

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 ENROLLED ACT No. 382

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

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

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

### **Chapter 6. Senior Consumer Protection**

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

**(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.**

**(c) This chapter does not apply to the exploitation of a senior consumer in relation to securities fraud that is regulated by the**

SEA 382 — Concur+



C  
O  
P  
Y

secretary of state's office. 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 the Indiana uniform securities act under IC 23-19;

shall report the act to the secretary of state under IC 23-19. If the secretary of state's office determines the person who committed the act is not subject to the regulation of the secretary of state's office, the secretary of state's office shall immediately refer the senior consumer to the attorney general and the senior consumer may pursue remedies available under this chapter.

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

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

- (1) simplify, clarify, and modernize the law concerning the ownership, control, and use of property or assets of senior consumers; and
- (2) protect senior consumers from financial exploitation from persons, who by deception or intimidation, obtain control over the property or assets of a senior consumer.

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

**(1) "Deception" means:**

**(A)** misrepresentation or omission of any material fact relating to the terms of a contract or agreement entered into with a senior consumer or to the existing or pre-existing condition of any of the property involved in such a contract or agreement; or

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

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

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

C  
O  
P  
Y



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

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

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

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

**(D) is a financial planning or investment professional; or**

**(E) is a paid or unpaid caregiver for the senior consumer.**

**(5) "Senior consumer" means an individual who is at least sixty (60) years of age.**

**Sec. 4. (a) A person commits financial exploitation of a senior consumer when the person knowingly and by deception or intimidation obtains control over the property of a senior consumer or illegally uses the assets or resources of a senior consumer.**

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

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

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

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

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

**(1) return property or assets improperly obtained, controlled, or used; and**

**(2) reimburse the senior consumer for any damages incurred or for the value of the property or assets lost as a result of the violation or violations of this chapter.**

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

C  
O  
P  
Y



**(1) For knowing violations committed by a person who is not in a position of trust and confidence:**

**(A) payment of two (2) times the amount of damages incurred or value of property or assets lost; and**

**(B) payment of a civil penalty not exceeding five thousand dollars (\$5,000).**

**(2) For knowing violations committed by a person in a position of trust and confidence:**

**(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**

C  
O  
P  
Y



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.

(h) In an action under subsection (a), upon the filing of the complaint or on the appearance of any defendant, claimant, or 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 other party or parties to give security, or additional security, in a sum the court directs to pay all costs, expenses, and disbursements that are awarded against that party or that the party may be directed to pay by any interlocutory order, by the final judgment, or on appeal.

(i) Any person who violates the terms of an injunction issued under subsection (f) 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 the 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 (f) has been violated, the court shall award reasonable costs to the state.

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

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

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

C  
o  
p  
y



- (A) A transfer of structured settlement payment rights under IC 34-50-2.
- (B) An unsolicited advertisement sent to a person by telephone facsimile machine offering a sale, lease, assignment, award by chance, or other disposition of an item of personal property, real property, a service, or an intangible.
- (C) Collecting or attempting to collect a debt owed or due, or asserted to be owed or due, to another person.
- (2) "Person" means an individual, corporation, the state of Indiana or its subdivisions or agencies, business trust, estate, trust, partnership, association, nonprofit corporation or organization, or cooperative or any other legal entity.
- (3) "Supplier" means the following:
- (A) A seller, lessor, assignor, or other person who regularly engages in or solicits consumer transactions, including soliciting a consumer transaction by using a telephone facsimile machine to transmit an unsolicited advertisement. The term includes a manufacturer, wholesaler, or retailer, whether or not the person deals directly with the consumer.
- (B) A person who contrives, prepares, sets up, operates, publicizes by means of advertisements, or promotes a pyramid promotional scheme.
- (C) A debt collector.
- (4) "Subject of a consumer transaction" means the personal property, real property, services, or intangibles offered or furnished in a consumer transaction.
- (5) "Cure" as applied to a deceptive act, means either:
- (A) to offer in writing to adjust or modify the consumer transaction to which the act relates to conform to the reasonable expectations of the consumer generated by such deceptive act and to perform such offer if accepted by the consumer; or
- (B) to offer in writing to rescind such consumer transaction and to perform such offer if accepted by the consumer.
- The term includes an offer in writing of one (1) or more items of value, including monetary compensation, that the supplier delivers to a consumer or a representative of the consumer if accepted by the consumer.
- (6) "Offer to cure" as applied to a deceptive act is a cure that:
- (A) is reasonably calculated to remedy a loss claimed by the consumer; and
- (B) includes a minimum additional amount that is the greater

C  
o  
p  
y



of:

(i) ten percent (10%) of the value of the remedy under clause (A), but not more than four thousand dollars (\$4,000); or

(ii) five hundred dollars (\$500);

as compensation for attorney's fees, expenses, and other costs that a consumer may incur in relation to the deceptive act.

(7) "Uncured deceptive act" means a deceptive act:

(A) with respect to which a consumer who has been damaged by such act has given notice to the supplier under section 5(a) of this chapter; and

(B) either:

(i) no offer to cure has been made to such consumer within thirty (30) days after such notice; or

(ii) the act has not been cured as to such consumer within a reasonable time after the consumer's acceptance of the offer to cure.

(8) "Incurable deceptive act" means a deceptive act done by a supplier as part of a scheme, artifice, or device with intent to defraud or mislead. The term includes a failure of a transferee of structured settlement payment rights to timely provide a true and complete disclosure statement to a payee as provided under IC 34-50-2 in connection with a direct or indirect transfer of structured settlement payment rights.

(9) "Pyramid promotional scheme" means any program utilizing a pyramid or chain process by which a participant in the program gives a valuable consideration exceeding one hundred dollars (\$100) for the opportunity or right to receive compensation or other things of value in return for inducing other persons to become participants for the purpose of gaining new participants in the program. The term does not include ordinary sales of goods or services to persons who are not purchasing in order to participate in such a scheme.

(10) "Promoting a pyramid promotional scheme" means:

(A) inducing or attempting to induce one (1) or more other persons to become participants in a pyramid promotional scheme; or

(B) assisting another in promoting a pyramid promotional scheme.

(11) "~~Elderly person~~" "**Senior consumer**" means an individual who is at least ~~sixty-five (65)~~ **sixty (60)** years of age.

(12) "Telephone facsimile machine" means equipment that has

C  
O  
P  
Y



the capacity to transcribe text or images, or both, from:

- (A) paper into an electronic signal and to transmit that signal over a regular telephone line; or
- (B) an electronic signal received over a regular telephone line onto paper.

(13) "Unsolicited advertisement" means material advertising the commercial availability or quality of:

- (A) property;
- (B) goods; or
- (C) services;

that is transmitted to a person without the person's prior express invitation or permission, in writing or otherwise.

(14) "Debt" has the meaning set forth in 15 U.S.C. 1692a(5)).

(15) "Debt collector" has the meaning set forth in 15 U.S.C. 1692a(6). The term does not include a person admitted to the practice of law in Indiana if the person is acting within the course and scope of the person's practice as an attorney.

(b) As used in section 3(a)(15) and 3(a)(16) of this chapter:

(1) "Directory assistance" means the disclosure of telephone number information in connection with an identified telephone service subscriber by means of a live operator or automated service.

(2) "Local telephone directory" refers to a telephone classified advertising directory or the business section of a telephone directory that is distributed by a telephone company or directory publisher to subscribers located in the local exchanges contained in the directory. The term includes a directory that includes listings of more than one (1) telephone company.

(3) "Local telephone number" refers to a telephone number that has the three (3) number prefix used by the provider of telephone service for telephones physically located within the area covered by the local telephone directory in which the number is listed. The term does not include long distance numbers or 800-, 888-, or 900- exchange numbers listed in a local telephone directory.

SECTION 3. IC 24-5-0.5-4, AS AMENDED BY SEA 536-2013, SECTION 8, AND AS AMENDED BY HEA 1376-2013, SECTION 6, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2013]: 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:

SEA 382 — Concur+



C  
o  
p  
y

- (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 does not apply with respect to a deceptive act described in section 3(a)(20) of this chapter. This subsection also does not apply to a violation of IC 24-4.7, IC 24-5-12, IC 24-5-14, or IC 24-5-14.5. 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. This subsection does not apply with respect to a deceptive act described in section 3(a)(20) of this chapter. 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, including a deceptive act described in section 3(a)(20) of this chapter, notwithstanding subsections (a) and (b). 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

C  
O  
P  
Y



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) for a knowing violation against a senior consumer, 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;**
- ~~(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;
- ~~(4)~~ **(5)** provide for the appointment of a receiver; and
- ~~(5)~~ **(6)** order the department of state revenue to suspend the supplier's registered retail merchant certificate, subject to the requirements and prohibitions contained in IC 6-2.5-8-7(i), if the court finds that a violation of this chapter involved the sale or solicited sale of a synthetic drug (as defined in IC 35-31.5-2-321) or a synthetic drug lookalike substance (as defined in IC 35-31.5-2-321.5).

(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



C  
O  
P  
Y

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.

(i) ~~An elderly person~~ **A senior consumer** 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.

(l) If a court finds that a person has knowingly violated section 3(a)(20) 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 not exceeding one thousand dollars (\$1,000) per consumer. In determining the amount of the civil penalty in any action by the attorney general under this subsection, the court shall consider, among other relevant factors, the frequency and persistence of

C  
o  
p  
y



noncompliance by the debt collector, the nature of the noncompliance, and the extent to which the noncompliance was intentional. A person may not be held liable in any action by the attorney general for a violation of section 3(a)(20) of this chapter if the person shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid the error. A person may not be held liable in any action for a violation of this chapter for contacting a person other than the debtor, if the contact is made in compliance with the Fair Debt Collection Practices Act.

**SECTION 4. [EFFECTIVE UPON PASSAGE] (a) The general assembly urges the legislative council to assign to an interim or statutory study committee, for study during the 2013 legislative interim, the topic of a supplier discriminating against consumers based on the price of promotion of goods to retailers by refusing to sell to a retailer a good at the same price that the supplier sells the good to any other retailer.**

**(b) If the topic described in subsection (a) is assigned to an interim or statutory study committee under subsection (a), the study committee shall:**

- (1) consider whether a supplier should be prohibited from discriminating against consumers by charging retailers higher prices based on the type of retailer or the demographic of the customer served;**
- (2) consider why suppliers refuse to sell value packaged goods to certain retailers and sell only reduced sizes with higher per ounce costs to certain retailers;**
- (3) consider why suppliers increase the price of goods to consumers who shop at certain retailers even if the retailers purchase identical volumes and are similarly situated as other retailers;**
- (4) consider why certain retailers may purchase goods in bulk when the opportunity to do so is denied to other retailers that may be buying the same or a larger amount of goods;**
- (5) recommend the appropriate remedy if a cause of action exists; and**
- (6) recommend whether the attorney general should be involved in a cause of action if a cause of action exists under subdivision (1).**

**(c) If the topic described in subsection (a) is assigned to an interim or statutory study committee, the study committee shall issue a final report to the legislative council containing the study**



C  
O  
P  
Y

**committee's findings and recommendations, including any recommended legislation concerning the topic, not later than November 1, 2013.**

**(d) This SECTION expires December 31, 2013.**

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

C  
o  
p  
y



\_\_\_\_\_  
President of the Senate

\_\_\_\_\_  
President Pro Tempore

\_\_\_\_\_  
Speaker of the House of Representatives

\_\_\_\_\_  
Governor of the State of Indiana

Date: \_\_\_\_\_ Time: \_\_\_\_\_

C  
O  
P  
Y

SEA 382 — Concur+

