January 25, 2011

HOUSE BILL No. 1182

DIGEST OF HB 1182 (Updated January 24, 2011 12:48 pm - DI 107)

Citations Affected: IC 24-5; IC 24-9; IC 24-10.

Synopsis: Consumer protection assistance fund. Establishes the consumer protection assistance fund (fund) to be administered by the office of the attorney general (office). Provides that money in the fund may be used to make payments to qualifying individuals who: (1) are awarded restitution by a court in a case instituted or maintained by the office in connection with a violation of certain specified consumer protection statutes; and (2) assist or otherwise cooperate with the office in the investigation, prosecution, or enforcement of the case. Provides that the office may not make a payment to a qualifying individual unless the party ordered to pay restitution to the qualifying individual has not paid the full amount ordered by the court. Provides that upon receiving a qualifying claim, the office shall pay, from money available in the fund, to each qualifying individual identified in the claim an amount that: (1) is determined at the discretion of the office; (2) may be up to the amount of the restitution awarded to the qualifying individual but not paid by the party ordered to pay the restitution; and (3) may not exceed $3,000. Provides that a qualifying individual is not prohibited from seeking to recover, in any action or through any other lawful remedy available, any amount of the restitution that is awarded by the court and exceeds the amount paid to the individual by the office. Amends the statute governing deceptive consumer sales to specify that civil penalties recovered by the office in actions for violations of the statutes governing: (1) credit services organizations; (2) mortgage rescue fraud; and (3) home loan practices; may, if ordered by the court, be deposited in the fund. Amends the statute governing home loan practices to provide that civil penalties recovered by the office in actions for a violation of the statute may, if ordered by the court, be deposited in the fund.

Effective: Upon passage.

Burton, Bardon, Frye R, Riecken

January 10, 2011, read first time and referred to Committee on Judiciary.
January 24, 2011, reported — Do Pass.

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January 25, 2011

First Regular Session 117th General Assembly (2011)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2010 Regular Session of the General Assembly.

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HOUSE BILL No. 1182

A BILL FOR AN ACT to amend the Indiana Code concerning trade regulation and to make an appropriation.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC 24-5-0.5-4, AS AMENDED BY P.L.85-2006, SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 4. (a) A person relying upon an uncured or incurable deceptive act may bring an action for the damages actually suffered as a consumer as a result of the deceptive act or five hundred dollars ($500), whichever is greater. The court may increase damages for a willful deceptive act in an amount that does not exceed the greater of:

(1) three (3) times the actual damages of the consumer suffering the loss; or

(2) one thousand dollars ($1,000).

Except as provided in subsection (j), the court may award reasonable attorney fees to the party that prevails in an action under this subsection. This subsection does not apply to a consumer transaction in real property, including a claim or action involving a construction defect (as defined in IC 32-27-3-1(5)) brought against a construction professional (as defined in IC 32-27-3-1(4)), except for purchases of

time shares and camping club memberships. This subsection also does not apply to a violation of IC 24-4.7, IC 24-5-12, or IC 24-5-14. Actual damages awarded to a person under this section have priority over any civil penalty imposed under this chapter.

(b) Any person who is entitled to bring an action under subsection (a) on the person's own behalf against a supplier for damages for a deceptive act may bring a class action against such supplier on behalf of any class of persons of which that person is a member and which has been damaged by such deceptive act, subject to and under the Indiana Rules of Trial Procedure governing class actions, except as herein expressly provided. Except as provided in subsection (j), the court may award reasonable attorney fees to the party that prevails in a class action under this subsection, provided that such fee shall be determined by the amount of time reasonably expended by the attorney and not by the amount of the judgment, although the contingency of the fee may be considered. **Except in the case of an extension of time granted by the attorney general under IC 24-10-2-2(b) in an action subject to IC 24-10,** any money or other property recovered in a class action under this subsection which cannot, with due diligence, be restored to consumers within one (1) year after the judgment becomes final shall be returned to the party depositing the same. This subsection does not apply to a consumer transaction in real property, except for purchases of time shares and camping club memberships. Actual damages awarded to a class have priority over any civil penalty imposed under this chapter.

(c) The attorney general may bring an action to enjoin a deceptive act. However, the attorney general may seek to enjoin patterns of incurable deceptive acts with respect to consumer transactions in real property. In addition, the court may:

(1) issue an injunction;

(2) order the supplier to make payment of the money unlawfully received from the aggrieved consumers to be held in escrow for distribution to aggrieved consumers;

(3) order the supplier to pay to the state the reasonable costs of the attorney general's investigation and prosecution related to the action; and

(4) provide for the appointment of a receiver.

(d) In an action under subsection (a), (b), or (c), the court may void or limit the application of contracts or clauses resulting from deceptive acts and order restitution to be paid to aggrieved consumers.

(e) In any action under subsection (a) or (b), upon the filing of the complaint or on the appearance of any defendant, claimant, or any

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other party, or at any later time, the trial court, the supreme court, or the court of appeals may require the plaintiff, defendant, claimant, or any other party or parties to give security, or additional security, in such sum as the court shall direct to pay all costs, expenses, and disbursements that shall be awarded against that party or which that party may be directed to pay by any interlocutory order by the final judgment or on appeal.

(f) Any person who violates the terms of an injunction issued under subsection (c) shall forfeit and pay to the state a civil penalty of not more than fifteen thousand dollars ($15,000) per violation. For the purposes of this section, the court issuing an injunction shall retain jurisdiction, the cause shall be continued, and the attorney general acting in the name of the state may petition for recovery of civil penalties. Whenever the court determines that an injunction issued under subsection (c) has been violated, the court shall award reasonable costs to the state. **If a civil penalty is recovered under this subsection in an action involving a violation of:**

(1) IC 24-5-15 (concerning credit service organizations), as permitted by IC 24-5-15-11;

(2) IC 24-5.5 (concerning mortgage rescue fraud), as permitted by IC 24-5.5-6-1; or

(3) IC 24-9 (concerning home loan practices), as permitted by IC 24-9-8-1;

the civil penalty recovered may, if ordered by the court, be deposited in the consumer protection assistance fund established by IC 24-10-2-1.

(g) If a court finds any person has knowingly violated section 3 or 10 of this chapter, other than section 3(a)(19) of this chapter, the attorney general, in an action pursuant to subsection (c), may recover from the person on behalf of the state a civil penalty of a fine not exceeding five thousand dollars ($5,000) per violation. **If a civil penalty is recovered under this subsection in an action involving a violation of:**

(1) IC 24-5-15 (concerning credit service organizations), as permitted by IC 24-5-15-11;

(2) IC 24-5.5 (concerning mortgage rescue fraud), as permitted by IC 24-5.5-6-1; or

(3) IC 24-9 (concerning home loan practices), as permitted by IC 24-9-8-1;

the civil penalty recovered may, if ordered by the court, be deposited in the consumer protection assistance fund established by IC 24-10-2-1.

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(h) If a court finds that a person has violated section 3(a)(19) of this chapter, the attorney general, in an action under subsection (c), may recover from the person on behalf of the state a civil penalty as follows:

(1) For a knowing or intentional violation, one thousand five hundred dollars ($1,500).

(2) For a violation other than a knowing or intentional violation, five hundred dollars ($500).

A civil penalty recovered under this subsection shall be deposited in the consumer protection division telephone solicitation fund established by IC 24-4.7-3-6 to be used for the administration and enforcement of section 3(a)(19) of this chapter.

(i) An elderly person relying upon an uncured or incurable deceptive act, including an act related to hypnotism, may bring an action to recover treble damages, if appropriate.

(j) An offer to cure is:

(1) not admissible as evidence in a proceeding initiated under this section unless the offer to cure is delivered by a supplier to the consumer or a representative of the consumer before the supplier files the supplier's initial response to a complaint; and

(2) only admissible as evidence in a proceeding initiated under this section to prove that a supplier is not liable for attorney's fees under subsection (k).

If the offer to cure is timely delivered by the supplier, the supplier may submit the offer to cure as evidence to prove in the proceeding in accordance with the Indiana Rules of Trial Procedure that the supplier made an offer to cure.

(k) A supplier may not be held liable for the attorney's fees and court costs of the consumer that are incurred following the timely delivery of an offer to cure as described in subsection (j) unless the actual damages awarded, not including attorney's fees and costs, exceed the value of the offer to cure.

SECTION 2. IC 24-5-0.5-8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 8. A person who commits an incurable deceptive act is subject to a civil penalty of a fine of not more than five hundred dollars ($500) for each violation. The attorney general, acting in the name of the state, has the exclusive right to petition for recovery of such a fine, and this fine may be recovered only in an action brought under section 4(c) of this chapter. **If a civil penalty is recovered under this section in an action involving a violation of:**

(1) IC 24-5-15 (concerning credit service organizations), as permitted by IC 24-5-15-11;

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(2) IC 24-5.5 (concerning mortgage rescue fraud), as permitted by IC 24-5.5-6-1; or

(3) IC 24-9 (concerning home loan practices), as permitted by IC 24-9-8-1;

the civil penalty recovered may, if ordered by the court, be deposited in the consumer protection assistance fund established by IC 24-10-2-1.

SECTION 3. IC 24-9-8-3, AS AMENDED BY P.L.114-2010, SECTION 21, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 3. (a) This section does not apply to a violation of IC 24-9-3-7(c)(4) by a person required to be licensed by the department of financial institutions. The attorney general may bring an action to enjoin a violation of this article. A court in which the action is brought may:

(1) issue an injunction;

(2) order a person to make restitution;

(3) order a person to reimburse the state for reasonable costs of the attorney general's investigation and prosecution of the violation of this article; and

(4) impose a civil penalty of not more than ten thousand dollars ($10,000) per violation.

(b) A person who violates an injunction under this section is subject to a civil penalty of not more than ten thousand dollars ($10,000) per violation.

(c) The court that issues an injunction retains jurisdiction over a proceeding seeking the imposition of a civil penalty under this section.

(d) A civil penalty recovered under this section may, if ordered by the court, be deposited in the consumer protection assistance fund established by IC 24-10-2-1.

SECTION 4. IC 24-10 IS ADDED TO THE INDIANA CODE AS A **NEW** ARTICLE TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]:

ARTICLE 10. CONSUMER PROTECTION ASSISTANCE FUND

Chapter 1. Definitions

Sec. 1. As used in this article, "fund" refers to the consumer protection assistance fund established by IC 24-10-2-1.

Sec. 2. As used in this article, "office" refers to the office of attorney general created by IC 4-6-1-2.

Sec. 3. As used in this article, "qualifying claim" means a claim that:

(1) subject to IC 24-10-2-2(b), is filed with the office on a form

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prescribed by the office;

(2) is based on a court order that:

(A) is issued in a case instituted or maintained by the office in connection with a violation of a statute set forth in IC 24-10-2-1(d); and

(B) awards restitution to one (1) or more qualifying individuals;

(3) identifies each qualifying individual who:

(A) has been awarded restitution in the order described in subdivision (2); and

(B) seeks payment from the fund through the claim submitted;

(4) attests that the party ordered to pay the restitution has not paid the full amount ordered with respect to each qualifying individual identified under subdivision (3); and

(5) seeks payment from the fund of any amount of the restitution:

(A) ordered by the court; and

(B) not paid by the party ordered to pay the restitution;

with respect to each qualifying individual identified under subdivision (3).

Sec. 4. As used in this article, "qualifying individual" means an Indiana resident who:

(1) is awarded restitution by a court in a case that:

(A) is instituted or maintained by the office; and

(B) involves a violation by one (1) or more other persons of a statute set forth in IC 24-10-2-1(d); and

(2) assists or otherwise cooperates with the office in the investigation, prosecution, or enforcement of the case.

Chapter 2. Establishment and Purposes of Fund

Sec. 1. (a) The consumer protection assistance fund is established for the purpose of compensating qualifying individuals who submit qualifying claims to the office. The fund shall be administered by the office.

(b) The fund consists of the following:

(1) Penalties and other amounts collected under the following statutes:

(A) IC 24-5-15 (concerning credit services organizations).

(B) IC 24-5.5 (concerning mortgage rescue fraud).

(C) IC 24-9 (concerning home loan practices).

(D) Unless otherwise prohibited by law, and at the discretion of the office, other statutes enforced by the

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office.

(2) Funds appropriated, recovered, or received for consumer protection purposes if use of the money is not otherwise restricted.

(c) Money in the fund is continuously appropriated for the purposes of this section.

(d) Money in the fund may be used to make payments to qualifying individuals who file qualifying claims with the office in connection with a case involving a violation by one (1) or more other persons of any of the following statutes, including rules adopted under the authority of the following statutes:

(1) IC 24-4.7 (concerning telephone solicitation of consumers) if the case concerns a violation involving telephone solicitations made in connection with any practice or transaction governed by a statute described in subdivisions (2) through (4).

(2) IC 24-5-15 (concerning credit services organizations).

(3) IC 24-5.5 (concerning mortgage rescue fraud).

(4) IC 24-9 (concerning home loan practices).

(e) The expenses of administering the fund shall be paid from money in the fund.

(f) The treasurer of state shall invest the money in the fund not currently needed to meet the obligations of the fund in the same manner as other public money may be invested. Interest that accrues from these investments shall be deposited in the fund.

(g) Money in the fund at the end of a state fiscal year does not revert to the state general fund.

Sec. 2. (a) The office may not make a payment to a qualifying individual under section 1(d) of this chapter unless the party ordered to pay restitution to the qualifying individual has not paid the full amount of the restitution ordered by the court in the order described in IC 24-10-1-3(2).

(b) A qualifying individual who seeks payment from the fund of any amount of the restitution:

(1) ordered by the court to be paid to the individual; and

(2) not paid by the party ordered to pay the restitution;

may file a claim with the office on a form prescribed by the office. A claim filed under this section must be received by the office not later than one hundred eighty (180) days after the date of the order described in IC 24-10-1-3(2). The office may grant an extension of time for good cause shown by the individual filing the claim. However, the office may not accept a claim that is received more

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than two (2) years after the date of the order described in IC 24-10-1-3(2).

(c) The personal information (as defined in IC 4-1-11-3) of an individual who files a claim with the office under subsection (b) is confidential and may not be disclosed or distributed outside the office, except as may be required by law.

(d) Upon receiving a qualifying claim, the office shall pay, from money available in the fund, to each qualifying individual identified in the claim under IC 24-10-1-3(3), an amount that:

(1) is determined at the discretion of the office;

(2) may be up to the amount of the restitution awarded to the qualifying individual and not paid by the party ordered to pay the restitution; and

(3) may not exceed three thousand dollars ($3,000).

(e) The limits set forth in subsection (d) do not prohibit a qualifying individual from seeking to recover, in any action or through any other lawful remedy available to the individual, any amount of the restitution that:

(1) is awarded to the qualifying individual in the order described in IC 24-10-1-3(2);

(2) is not paid by the party ordered to pay the restitution; and

(3) exceeds the amount paid to the qualifying individual by the office under subsection (d).

Sec. 3. The state is not liable for a determination or an award made by the office under this chapter except to the extent that money is available in the fund on the date the award is determined by the office under this chapter.

Sec. 4. The office may adopt rules under IC 4-22-2 to implement this article.

SECTION 5. **An emergency is declared for this act.**

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COMMITTEE REPORT

Mr. Speaker: Your Committee on Judiciary, to which was referred House Bill 1182, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill do pass.

FOLEY, Chair

Committee Vote: yeas 9, nays 0.

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