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HOUSE BILL No. 1504

Proposed Changes to February 16, 2023 printing by AM150403

DIGEST OF PROPOSED AMENDMENT

Enforcement of deceptive consumer sales act. Removes the provisions from the bill that affect the remedies available, procedure, definitions, and how settlement funds are deposited with respect to the enforcement of deceptive consumer sales.

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 4-12-16-3, AS AMENDED BY P.L.141-2021;~~
2 ~~SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE~~
3 ~~JULY 1, 2023]:~~ Sec. 3. (a) The fund consists of:
4 ~~— (1) except as provided in subsections (b) and (c), all funds~~
5 ~~received by the state under:~~
6 ~~— (A) multistate and Indiana specific settlements;~~
7 ~~— (B) assurances of voluntary compliance accepted by the~~
8 ~~attorney general; and~~
9 ~~— (C) any other form of agreement that:~~
10 ~~— (i) is enforceable by a court; and~~
11 ~~— (ii) settles litigation between the state and another~~
12 ~~party; and~~
13 ~~— (2) all money recovered as court costs or costs related to~~
14 ~~litigation.~~
15 ~~— (b) Any amount of restitution that is:~~
16 ~~— (1) awarded to an individual or institution under a settlement or~~
17 ~~assurance of voluntary compliance;~~
18 ~~— (2) unclaimed by an individual or institution;~~
19 ~~— (3) received by a state agency; and~~
20 ~~— (4) determined to be abandoned property under IC 32-34-1.5;~~
21 ~~must be deposited in the abandoned property fund under~~

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~~IC 32-34-1.5-42:~~

- ~~— (c) The fund does not include the following:~~
- ~~— (1) Funds received by the state department of revenue.~~
- ~~— (2) Funds required to be deposited in the securities division enforcement account (IC 23-19-6-1).~~
- ~~— (3) Funds received as the result of a civil forfeiture under IC 34-24-1.~~
- ~~— (4) Funds received as a civil penalty or as part of an enforcement or collection action by an agency authorized to impose a civil penalty or engage in an enforcement or collection action, if the funds are required to be deposited in the general fund or another fund by statute.~~
- ~~— (5) Funds recovered by the Medicaid fraud control unit in actions to recover money inappropriately paid out of or obtained from the state Medicaid program.~~
- ~~— (6) Amounts required to be paid as consumer restitution or refunds in settlements specified in this chapter.~~
- ~~— (7) Amounts received under the Master Settlement Agreement (as defined in IC 24-3-3-6).~~
- ~~— (8) Costs and expenses, including reasonable attorney's fees and expert fees, received by the attorney general in connection with an action brought by the attorney general under IC 24-5-0.5-4(e), as provided for in IC 24-5-0.5-4(e)(7).~~
- ~~— SECTION 2. IC 24-5-0.5-2, AS AMENDED BY P.L.280-2019; SECTION 4, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2023]:~~ 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:~~
 - ~~— (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) The collection of or attempt to collect a debt by a debt collector.~~
 - ~~— (D) Conduct that is described in section 3(a) of this chapter and that arises from, occurs in connection with, or otherwise involves a transaction between commercial entities if the conduct results in harm to consumers.~~

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- 1 ~~(2) "Person" means an individual, corporation, the state of~~
2 ~~Indiana or its subdivisions or agencies, business trust, estate,~~
3 ~~trust, partnership, association, nonprofit corporation or~~
4 ~~organization, or 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 ~~**or, in a consumer transaction described in subdivision**~~
12 ~~**(1)(D), a commercial entity, regardless of whether or not**~~
13 ~~the person deals directly with the consumer.~~
- 14 ~~(B) A debt collector.~~
- 15 ~~(4) "Subject of a consumer transaction" means the personal~~
16 ~~property, real property, services, or intangibles offered or~~
17 ~~furnished in a consumer transaction.~~
- 18 ~~(5) "Cure" as applied to a deceptive act, means either:~~
19 ~~(A) to offer in writing to adjust or modify the consumer~~
20 ~~transaction to which the act relates to conform to the~~
21 ~~reasonable expectations of the consumer generated by such~~
22 ~~deceptive act and to perform such offer if accepted by the~~
23 ~~consumer; or~~
24 ~~(B) to offer in writing to rescind such consumer transaction~~
25 ~~and to perform such offer if accepted by the consumer.~~
- 26 ~~The term includes an offer in writing of one (1) or more items of~~
27 ~~value, including monetary compensation, that the supplier~~
28 ~~delivers to a consumer or a representative of the consumer if~~
29 ~~accepted by the consumer.~~
- 30 ~~(6) "Offer to cure" as applied to a deceptive act is a cure that:~~
31 ~~(A) is reasonably calculated to remedy a loss claimed by the~~
32 ~~consumer; and~~
33 ~~(B) includes a minimum additional amount that is the~~
34 ~~greater of:~~
35 ~~(i) ten percent (10%) of the value of the remedy under~~
36 ~~clause (A), but not more than four thousand dollars~~
37 ~~(\$4,000); or~~
38 ~~(ii) five hundred dollars (\$500);~~
39 ~~as compensation for attorney's fees, expenses, and other~~
40 ~~costs that a consumer may incur in relation to the deceptive~~
41 ~~act.~~
- 42 ~~(7) "Uncured deceptive act" means a deceptive act:~~
43 ~~(A) with respect to which a consumer who has been~~
44 ~~damaged by such act has given notice to the supplier under~~
45 ~~section 5(a) of this chapter; and~~
46 ~~(B) either:~~
47 ~~(i) no offer to cure has been made to such consumer~~
48 ~~within thirty (30) days after such notice; or~~
49 ~~(ii) the act has not been cured as to such consumer~~

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- 1 within a reasonable time after the consumer's
 2 acceptance of the offer to cure.
- 3 ~~(8) "Incurable deceptive act" means a deceptive act done by a~~
 4 ~~supplier as part of a scheme, artifice, or device with intent to~~
 5 ~~defraud or mislead. The term includes a failure of a transferee of~~
 6 ~~structured settlement payment rights to timely provide a true and~~
 7 ~~complete disclosure statement to a payee as provided under~~
 8 ~~IC 34-50-2 in connection with a direct or indirect transfer of~~
 9 ~~structured settlement payment rights.~~
- 10 ~~(9) "Senior consumer" means an individual who is at least sixty~~
 11 ~~(60) years of age.~~
- 12 ~~(10) "Telephone facsimile machine" means equipment that has~~
 13 ~~the capacity to transcribe text or images, or both, from:~~
- 14 ~~(A) paper into an electronic signal and to transmit that~~
 15 ~~signal over a regular telephone line; or~~
- 16 ~~(B) an electronic signal received over a regular telephone~~
 17 ~~line onto paper.~~
- 18 ~~(11) "Unsolicited advertisement" means material advertising the~~
 19 ~~commercial availability or quality of:~~
- 20 ~~(A) property;~~
 21 ~~(B) goods; or~~
 22 ~~(C) services;~~
- 23 ~~that is transmitted to a person without the person's prior express~~
 24 ~~invitation or permission, in writing or otherwise.~~
- 25 ~~(12) "Debt" has the meaning set forth in 15 U.S.C. 1692(a)(5).~~
- 26 ~~(13) "Debt collector" has the meaning set forth in 15 U.S.C.~~
 27 ~~1692(a)(6). The term does not include a person admitted to the~~
 28 ~~practice of law in Indiana if the person is acting within the~~
 29 ~~course and scope of the person's practice as an attorney. The~~
 30 ~~term includes a debt buyer (as defined in IC 24-5-15.5).~~
- 31 ~~(b) As used in section 3(b)(15) and 3(b)(16) of this chapter:~~
- 32 ~~(1) "Directory assistance" means the disclosure of telephone~~
 33 ~~number information in connection with an identified telephone~~
 34 ~~service subscriber by means of a live operator or automated~~
 35 ~~service.~~
- 36 ~~(2) "Local telephone directory" refers to a telephone classified~~
 37 ~~advertising directory or the business section of a telephone~~
 38 ~~directory that is distributed by a telephone company or directory~~
 39 ~~publisher to subscribers located in the local exchanges contained~~
 40 ~~in the directory. The term includes a directory that includes~~
 41 ~~listings of more than one (1) telephone company.~~
- 42 ~~(3) "Local telephone number" refers to a telephone number that~~
 43 ~~has the three (3) number prefix used by the provider of telephone~~
 44 ~~service for telephones physically located within the area covered~~
 45 ~~by the local telephone directory in which the number is listed.~~
 46 ~~The term does not include long distance numbers or 800-, 888-,~~
 47 ~~or 900- exchange numbers listed in a local telephone directory.~~
- 48 ~~SECTION 3. IC 24-5-0.5-4, AS AMENDED BY THE~~
 49 ~~TECHNICAL CORRECTIONS BILL OF THE 2023 GENERAL~~

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ASSEMBLY, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2023]: 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), ~~(k)~~, the court may award reasonable attorney ~~attorney's~~ 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(b)(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), ~~(k)~~, the court may award reasonable attorney ~~attorney's~~ 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(b)(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(b)(20) of this chapter, notwithstanding subsections (a) and (b). However, The attorney general may seek to enjoin patterns of incurable deceptive

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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) 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;
- (4) order the supplier 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; and
- (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), a synthetic drug lookalike substance (as defined in IC 35-31.5-2-321.5 (repealed)) (before July 1, 2019), a controlled substance analog (as defined in IC 35-48-1-9.3), or a substance represented to be a controlled substance (as described in IC 35-48-4-4.6); and
- **(7) order the supplier to pay the costs and expenses of the action, including reasonable attorney's fees and expert fees. Any award, judgment, or settlement for the costs and expenses of the action, including reasonable attorney's fees and expert fees, made or reached under this subdivision shall be deposited in the consumer protection judgment fund and used to support the efforts of the division of consumer protection created by IC 4-6-9-1.**

~~An action that arises from, or otherwise involves, a consumer transaction described in section 2(a)(1)(D) of this chapter may only be brought and enforced by the attorney general under this subsection:~~

— (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

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~~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(b)(19), 3(b)(20), or 3(b)(40) 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(b)(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(b)(19) of this chapter.~~

~~—(i) 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(b)(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~~

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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 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(b)(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.

— (m) If a court finds that a person has knowingly or intentionally violated section 3(b)(40) 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 in accordance with IC 24-5-14.5-12(b). As specified in IC 24-5-14.5-12(b), a civil penalty recovered under IC 24-5-14.5-12(b) 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 IC 24-5-14.5. In addition to the recovery of a civil penalty in accordance with IC 24-5-14.5-12(b), the attorney general may also recover reasonable attorney's fees and court costs from the person on behalf of the state. Those funds shall also be deposited in the consumer protection division telephone solicitation fund established by IC 24-4.7-3-6.

— ~~SECTION 4.~~ IC 24-5-0.5-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2023]: Sec. 5. (a) No action may be brought under this chapter, except under section 4(c) of this chapter, unless (1) the deceptive act is incurable or (2) the consumer bringing the action shall have given notice in writing to the supplier within the sooner of (i) six (6) months after the initial discovery of the deceptive act, (ii) one (1) year following such consumer transaction, or (iii) any time limitation, not less than thirty (30) days, of any period of warranty applicable to the transaction, which notice shall state fully the nature of the alleged deceptive act and the actual damage suffered therefrom, and unless such deceptive act shall have become an uncured deceptive act.

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

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