5 Chapter 6 (commencing with Section 10450) of Part 1 of
6 Division 4 of the Business and Professions Code.

7 (e) “Purchaser” means a person who is solicited to
8 become obligated or does become obligated on a seller
9 assisted marketing plan contract.

10 (f) “Equipment” includes machines, all electrical
11 devices, video or audio devices, molds, display racks,
12 vending machines, coin operated game machines,
13 machines ~~which~~ *that* dispense products, and display units
14 of all kinds.

15 (g) “Supplies” includes any and all materials used to
16 produce, grow, breed, fabricate, modify, develop, or
17 make any product or item.

18 (h) “Product” includes any tangible chattel, including
19 food or living animals, ~~which~~ *that* the purchaser intends
20 to:

21 (1) Sell or lease.

22 (2) Use to perform a service.

23 (3) Resell or attempt to resell to the seller assisted
24 marketing plan seller.

25 (4) Provide or attempt to provide to the seller assisted
26 marketing plan seller or to any other person whom the
27 seller suggests the purchaser contact so that the seller
28 assisted marketing plan seller or that other person may
29 assist, either directly or indirectly, the purchaser in
30 distributing, selling, leasing, or otherwise disposing of the
31 product.

32 (i) “Services” includes any assistance, guidance,
33 direction, work, labor, or services provided by the seller
34 to initiate or maintain or assist in the initiation or
35 maintenance of a business.

36 (j) “Seller assisted marketing plan contract” or
37 “contract” means any contract or agreement ~~which~~ *that*
38 obligates a purchaser to a seller.

39 (k) “Initial payment” means the total amount a
40 purchaser is obligated to pay *to the seller* under the terms



1 of the seller assisted marketing plan contract prior to or
2 at the time of delivery of the equipment, supplies,
3 products, or services or within six months of the
4 purchaser commencing operation of the seller assisted
5 marketing plan. If the contract sets forth a specific total
6 sale price for purchase of the seller assisted marketing
7 plan which total price is to be paid partially as a
8 downpayment and then in specific monthly payments,
9 the “initial payment” means the entire total sale price.
10 *“Initial payment” shall not include any amount that*
11 *represents the bona fide wholesale price for products.*

12 (l) “Initial cash payment” or “downpayment” means
13 that portion of the initial payment ~~which~~ *that* the
14 purchaser is obligated to pay to the seller prior to or at the
15 time of delivery of equipment, supplies, products, or
16 services. It does not include any amount financed by or
17 for which financing is to be obtained by the seller, or
18 financing ~~which~~ *that* the seller assists in obtaining.

19 (m) “Buy-back” or “secured investment” means any
20 representation—~~which~~ *that* implies in any manner that the
21 purchaser’s initial payment is protected from loss. These
22 terms include a representation or implication of any of
23 the following:

24 (1) That the seller may repurchase either all or part of
25 what it sold to the purchaser.

26 (2) That the seller may at some future time pay the
27 purchaser the difference between what has been earned
28 and the initial payment.

29 (3) That the seller may in the ordinary course buy
30 from the purchaser items made, produced, fabricated,
31 grown, bred, modified, or developed by the purchaser
32 using, in whole or in part, the product, supplies,
33 equipment, or services ~~which~~ *that* were initially sold or
34 leased to the purchaser by the seller.

35 (4) That the seller or a person to whom the seller will
36 refer the purchaser may in the ordinary course sell, lease,
37 or distribute the items the purchaser has for sale or lease.

38 SEC. 2. Section 1812.218 of the Civil Code is amended
39 to read:



1 1812.218. (a) Any purchaser injured by a violation of
2 this title or by the seller's breach of a contract subject to
3 this title or of any obligation arising from the sale or lease
4 of the seller assisted marketing plan may bring any action
5 for recovery of damages. Judgment shall be entered for
6 actual damages, plus reasonable attorney's fees and costs,
7 but in no case shall the award of damages be less than the
8 amount of the initial payment provided the purchaser is
9 able to return all the equipment, supplies or products
10 delivered by the seller; ~~when such~~. *When that complete*
11 *return cannot be made, the minimum award shall be no*
12 *less than the amount of the initial payment less the fair*
13 *market value at the time of delivery of the equipment,*
14 *supplies or products that cannot be returned but were*
15 *actually delivered by the seller. An award, if the trial*
16 *court deems it proper, may be entered for punitive*
17 *damages.*

18 (b) *No action shall be maintained to enforce any*
19 *violation or breach under this title unless brought before*
20 *the earlier of (1) three years after the execution by the*
21 *purchaser of the seller assisted marketing plan contract*
22 *or (2) one year after discovery by the plaintiff of the facts*
23 *giving rise to the violation or breach.*

