



Reprinted
February 19, 2013

SENATE BILL No. 382

DIGEST OF SB 382 (Updated February 18, 2013 2:40 pm - DI 97)

Citations Affected: IC 24-4.6; IC 24-5.

Synopsis: Senior consumer protection act. Creates the senior consumer protection act and makes conforming changes. Refers actions regulated by the department of insurance to the insurance commissioner.

Effective: July 1, 2013.

Lanane, Zakas, Banks, Landske

January 10, 2013, read first time and referred to Committee on Civil Law.
February 12, 2013, reported favorably — Do Pass.
February 18, 2013, read second time, amended, ordered engrossed.

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SB 382—LS 7065/DI 14+



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.

SENATE BILL No. 382

A BILL FOR AN ACT to amend the Indiana Code concerning business and other associations.

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

1 SECTION 1. IC 24-4.6-6 IS ADDED TO THE INDIANA CODE
2 AS A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE
3 JULY 1, 2013]:

4 **Chapter 6. Senior Consumer Protection**

5 **Sec. 1. (a) This chapter shall be known and may be cited as the**
6 **senior consumer protection act.**

7 **(b) This chapter does not apply to deception, intimidation, or**
8 **other exploitation of a senior consumer in relation to insurance**
9 **coverage or an insurance product that is regulated by the Indiana**
10 **department of insurance. A senior consumer who is a victim of an**
11 **act that is:**

12 **(1) described in section 4(a) or 4(b) of this chapter; and**
13 **(2) related to insurance coverage or an insurance product;**
14 **may report the act to the Indiana department of insurance for**
15 **action by the insurance commissioner under IC 27. If the insurance**
16 **commissioner determines that the person who committed the act**
17 **is not subject to regulation by the Indiana department of**

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1 insurance, the insurance commissioner shall immediately refer the
 2 senior consumer to the attorney general and the senior consumer
 3 may pursue remedies available under this chapter.

4 Sec. 2. (a) This chapter shall be liberally construed and applied
 5 to protect senior consumers.

6 (b) The purposes and policies of this chapter are to:

7 (1) simply, clarify, and modernize the law concerning the
 8 ownership, control, and use of property or assets of senior
 9 consumers; and

10 (2) protect senior consumers from financial exploitation from
 11 persons, who by deception or intimidation, obtain control
 12 over the property or assets of a senior consumer.

13 Sec. 3. The following definitions apply throughout this chapter:

14 (1) "Deception" means:

15 (A) misrepresentation or concealment of any material fact
 16 relating to the terms of a contract or agreement entered
 17 into with a senior consumer or to the existing or
 18 pre-existing condition of any of the property involved in
 19 such a contract or agreement; or

20 (B) the use or employment of any misrepresentation, false
 21 pretense, or false promise in order to induce, encourage, or
 22 solicit a senior consumer to enter into a contract or
 23 agreement.

24 (2) "Intimidation" means the conduct or communication by
 25 a person directed toward a senior consumer informing or
 26 implying to the senior consumer that he or she will be
 27 deprived of food and nutrition, shelter, prescribed medication,
 28 or medical care and treatment if the senior consumer does not
 29 comply with the person's demands.

30 (3) "Person" means an individual, a corporation, the state of
 31 Indiana or its subdivisions or agencies, a business trust, an
 32 estate, a trust, a partnership, an association, a nonprofit
 33 corporation or organization, a cooperative, or any other legal
 34 entity.

35 (4) "Person in a position of trust and confidence" means a
 36 person, in relation to a senior consumer, who:

37 (A) is a parent, spouse, adult child, or other relative by
 38 blood or marriage of the senior consumer;

39 (B) is a joint tenant or tenant in common with the senior
 40 consumer;

41 (C) has a legal or fiduciary relationship with the senior
 42 consumer;

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- 1 (D) is a financial planning or investment professional; or
- 2 (E) is a paid or unpaid caregiver for the senior consumer.
- 3 (5) "Senior consumer" means an individual who is at least
- 4 sixty (60) years of age.

5 Sec. 4. (a) A person commits financial exploitation of a senior
 6 consumer when he or she knowingly and by deception or
 7 intimidation obtains control over the property of a senior
 8 consumer or illegally uses the assets or resources of a senior
 9 consumer.

10 (b) The illegal use of the assets or resources of a senior
 11 consumer includes, but is not limited to, the misappropriation of
 12 those assets or resources by undue influence, breach of a fiduciary
 13 relationship, fraud, deception, extortion, intimidation, or use of the
 14 assets or resources contrary to law.

15 (c) Nothing in this section shall be construed to impose civil
 16 liability on a person who has made a good faith effort to assist a
 17 senior consumer in the management of the senior consumer's
 18 property, but through no fault of the person has been unable to
 19 provide such assistance.

20 (d) It is not a defense in an action under this chapter that a
 21 person reasonably believed that the victim was not a senior
 22 consumer.

23 Sec. 5. (a) A senior consumer who is a victim of an act described
 24 in section 4(a) or 4(b) of this chapter may bring an action against
 25 the person who commits the act.

26 (b) In an action brought against a person under this section, the
 27 court may order the person to:

- 28 (1) return property or assets improperly obtained, controlled,
 29 or used; and
- 30 (2) reimburse the senior consumer for any damages incurred
 31 or for the value of the property or assets lost as a result of the
 32 violation or violations of this chapter.

33 (c) In addition to the remedy provided in subsection (b), a court
 34 may order the following:

- 35 (1) For knowing violations committed by a person who is not
 36 in a position of trust and confidence:
 - 37 (A) payment of two (2) times the amount of damages
 38 incurred or value of property or assets lost; and
 - 39 (B) payment of a civil penalty not exceeding five thousand
 40 dollars (\$5,000).
- 41 (2) For knowing violations committed by a person in a
 42 position of trust and confidence:

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- (A) payment of treble damages; and
- (B) payment of a civil penalty not exceeding ten thousand dollars (\$10,000).

(d) The court may award reasonable attorney's fees to a senior consumer that prevails in an action under this section. Actual damages awarded to a person under this section have priority over any civil penalty imposed under this chapter.

(e) The burden of proof in proving that a person committed financial exploitation of a senior consumer under section 4 of this chapter is by a preponderance of the evidence.

(f) The attorney general may bring an action to enjoin an alleged commission of financial exploitation of a senior consumer and may petition the court to freeze the assets of the person allegedly committing financial exploitation of a senior consumer in an amount equal to but not greater than the alleged value of lost property or assets for purposes of restoring to the victim the value of the lost property or assets. The burden of proof required to freeze the assets of a person allegedly committing financial exploitation of a senior consumer is by a preponderance of the evidence. In addition, the court may:

- (1) issue an injunction;
- (2) order the person to make payment of the money unlawfully received from the senior consumer or senior consumers, to be held in escrow for distribution to the aggrieved senior consumer or senior consumers;
- (3) for knowing violations, increase the amount of restitution ordered under subdivision (2) in any amount up to three (3) times the amount of damages incurred or value of property or assets lost;
- (4) order the person to pay to the state the reasonable costs of the attorney general's investigation and prosecution related to the action;
- (5) provide for the appointment of a receiver;
- (6) for knowing violations by a person who is not in a position of trust and confidence, order the person to pay a civil penalty of up to five thousand dollars (\$5,000) per violation; and
- (7) for knowing violations by a person in a position of trust and confidence, order the person to pay a civil penalty of up to ten thousand dollars (\$10,000) per violation.

(g) In an action under subsection (a) or (f), the court may void or limit the application of contracts or clauses resulting from the financial exploitation.

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1 **(h) In an action under subsection (a), upon the filing of the**
 2 **complaint or on the appearance of any defendant, claimant, or**
 3 **other party, or at any later time, the trial court, the supreme court,**
 4 **or the court of appeals may require the plaintiff, defendant,**
 5 **claimant, or other party or parties to give security, or additional**
 6 **security, in a sum the court directs to pay all costs, expenses, and**
 7 **disbursements that are awarded against that party or that the**
 8 **party may be directed to pay by any interlocutory order, by the**
 9 **final judgment, or on appeal.**

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

19 **Sec. 6. This chapter does not limit the rights or remedies that**
 20 **are otherwise available to a senior consumer under any other**
 21 **applicable provision of law.**

22 SECTION 2. IC 24-5-0.5-2, AS AMENDED BY P.L.226-2011,
 23 SECTION 13, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
 24 JULY 1, 2013]: Sec. 2. (a) As used in this chapter:

25 (1) "Consumer transaction" means a sale, lease, assignment,
 26 award by chance, or other disposition of an item of personal
 27 property, real property, a service, or an intangible, except
 28 securities and policies or contracts of insurance issued by
 29 corporations authorized to transact an insurance business under
 30 the laws of the state of Indiana, with or without an extension of
 31 credit, to a person for purposes that are primarily personal,
 32 familial, charitable, agricultural, or household, or a solicitation to
 33 supply any of these things. However, the term includes the
 34 following:

35 (A) A transfer of structured settlement payment rights under
 36 IC 34-50-2.

37 (B) An unsolicited advertisement sent to a person by telephone
 38 facsimile machine offering a sale, lease, assignment, award by
 39 chance, or other disposition of an item of personal property,
 40 real property, a service, or an intangible.

41 (C) Collecting or attempting to collect a debt owed or due, or
 42 asserted to be owed or due, to another person.



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- 1 (2) "Person" means an individual, corporation, the state of Indiana
 2 or its subdivisions or agencies, business trust, estate, trust,
 3 partnership, association, nonprofit corporation or organization, or
 4 cooperative or any other legal entity.
- 5 (3) "Supplier" means the following:
 6 (A) A seller, lessor, assignor, or other person who regularly
 7 engages in or solicits consumer transactions, including
 8 soliciting a consumer transaction by using a telephone
 9 facsimile machine to transmit an unsolicited advertisement.
 10 The term includes a manufacturer, wholesaler, or retailer,
 11 whether or not the person deals directly with the consumer.
 12 (B) A person who contrives, prepares, sets up, operates,
 13 publicizes by means of advertisements, or promotes a pyramid
 14 promotional scheme.
 15 (C) A debt collector.
- 16 (4) "Subject of a consumer transaction" means the personal
 17 property, real property, services, or intangibles offered or
 18 furnished in a consumer transaction.
- 19 (5) "Cure" as applied to a deceptive act, means either:
 20 (A) to offer in writing to adjust or modify the consumer
 21 transaction to which the act relates to conform to the
 22 reasonable expectations of the consumer generated by such
 23 deceptive act and to perform such offer if accepted by the
 24 consumer; or
 25 (B) to offer in writing to rescind such consumer transaction
 26 and to perform such offer if accepted by the consumer.
 27 The term includes an offer in writing of one (1) or more items of
 28 value, including monetary compensation, that the supplier
 29 delivers to a consumer or a representative of the consumer if
 30 accepted by the consumer.
- 31 (6) "Offer to cure" as applied to a deceptive act is a cure that:
 32 (A) is reasonably calculated to remedy a loss claimed by the
 33 consumer; and
 34 (B) includes a minimum additional amount that is the greater
 35 of:
 36 (i) ten percent (10%) of the value of the remedy under
 37 clause (A), but not more than four thousand dollars
 38 (\$4,000); or
 39 (ii) five hundred dollars (\$500);
 40 as compensation for attorney's fees, expenses, and other costs
 41 that a consumer may incur in relation to the deceptive act.
- 42 (7) "Uncured deceptive act" means a deceptive act:

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- 1 (A) with respect to which a consumer who has been damaged
 2 by such act has given notice to the supplier under section 5(a)
 3 of this chapter; and
 4 (B) either:
 5 (i) no offer to cure has been made to such consumer within
 6 thirty (30) days after such notice; or
 7 (ii) the act has not been cured as to such consumer within a
 8 reasonable time after the consumer's acceptance of the offer
 9 to cure.
- 10 (8) "Incurable deceptive act" means a deceptive act done by a
 11 supplier as part of a scheme, artifice, or device with intent to
 12 defraud or mislead. The term includes a failure of a transferee of
 13 structured settlement payment rights to timely provide a true and
 14 complete disclosure statement to a payee as provided under
 15 IC 34-50-2 in connection with a direct or indirect transfer of
 16 structured settlement payment rights.
- 17 (9) "Pyramid promotional scheme" means any program utilizing
 18 a pyramid or chain process by which a participant in the program
 19 gives a valuable consideration exceeding one hundred dollars
 20 (\$100) for the opportunity or right to receive compensation or
 21 other things of value in return for inducing other persons to
 22 become participants for the purpose of gaining new participants
 23 in the program. The term does not include ordinary sales of goods
 24 or services to persons who are not purchasing in order to
 25 participate in such a scheme.
- 26 (10) "Promoting a pyramid promotional scheme" means:
 27 (A) inducing or attempting to induce one (1) or more other
 28 persons to become participants in a pyramid promotional
 29 scheme; or
 30 (B) assisting another in promoting a pyramid promotional
 31 scheme.
- 32 (11) "~~Elderly person~~" "**Senior consumer**" means an individual
 33 who is at least ~~sixty-five (65)~~ **sixty (60)** years of age.
- 34 (12) "Telephone facsimile machine" means equipment that has
 35 the capacity to transcribe text or images, or both, from:
 36 (A) paper into an electronic signal and to transmit that signal
 37 over a regular telephone line; or
 38 (B) an electronic signal received over a regular telephone line
 39 onto paper.
- 40 (13) "Unsolicited advertisement" means material advertising the
 41 commercial availability or quality of:
 42 (A) property;

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1 (B) goods; or
 2 (C) services;
 3 that is transmitted to a person without the person's prior express
 4 invitation or permission, in writing or otherwise.
 5 (14) "Debt" has the meaning set forth in 15 U.S.C. 1692a(5)).
 6 (15) "Debt collector" has the meaning set forth in 15 U.S.C.
 7 1692a(6). The term does not include a person admitted to the
 8 practice of law in Indiana if the person is acting within the course
 9 and scope of the person's practice as an attorney.
 10 (b) As used in section 3(a)(15) and 3(a)(16) of this chapter:
 11 (1) "Directory assistance" means the disclosure of telephone
 12 number information in connection with an identified telephone
 13 service subscriber by means of a live operator or automated
 14 service.
 15 (2) "Local telephone directory" refers to a telephone classified
 16 advertising directory or the business section of a telephone
 17 directory that is distributed by a telephone company or directory
 18 publisher to subscribers located in the local exchanges contained
 19 in the directory. The term includes a directory that includes
 20 listings of more than one (1) telephone company.
 21 (3) "Local telephone number" refers to a telephone number that
 22 has the three (3) number prefix used by the provider of telephone
 23 service for telephones physically located within the area covered
 24 by the local telephone directory in which the number is listed. The
 25 term does not include long distance numbers or 800-, 888-, or
 26 900- exchange numbers listed in a local telephone directory.
 27 SECTION 3. IC 24-5-0.5-4, AS AMENDED BY P.L.226-2011,
 28 SECTION 15, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
 29 JULY 1, 2013]: Sec. 4. (a) A person relying upon an uncured or
 30 incurable deceptive act may bring an action for the damages actually
 31 suffered as a consumer as a result of the deceptive act or five hundred
 32 dollars (\$500), whichever is greater. The court may increase damages
 33 for a willful deceptive act in an amount that does not exceed the greater
 34 of:
 35 (1) three (3) times the actual damages of the consumer suffering
 36 the loss; or
 37 (2) one thousand dollars (\$1,000).
 38 Except as provided in subsection (j), the court may award reasonable
 39 attorney fees to the party that prevails in an action under this
 40 subsection. This subsection does not apply to a consumer transaction
 41 in real property, including a claim or action involving a construction
 42 defect (as defined in IC 32-27-3-1(5)) brought against a construction

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1 professional (as defined in IC 32-27-3-1(4)), except for purchases of
 2 time shares and camping club memberships. This subsection does not
 3 apply with respect to a deceptive act described in section 3(a)(20) of
 4 this chapter. This subsection also does not apply to a violation of
 5 IC 24-4.7, IC 24-5-12, or IC 24-5-14. Actual damages awarded to a
 6 person under this section have priority over any civil penalty imposed
 7 under this chapter.

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

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

- 36 (1) issue an injunction;
- 37 (2) order the supplier to make payment of the money unlawfully
- 38 received from the aggrieved consumers to be held in escrow for
- 39 distribution to aggrieved consumers;
- 40 **(3) for a knowing violation against a senior consumer,**
- 41 **increase the amount of restitution ordered under subdivision**
- 42 **(2) in any amount up to three (3) times the amount of damages**



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incurred or value of property or assets lost;

~~(3)~~ (4) 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)~~ (5) 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 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.

(g) If a court finds any person has knowingly violated section 3 or 10 of this chapter, other than section 3(a)(19) or 3(a)(20) 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.

(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.

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1 (i) ~~An elderly person~~ **A senior consumer** relying upon an uncured
2 or incurable deceptive act, including an act related to hypnotism, may
3 bring an action to recover treble damages, if appropriate.

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

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

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

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

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COMMITTEE REPORT

Madam President: The Senate Committee on Civil Law, to which was referred Senate Bill No. 382, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill DO PASS.

(Reference is made to Senate Bill 382 as introduced.)

ZAKAS, Chairperson

Committee Vote: Yeas 10, Nays 0.

SENATE MOTION

Madam President: I move that Senate Bill 382 be amended to read as follows:

Page 1, line 5, after "1." insert "(a)".

Page 1, between lines 6 and 7, begin a new paragraph and insert:

"(b) This chapter does not apply to deception, intimidation, or other exploitation of a senior consumer in relation to insurance coverage or an insurance product that is regulated by the Indiana department of insurance. A senior consumer who is a victim of an act that is:

(1) described in section 4(a) or 4(b) of this chapter; and
(2) related to insurance coverage or an insurance product;
may report the act to the Indiana department of insurance for action by the insurance commissioner under IC 27. If the insurance commissioner determines that the person who committed the act is not subject to regulation by the Indiana department of insurance, the insurance commissioner shall immediately refer the senior consumer to the attorney general and the senior consumer may pursue remedies available under this chapter."

(Reference is to SB 382 as printed February 13, 2013.)

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