

SENATE BILL No. 311

DIGEST OF INTRODUCED BILL

Citations Affected: IC 24-4.7-3-6; IC 24-5-0.5.

Synopsis: Unsolicited facsimile advertisements. Provides that the transmission of an unsolicited facsimile advertisement is actionable as a deceptive consumer sale. Authorizes the attorney general to recover civil penalties up to \$1,500 for the transmission of an unsolicited facsimile advertisement. Deposits the civil penalties in the consumer protection division telephone solicitation fund.

Effective: January 1, 2007.

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January 10, 2006, read first time and referred to Committee on Corrections, Criminal, and Civil Matters.

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Second Regular Session 114th General Assembly (2006)

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 2005 Regular Session of the General Assembly.

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SENATE BILL No. 311



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 24-4.7-3-6 IS AMENDED TO READ AS
 2 FOLLOWS [EFFECTIVE JANUARY 1, 2007]: Sec. 6. (a) The
 3 consumer protection division telephone solicitation fund is established
 4 for the purpose of the administration of:
 5 (1) this article; and
 6 (2) **IC 24-5-0.5-3(a)(19)**.
 7 **The fund** shall be used exclusively for this purpose.
 8 (b) The division shall administer the fund.
 9 (c) The division shall deposit all revenue received:
 10 (1) under this article; **and**
 11 (2) **from civil penalties deposited under IC 24-5-0.5-4(h)**;
 12 in the fund.
 13 (d) Money in the fund is continuously appropriated to the division
 14 for the administration of:
 15 (1) this article; **and**
 16 (2) **IC 24-5-0.5-3(a)(19)**.
 17 (e) Money in the fund at the end of a state fiscal year does not revert



1 to the state general fund. However, if the amount of money in the fund
2 at the end of a particular state fiscal year exceeds two hundred
3 thousand dollars (\$200,000), the treasurer of state shall transfer the
4 excess from the fund to the state general fund.

5 SECTION 2. IC 24-5-0.5-2, AS AMENDED BY P.L.165-2005,
6 SECTION 6, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
7 JANUARY 1, 2007]: Sec. 2. (a) As used in this chapter:

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

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

20 (B) **The offer of a sale, lease, assignment, award by chance,**
21 **or other disposition of an item of personal property, real**
22 **property, a service, or an intangible to a person by an**
23 **unsolicited facsimile advertisement.**

24 (2) "Person" means an individual, corporation, the state of Indiana
25 or its subdivisions or agencies, business trust, estate, trust,
26 partnership, association, nonprofit corporation or organization, or
27 cooperative or any other legal entity.

28 (3) "Supplier" means **the following:**

29 (A) A seller, lessor, assignor, or other person who regularly
30 engages in or solicits consumer transactions, including
31 **soliciting a consumer transaction by transmitting an**
32 **unsolicited facsimile advertisement. The term includes a**
33 **manufacturer, wholesaler, or retailer, whether or not the**
34 **person deals directly with the consumer. or**

35 (B) A person who contrives, prepares, sets up, operates,
36 publicizes by means of advertisements, or promotes a pyramid
37 promotional scheme.

38 (4) "Subject of a consumer transaction" means the personal
39 property, real property, services, or intangibles **offered or**
40 **furnished in a consumer transaction.**

41 (5) "Cure" as applied to a deceptive act, means either:

42 (A) to offer in writing to adjust or modify the consumer

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1 transaction to which the act relates to conform to the
 2 reasonable expectations of the consumer generated by such
 3 deceptive act and to perform such offer if accepted by the
 4 consumer; or
 5 (B) to offer in writing to rescind such consumer transaction
 6 and to perform such offer if accepted by the consumer.
 7 The term includes an offer in writing of one (1) or more items of
 8 value, including monetary compensation, that the supplier
 9 delivers to a consumer or a representative of the consumer if
 10 accepted by the consumer.
 11 (6) "Offer to cure" as applied to a deceptive act is a cure that:
 12 (A) is reasonably calculated to remedy a loss claimed by the
 13 consumer; and
 14 (B) includes a minimum additional amount that is the greater
 15 of:
 16 (i) ten percent (10%) of the value of the remedy under
 17 clause (A), but not more than four thousand dollars
 18 (\$4,000); or
 19 (ii) five hundred dollars (\$500);
 20 as compensation for attorney's fees, expenses, and other costs
 21 that a consumer may incur in relation to the deceptive act.
 22 (7) "Uncured deceptive act" means a deceptive act:
 23 (A) with respect to which a consumer who has been damaged
 24 by such act has given notice to the supplier under section 5(a)
 25 of this chapter; and
 26 (B) either:
 27 (i) no offer to cure has been made to such consumer within
 28 thirty (30) days after such notice; or
 29 (ii) the act has not been cured as to such consumer within a
 30 reasonable time after the consumer's acceptance of the offer
 31 to cure.
 32 (8) "Incurable deceptive act" means a deceptive act done by a
 33 supplier as part of a scheme, artifice, or device with intent to
 34 defraud or mislead. The term includes a failure of a transferee of
 35 structured settlement payment rights to timely provide a true and
 36 complete disclosure statement to a payee as provided under
 37 IC 34-50-2 in connection with a direct or indirect transfer of
 38 structured settlement payment rights.
 39 (9) "Pyramid promotional scheme" means any program utilizing
 40 a pyramid or chain process by which a participant in the program
 41 gives a valuable consideration exceeding one hundred dollars
 42 (\$100) for the opportunity or right to receive compensation or

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1 other things of value in return for inducing other persons to
2 become participants for the purpose of gaining new participants
3 in the program. The term does not include ordinary sales of goods
4 or services to persons who are not purchasing in order to
5 participate in such a scheme.

6 (10) "Promoting a pyramid promotional scheme" means:
7 (A) inducing or attempting to induce one (1) or more other
8 persons to become participants in a pyramid promotional
9 scheme; or
10 (B) assisting another in promoting a pyramid promotional
11 scheme.

12 (11) "Elderly person" means an individual who is at least
13 sixty-five (65) years of age.

14 (12) "Unsolicited facsimile advertisement" means material
15 that:

16 (A) advertises the commercial availability or the quality of
17 any property, good, or service; and

18 (B) is transmitted to a person without the person's prior
19 express invitation or permission by equipment that has the
20 capacity to transcribe text or images, or both, from:

21 (i) paper into an electronic signal and to transmit that
22 signal over a regular telephone line; or

23 (ii) an electronic signal received over a regular telephone
24 line onto paper.

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

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

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

36 (3) "Local telephone number" refers to a telephone number that
37 has the three (3) number prefix used by the provider of telephone
38 service for telephones physically located within the area covered
39 by the local telephone directory in which the number is listed. The
40 term does not include long distance numbers or 800-, 888-, or
41 900- exchange numbers listed in a local telephone directory.

42 SECTION 3. IC 24-5-0.5-3 IS AMENDED TO READ AS

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1 FOLLOWS [EFFECTIVE JANUARY 1, 2007]: Sec. 3. (a) The
2 following acts or representations as to the subject matter of a consumer
3 transaction, made ~~either~~ orally, ~~or~~ in writing, **or by electronic**
4 **communication**, by a supplier, are deceptive acts:
5 (1) That such subject of a consumer transaction has sponsorship,
6 approval, performance, characteristics, accessories, uses, or
7 benefits it does not have which the supplier knows or should
8 reasonably know it does not have.
9 (2) That such subject of a consumer transaction is of a particular
10 standard, quality, grade, style, or model, if it is not and if the
11 supplier knows or should reasonably know that it is not.
12 (3) That such subject of a consumer transaction is new or unused,
13 if it is not and if the supplier knows or should reasonably know
14 that it is not.
15 (4) That such subject of a consumer transaction will be supplied
16 to the public in greater quantity than the supplier intends or
17 reasonably expects.
18 (5) That replacement or repair constituting the subject of a
19 consumer transaction is needed, if it is not and if the supplier
20 knows or should reasonably know that it is not.
21 (6) That a specific price advantage exists as to such subject of a
22 consumer transaction, if it does not and if the supplier knows or
23 should reasonably know that it does not.
24 (7) That the supplier has a sponsorship, approval, or affiliation in
25 such consumer transaction ~~he~~ **the supplier** does not have, and
26 which the supplier knows or should reasonably know that ~~he~~ **the**
27 **supplier** does not have.
28 (8) That such consumer transaction involves or does not involve
29 a warranty, a disclaimer of warranties, or other rights, remedies,
30 or obligations, if the representation is false and if the supplier
31 knows or should reasonably know that the representation is false.
32 (9) That the consumer will receive a rebate, discount, or other
33 benefit as an inducement for entering into a sale or lease in return
34 for giving the supplier the names of prospective consumers or
35 otherwise helping the supplier to enter into other consumer
36 transactions, if earning the benefit, rebate, or discount is
37 contingent upon the occurrence of an event subsequent to the time
38 the consumer agrees to the purchase or lease.
39 (10) That the supplier is able to deliver or complete the subject of
40 the consumer transaction within a stated period of time, when the
41 supplier knows or should reasonably know ~~he~~ **the supplier** could
42 not. If no time period has been stated by the supplier, there is a

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presumption that the supplier has represented that ~~he~~ **the supplier** will deliver or complete the subject of the consumer transaction within a reasonable time, according to the course of dealing or the usage of the trade.

(11) That the consumer will be able to purchase the subject of the consumer transaction as advertised by the supplier, if the supplier does not intend to sell it.

(12) That the replacement or repair constituting the subject of a consumer transaction can be made by the supplier for the estimate the supplier gives a customer for the replacement or repair, if the specified work is completed and:

- (A) the cost exceeds the estimate by an amount equal to or greater than ten percent (10%) of the estimate;
- (B) the supplier did not obtain written permission from the customer to authorize the supplier to complete the work even if the cost would exceed the amounts specified in clause (A);
- (C) the total cost for services and parts for a single transaction is more than seven hundred fifty dollars (\$750); and
- (D) the supplier knew or reasonably should have known that the cost would exceed the estimate in the amounts specified in clause (A).

(13) That the replacement or repair constituting the subject of a consumer transaction is needed, and that the supplier disposes of the part repaired or replaced earlier than seventy-two (72) hours after both:

- (A) the customer has been notified that the work has been completed; and
- (B) the part repaired or replaced has been made available for examination upon the request of the customer.

(14) Engaging in the replacement or repair of the subject of a consumer transaction if the consumer has not authorized the replacement or repair, and if the supplier knows or should reasonably know that it is not authorized.

(15) The act of misrepresenting the geographic location of the supplier by listing a fictitious business name or an assumed business name (as described in IC 23-15-1) in a local telephone directory if:

- (A) the name misrepresents the supplier's geographic location;
- (B) the listing fails to identify the locality and state of the supplier's business;
- (C) calls to the local telephone number are routinely forwarded or otherwise transferred to a supplier's business location that

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1 is outside the calling area covered by the local telephone
 2 directory; and
 3 (D) the supplier's business location is located in a county that
 4 is not contiguous to a county in the calling area covered by the
 5 local telephone directory.
 6 (16) The act of listing a fictitious business name or assumed
 7 business name (as described in IC 23-15-1) in a directory
 8 assistance database if:
 9 (A) the name misrepresents the supplier's geographic location;
 10 (B) calls to the local telephone number are routinely forwarded
 11 or otherwise transferred to a supplier's business location that
 12 is outside the local calling area; and
 13 (C) the supplier's business location is located in a county that
 14 is not contiguous to a county in the local calling area.
 15 (17) That the supplier violated IC 24-3-4 concerning cigarettes for
 16 import or export.
 17 (18) That a supplier knowingly sells or resells a product to a
 18 consumer if the product has been recalled, whether by the order
 19 of a court or a regulatory body, or voluntarily by the
 20 manufacturer, distributor, or retailer unless the product has been
 21 repaired or modified to correct the defect that was the subject of
 22 the recall.
 23 **(19) That the supplier violated 47 U.S.C. 227, including any**
 24 **rules or regulations issued under 47 U.S.C. 227.**
 25 (b) Any representations on or within a product or its packaging or
 26 in advertising or promotional materials which would constitute a
 27 deceptive act shall be the deceptive act both of the supplier who places
 28 such representation thereon or therein, or who authored such materials,
 29 and such other suppliers who shall state orally or in writing that such
 30 representation is true if such other supplier shall know or have reason
 31 to know that such representation was false.
 32 (c) If a supplier shows by a preponderance of the evidence that an
 33 act resulted from a bona fide error notwithstanding the maintenance of
 34 procedures reasonably adopted to avoid the error, such act shall not be
 35 deceptive within the meaning of this chapter.
 36 (d) It shall be a defense to any action brought under this chapter that
 37 the representation constituting an alleged deceptive act was one made
 38 in good faith by the supplier without knowledge of its falsity and in
 39 reliance upon the oral or written representations of the manufacturer,
 40 the person from whom the supplier acquired the product, any testing
 41 organization, or any other person provided that the source thereof is
 42 disclosed to the consumer.

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1 (e) For purposes of subsection (a)(12), a supplier that provides
2 estimates before performing repair or replacement work for a customer
3 shall give the customer a written estimate itemizing as closely as
4 possible the price for labor and parts necessary for the specific job
5 before commencing the work.

6 (f) For purposes of subsection (a)(15), a telephone company or other
7 provider of a telephone directory or directory assistance service or its
8 officer or agent is immune from liability for publishing the listing of a
9 fictitious business name or assumed business name of a supplier in its
10 directory or directory assistance database unless the telephone
11 company or other provider of a telephone directory or directory
12 assistance service is the same person as the supplier who has
13 committed the deceptive act.

14 (g) For purposes of subsection (a)(18), it is an affirmative defense
15 to any action brought under this chapter that the product has been
16 altered by a person other than the defendant to render the product
17 completely incapable of serving its original purpose.

18 SECTION 4. IC 24-5-0.5-4, AS AMENDED BY P.L.222-2005,
19 SECTION 33, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
20 JANUARY 1, 2007]: Sec. 4. (a) A person relying upon an uncured or
21 incurable deceptive act **or a person that receives an unsolicited**
22 **facsimile advertisement** may bring an action for the damages actually
23 suffered as a consumer as a result of the deceptive act or five hundred
24 dollars (\$500), whichever is greater. The court may increase damages
25 for a willful deceptive act in an amount that does not exceed the greater
26 of:

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

- 29 (2) **either:**
30 **(A) for a willful deceptive act described in section 3(a)(19)**
31 **of this chapter, one thousand five hundred dollars (\$1,500);**
32 **or**
33 **(B) for any other willful deceptive act, one thousand dollars**
34 **(\$1,000).**

35 Except as provided in subsection (j), the court may award reasonable
36 attorney fees to the party that prevails in an action under this
37 subsection. This subsection does not apply to a consumer transaction
38 in real property, including a claim or action involving a construction
39 defect (as defined in IC 32-27-3-1(5)) brought against a construction
40 professional (as defined in IC 32-27-3-1(4)), except for purchases of
41 time shares and camping club memberships. This subsection also does
42 not apply to a violation of IC 24-4.7, IC 24-5-12, or IC 24-5-14. Actual

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1 damages awarded to a person under this section have priority over any
2 civil penalty imposed under this chapter.

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

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

- 26 (1) issue an injunction;
- 27 (2) order the supplier to make payment of the money unlawfully
28 received from the aggrieved consumers to be held in escrow for
29 distribution to aggrieved consumers;
- 30 (3) order the supplier to pay to the state the reasonable costs of
31 the attorney general's investigation and prosecution related to the
32 action; and
- 33 (4) provide for the appointment of a receiver.

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

37 (e) In any action under subsection (a) or (b), upon the filing of the
38 complaint or on the appearance of any defendant, claimant, or any
39 other party, or at any later time, the trial court, the supreme court, or the
40 court of appeals may require the plaintiff, defendant, claimant, or any
41 other party or parties to give security, or additional security, in such
42 sum as the court shall direct to pay all costs, expenses, and

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1 disbursements that shall be awarded against that party or which that
 2 party may be directed to pay by any interlocutory order by the final
 3 judgment or on appeal.

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

13 (g) If a court finds any person has knowingly violated section 3 or
 14 10 of this chapter, **other than section 3(a)(19) of this chapter**, the
 15 attorney general, in an action pursuant to subsection (c), may recover
 16 from the person on behalf of the state a civil penalty of a fine not
 17 exceeding five thousand dollars (\$5,000) per violation.

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

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

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

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

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

33 ~~(f)~~ **(j)** An offer to cure is:

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

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

41 If the offer to cure is timely delivered by the supplier, the supplier may
 42 submit the offer to cure as evidence to prove in the proceeding in

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1 accordance with the Indiana Rules of Trial Procedure that the supplier
2 made an offer to cure.

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

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