
HOUSE BILL No. 1367

DIGEST OF INTRODUCED BILL

Citations Affected: IC 24-5-0.5.

Synopsis: Deceptive consumer sales law. Provides that a supplier commits an unconscionable act that is treated the same as a deceptive act under the deceptive consumer sales law if the supplier refuses to sell to a retailer with which the supplier has done business within the previous two years a good at the same price that the supplier sells the good to any other retailer. Establishes exceptions. Provides that certain deceptive consumer sales provisions do not apply to the unconscionable act. Requires a court to award to a retailer the difference between the higher price at which the goods were sold to the retailer and the lower price at which the goods were sold to another retailer if a court finds a supplier has committed an unconscionable act. Requires a court to award to the attorney general, if the attorney general files an action to enjoin the unconscionable act, a civil penalty equal to two times the amount of the difference in the higher price at which the goods were sold to a retailer and the lower price at which the goods were sold to another retailer.

Effective: July 1, 2013.

Soliday

January 22, 2013, read first time and referred to Committee on Judiciary.

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First Regular Session 118th General Assembly (2013)

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 2012 Regular Session of the General Assembly.

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HOUSE BILL No. 1367



A BILL FOR AN ACT to amend the Indiana Code concerning trade regulation.

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

1 SECTION 1. IC 24-5-0.5-4, AS AMENDED BY P.L.226-2011,
2 SECTION 15, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
3 JULY 1, 2013]: Sec. 4. (a) A person relying upon an uncured or
4 incurable deceptive act may bring an action for the damages actually
5 suffered as a consumer as a result of the deceptive act or five hundred
6 dollars (\$500), whichever is greater. The court may increase damages
7 for a willful deceptive act in an amount that does not exceed the greater
8 of:

- 9 (1) three (3) times the actual damages of the consumer suffering
10 the loss; or
- 11 (2) one thousand dollars (\$1,000).

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



1 time shares and camping club memberships. This subsection does not
 2 apply with respect to a deceptive act described in section 3(a)(20) of
 3 this chapter. This subsection also does not apply to a violation of
 4 IC 24-4.7, IC 24-5-12, or IC 24-5-14. Actual damages awarded to a
 5 person under this section have priority over any civil penalty imposed
 6 under this chapter.

7 (b) Any person who is entitled to bring an action under subsection
 8 (a) on the person's own behalf against a supplier for damages for a
 9 deceptive act may bring a class action against such supplier on behalf
 10 of any class of persons of which that person is a member and which has
 11 been damaged by such deceptive act, subject to and under the Indiana
 12 Rules of Trial Procedure governing class actions, except as herein
 13 expressly provided. Except as provided in subsection (j), the court may
 14 award reasonable attorney fees to the party that prevails in a class
 15 action under this subsection, provided that such fee shall be determined
 16 by the amount of time reasonably expended by the attorney and not by
 17 the amount of the judgment, although the contingency of the fee may
 18 be considered. Except in the case of an extension of time granted by the
 19 attorney general under IC 24-10-2-2(b) in an action subject to IC 24-10,
 20 any money or other property recovered in a class action under this
 21 subsection which cannot, with due diligence, be restored to consumers
 22 within one (1) year after the judgment becomes final shall be returned
 23 to the party depositing the same. This subsection does not apply to a
 24 consumer transaction in real property, except for purchases of time
 25 shares and camping club memberships. This subsection does not apply
 26 with respect to a deceptive act described in section 3(a)(20) of this
 27 chapter. Actual damages awarded to a class have priority over any civil
 28 penalty imposed under this chapter.

29 (c) The attorney general may bring an action to enjoin a deceptive
 30 act, including a deceptive act described in section 3(a)(20) of this
 31 chapter, notwithstanding subsections (a) and (b). However, the attorney
 32 general may seek to enjoin patterns of incurable deceptive acts with
 33 respect to consumer transactions in real property. In addition, the court
 34 may:

- 35 (1) issue an injunction;
- 36 (2) order the supplier to make payment of the money unlawfully
 37 received from the aggrieved consumers to be held in escrow for
 38 distribution to aggrieved consumers;
- 39 (3) order the supplier to pay to the state the reasonable costs of
 40 the attorney general's investigation and prosecution related to the
 41 action; and
- 42 (4) provide for the appointment of a receiver.



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

4 (e) In any action under subsection (a) or (b), upon the filing of the
 5 complaint or on the appearance of any defendant, claimant, or any
 6 other party, or at any later time, the trial court, the supreme court, or the
 7 court of appeals may require the plaintiff, defendant, claimant, or any
 8 other party or parties to give security, or additional security, in such
 9 sum as the court shall direct to pay all costs, expenses, and
 10 disbursements that shall be awarded against that party or which that
 11 party may be directed to pay by any interlocutory order by the final
 12 judgment or on appeal.

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

22 (g) If a court finds any person has knowingly violated section 3 or
 23 10 of this chapter, other than section 3(a)(19) or 3(a)(20) of this
 24 chapter, the attorney general, in an action pursuant to subsection (c),
 25 may recover from the person on behalf of the state a civil penalty of a
 26 fine not exceeding five thousand dollars (\$5,000) per violation.

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

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

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

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

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

41 (j) An offer to cure is:

42 (1) not admissible as evidence in a proceeding initiated under this

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1 section unless the offer to cure is delivered by a supplier to the
 2 consumer or a representative of the consumer before the supplier
 3 files the supplier's initial response to a complaint; and
 4 (2) only admissible as evidence in a proceeding initiated under
 5 this section to prove that a supplier is not liable for attorney's fees
 6 under subsection (k).

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

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

16 (l) If a court finds that a person has knowingly violated section
 17 3(a)(20) of this chapter, the attorney general, in an action under
 18 subsection (c), may recover from the person on behalf of the state a
 19 civil penalty not exceeding one thousand dollars (\$1,000) per
 20 consumer. In determining the amount of the civil penalty in any action
 21 by the attorney general under this subsection, the court shall consider,
 22 among other relevant factors, the frequency and persistence of
 23 noncompliance by the debt collector, the nature of the noncompliance,
 24 and the extent to which the noncompliance was intentional. A person
 25 may not be held liable in any action by the attorney general for a
 26 violation of section 3(a)(20) of this chapter if the person shows by a
 27 preponderance of evidence that the violation was not intentional and
 28 resulted from a bona fide error, notwithstanding the maintenance of
 29 procedures reasonably adapted to avoid the error. A person may not be
 30 held liable in any action for a violation of this chapter for contacting a
 31 person other than the debtor, if the contact is made in compliance with
 32 the Fair Debt Collection Practices Act.

33 **(m) This section does not apply to a violation of section 11 of this**
 34 **chapter.**

35 SECTION 2. IC 24-5-0.5-5 IS AMENDED TO READ AS
 36 FOLLOWS [EFFECTIVE JULY 1, 2013]: Sec. 5. (a) No action may be
 37 brought under this chapter, except under section 4(c) of this chapter,
 38 unless (1) the deceptive act is incurable or (2) the consumer bringing
 39 the action shall have given notice in writing to the supplier within the
 40 sooner of (i) six (6) months after the initial discovery of the deceptive
 41 act, (ii) one (1) year following such consumer transaction, or (iii) any
 42 time limitation, not less than thirty (30) days, of any period of warranty

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1 applicable to the transaction, which notice shall state fully the nature
 2 of the alleged deceptive act and the actual damage suffered therefrom,
 3 and unless such deceptive act shall have become an uncured deceptive
 4 act.

5 (b) No action may be brought under this chapter except as expressly
 6 authorized in section 4(a), 4(b), or 4(c) of this chapter. Any action
 7 brought under this chapter may not be brought more than two (2) years
 8 after the occurrence of the deceptive act.

9 (c) **This section does not apply to a violation of section 11 of this
 10 chapter.**

11 SECTION 3. IC 24-5-0.5-11 IS ADDED TO THE INDIANA CODE
 12 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
 13 1, 2013]: **Sec. 11. (a) This section does not apply to the following:**

14 (1) **Contracts between a franchisor and a franchisee.**

15 (2) **Transactions concerning the sale of alcoholic beverages (as
 16 defined in IC 7.1-1-3-5).**

17 (b) **As used in this section, "retailer" means a person, and any
 18 entity affiliated and under common control with the person, that
 19 engages in the business of selling tangible personal property to
 20 consumers. For purposes of this section, "retailer" does not include
 21 a supplier.**

22 (c) **For purposes of this section, "supplier" does not include a
 23 retailer.**

24 (d) **Except as provided in subsection (e), a supplier commits an
 25 unconscionable act that is treated the same as a deceptive act under
 26 this chapter if the supplier refuses to sell to a retailer with which
 27 the supplier has done business within the previous two (2) years a
 28 good at the same price that the supplier sells the good to any other
 29 retailer.**

30 (e) **A supplier that charges a retailer a higher price for a good
 31 than the supplier charges another retailer does not commit an
 32 unconscionable act under subsection (d) if one (1) or more of the
 33 following apply:**

34 (1) **The supplier charges a retailer a higher price for goods
 35 based on the retailer purchasing a lower quantity of the goods
 36 than another retailer purchases for a single delivery. For
 37 purposes of this subdivision, the number of deliveries is equal
 38 to the number of vehicles used to transport goods to a retailer.**

39 (2) **The supplier charges a retailer a higher price for the goods
 40 based only on a greater cost to the supplier to deliver the
 41 goods to the retailer.**

42 (3) **The supplier charges a higher price for the goods in**

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1 response to changing conditions affecting the market for or
2 marketability of the goods including:

3 (A) imminent deterioration of perishable goods;

4 (B) obsolescence of seasonal goods; or

5 (C) distress sales in anticipation of discontinuance of
6 business in the goods.

7 (f) A retailer harmed by a violation of this section may bring an
8 action for damages. If a court finds a supplier has committed an
9 unconscionable act under this section, the court shall require the
10 supplier to reimburse a retailer that is a party to the action the
11 amount of the difference between the higher price at which the
12 goods were sold to the retailer and the lower price at which the
13 goods were sold to another retailer.

14 (g) If:

15 (1) the attorney general brings an action to enjoin an
16 unconscionable act under this section; and

17 (2) the court finds a supplier has committed an
18 unconscionable act under this section;

19 the attorney general may recover from the supplier on behalf of
20 the state a civil penalty equal to two (2) times the amount of the
21 difference in the higher price at which the goods were sold to a
22 retailer and the lower price at which the goods were sold to
23 another retailer.

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