

SENATE BILL No. 382

DIGEST OF INTRODUCED BILL

Citations Affected: IC 24-4.6-6; IC 24-5-0.5.

Synopsis: Senior consumer protection act. Creates the senior consumer protection act and makes conforming changes.

Effective: July 1, 2013.

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January 10, 2013, read first time and referred to Committee on Civil Law.

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First Regular Session 118th General Assembly (2013)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2012 Regular Session of the General Assembly.

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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. This chapter shall be known and may be cited as the**
 6 **senior consumer protection act.**
 7 **Sec. 2. (a) This chapter shall be liberally construed and applied**
 8 **to protect senior consumers.**
 9 **(b) The purposes and policies of this chapter are to:**
 10 **(1) simply, clarify, and modernize the law concerning the**
 11 **ownership, control, and use of property or assets of senior**
 12 **consumers; and**
 13 **(2) protect senior consumers from financial exploitation from**
 14 **persons, who by deception or intimidation, obtain control**
 15 **over the property or assets of a senior consumer.**
 16 **Sec. 3. The following definitions apply throughout this chapter:**
 17 **(1) "Deception" means:**



- 1 (A) misrepresentation or concealment of any material fact
 2 relating to the terms of a contract or agreement entered
 3 into with a senior consumer or to the existing or
 4 pre-existing condition of any of the property involved in
 5 such a contract or agreement; or
 6 (B) the use or employment of any misrepresentation, false
 7 pretense, or false promise in order to induce, encourage, or
 8 solicit a senior consumer to enter into a contract or
 9 agreement.
- 10 (2) "Intimidation" means the conduct or communication by
 11 a person directed toward a senior consumer informing or
 12 implying to the senior consumer that he or she will be
 13 deprived of food and nutrition, shelter, prescribed medication,
 14 or medical care and treatment if the senior consumer does not
 15 comply with the person's demands.
- 16 (3) "Person" means an individual, a corporation, the state of
 17 Indiana or its subdivisions or agencies, a business trust, an
 18 estate, a trust, a partnership, an association, a nonprofit
 19 corporation or organization, a cooperative, or any other legal
 20 entity.
- 21 (4) "Person in a position of trust and confidence" means a
 22 person, in relation to a senior consumer, who:
 23 (A) is a parent, spouse, adult child, or other relative by
 24 blood or marriage of the senior consumer;
 25 (B) is a joint tenant or tenant in common with the senior
 26 consumer;
 27 (C) has a legal or fiduciary relationship with the senior
 28 consumer;
 29 (D) is a financial planning or investment professional; or
 30 (E) is a paid or unpaid caregiver for the senior consumer.
- 31 (5) "Senior consumer" means an individual who is at least
 32 sixty (60) years of age.
- 33 **Sec. 4. (a) A person commits financial exploitation of a senior**
 34 **consumer when he or she knowingly and by deception or**
 35 **intimidation obtains control over the property of a senior**
 36 **consumer or illegally uses the assets or resources of a senior**
 37 **consumer.**
- 38 (b) The illegal use of the assets or resources of a senior
 39 consumer includes, but is not limited to, the misappropriation of
 40 those assets or resources by undue influence, breach of a fiduciary
 41 relationship, fraud, deception, extortion, intimidation, or use of the
 42 assets or resources contrary to law.

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

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

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

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

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

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

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

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

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

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

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

29 (A) payment of treble damages; and

30 (B) payment of a civil penalty not exceeding ten thousand
31 dollars (\$10,000).

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

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

39 (f) The attorney general may bring an action to enjoin an
40 alleged commission of financial exploitation of a senior consumer
41 and may petition the court to freeze the assets of the person
42 allegedly committing financial exploitation of a senior consumer in

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1 an amount equal to but not greater than the alleged value of lost
 2 property or assets for purposes of restoring to the victim the value
 3 of the lost property or assets. The burden of proof required to
 4 freeze the assets of a person allegedly committing financial
 5 exploitation of a senior consumer is by a preponderance of the
 6 evidence. In addition, the court may:

7 (1) issue an injunction;

8 (2) order the person to make payment of the money
 9 unlawfully received from the senior consumer or senior
 10 consumers, to be held in escrow for distribution to the
 11 aggrieved senior consumer or senior consumers;

12 (3) for knowing violations, increase the amount of restitution
 13 ordered under subdivision (2) in any amount up to three (3)
 14 times the amount of damages incurred or value of property or
 15 assets lost;

16 (4) order the person to pay to the state the reasonable costs of
 17 the attorney general's investigation and prosecution related
 18 to the action;

19 (5) provide for the appointment of a receiver;

20 (6) for knowing violations by a person who is not in a position
 21 of trust and confidence, order the person to pay a civil penalty
 22 of up to five thousand dollars (\$5,000) per violation; and

23 (7) for knowing violations by a person in a position of trust
 24 and confidence, order the person to pay a civil penalty of up
 25 to ten thousand dollars (\$10,000) per violation.

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

29 (h) In an action under subsection (a), upon the filing of the
 30 complaint or on the appearance of any defendant, claimant, or
 31 other party, or at any later time, the trial court, the supreme court,
 32 or the court of appeals may require the plaintiff, defendant,
 33 claimant, or other party or parties to give security, or additional
 34 security, in a sum the court directs to pay all costs, expenses, and
 35 disbursements that are awarded against that party or that the
 36 party may be directed to pay by any interlocutory order, by the
 37 final judgment, or on appeal.

38 (i) Any person who violates the terms of an injunction issued
 39 under subsection (f) shall forfeit and pay to the state a civil penalty
 40 of not more than fifteen thousand dollars (\$15,000) per violation.
 41 For the purposes of this section, the court issuing the injunction
 42 shall retain jurisdiction, the cause shall be continued, and the

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1 attorney general acting in the name of the state may petition for
 2 recovery of civil penalties. Whenever the court determines that an
 3 injunction issued under subsection (f) has been violated, the court
 4 shall award reasonable costs to the state.

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

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

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

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

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

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

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

33 (3) "Supplier" means the following:

34 (A) A seller, lessor, assignor, or other person who regularly
 35 engages in or solicits consumer transactions, including
 36 soliciting a consumer transaction by using a telephone
 37 facsimile machine to transmit an unsolicited advertisement.

38 The term includes a manufacturer, wholesaler, or retailer,
 39 whether or not the person deals directly with the consumer.

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

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

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- 1 IC 34-50-2 in connection with a direct or indirect transfer of
 2 structured settlement payment rights.
- 3 (9) "Pyramid promotional scheme" means any program utilizing
 4 a pyramid or chain process by which a participant in the program
 5 gives a valuable consideration exceeding one hundred dollars
 6 (\$100) for the opportunity or right to receive compensation or
 7 other things of value in return for inducing other persons to
 8 become participants for the purpose of gaining new participants
 9 in the program. The term does not include ordinary sales of goods
 10 or services to persons who are not purchasing in order to
 11 participate in such a scheme.
- 12 (10) "Promoting a pyramid promotional scheme" means:
 13 (A) inducing or attempting to induce one (1) or more other
 14 persons to become participants in a pyramid promotional
 15 scheme; or
 16 (B) assisting another in promoting a pyramid promotional
 17 scheme.
- 18 (11) ~~"Elderly person"~~ **"Senior consumer"** means an individual
 19 who is at least ~~sixty-five (65)~~ **sixty (60)** years of age.
- 20 (12) "Telephone facsimile machine" means equipment that has
 21 the capacity to transcribe text or images, or both, from:
 22 (A) paper into an electronic signal and to transmit that signal
 23 over a regular telephone line; or
 24 (B) an electronic signal received over a regular telephone line
 25 onto paper.
- 26 (13) "Unsolicited advertisement" means material advertising the
 27 commercial availability or quality of:
 28 (A) property;
 29 (B) goods; or
 30 (C) services;
 31 that is transmitted to a person without the person's prior express
 32 invitation or permission, in writing or otherwise.
- 33 (14) "Debt" has the meaning set forth in 15 U.S.C. 1692a(5)).
- 34 (15) "Debt collector" has the meaning set forth in 15 U.S.C.
 35 1692a(6). The term does not include a person admitted to the
 36 practice of law in Indiana if the person is acting within the course
 37 and scope of the person's practice as an attorney.
- 38 (b) As used in section 3(a)(15) and 3(a)(16) of this chapter:
 39 (1) "Directory assistance" means the disclosure of telephone
 40 number information in connection with an identified telephone
 41 service subscriber by means of a live operator or automated
 42 service.

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

7 (3) "Local telephone number" refers to a telephone number that
 8 has the three (3) number prefix used by the provider of telephone
 9 service for telephones physically located within the area covered
 10 by the local telephone directory in which the number is listed. The
 11 term does not include long distance numbers or 800-, 888-, or
 12 900- exchange numbers listed in a local telephone directory.

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

21 (1) three (3) times the actual damages of the consumer suffering
 22 the loss; or

23 (2) one thousand dollars (\$1,000).

24 Except as provided in subsection (j), the court may award reasonable
 25 attorney fees to the party that prevails in an action under this
 26 subsection. This subsection does not apply to a consumer transaction
 27 in real property, including a claim or action involving a construction
 28 defect (as defined in IC 32-27-3-1(5)) brought against a construction
 29 professional (as defined in IC 32-27-3-1(4)), except for purchases of
 30 time shares and camping club memberships. This subsection does not
 31 apply with respect to a deceptive act described in section 3(a)(20) of
 32 this chapter. This subsection also does not apply to a violation of
 33 IC 24-4.7, IC 24-5-12, or IC 24-5-14. Actual damages awarded to a
 34 person under this section have priority over any civil penalty imposed
 35 under this chapter.

36 (b) Any person who is entitled to bring an action under subsection
 37 (a) on the person's own behalf against a supplier for damages for a
 38 deceptive act may bring a class action against such supplier on behalf
 39 of any class of persons of which that person is a member and which has
 40 been damaged by such deceptive act, subject to and under the Indiana
 41 Rules of Trial Procedure governing class actions, except as herein
 42 expressly provided. Except as provided in subsection (j), the court may

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1 award reasonable attorney fees to the party that prevails in a class
 2 action under this subsection, provided that such fee shall be determined
 3 by the amount of time reasonably expended by the attorney and not by
 4 the amount of the judgment, although the contingency of the fee may
 5 be considered. Except in the case of an extension of time granted by the
 6 attorney general under IC 24-10-2-2(b) in an action subject to IC 24-10,
 7 any money or other property recovered in a class action under this
 8 subsection which cannot, with due diligence, be restored to consumers
 9 within one (1) year after the judgment becomes final shall be returned
 10 to the party depositing the same. This subsection does not apply to a
 11 consumer transaction in real property, except for purchases of time
 12 shares and camping club memberships. This subsection does not apply
 13 with respect to a deceptive act described in section 3(a)(20) of this
 14 chapter. Actual damages awarded to a class have priority over any civil
 15 penalty imposed under this chapter.

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

- 22 (1) issue an injunction;
 23 (2) order the supplier to make payment of the money unlawfully
 24 received from the aggrieved consumers to be held in escrow for
 25 distribution to aggrieved consumers;
 26 **(3) for a knowing violation against a senior consumer,**
 27 **increase the amount of restitution ordered under subdivision**
 28 **(2) in any amount up to three (3) times the amount of damages**
 29 **incurred or value of property or assets lost;**
 30 ~~(3)~~ **(4)** order the supplier to pay to the state the reasonable costs
 31 of the attorney general's investigation and prosecution related to
 32 the action; and
 33 ~~(4)~~ **(5)** 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) or 3(a)(20) of this
 15 chapter, the attorney general, in an action pursuant to subsection (c),
 16 may recover from the person on behalf of the state a civil penalty of a
 17 fine not exceeding five thousand dollars (\$5,000) per violation.

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

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

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

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

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

32 (j) An offer to cure is:

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

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

40 If the offer to cure is timely delivered by the supplier, the supplier may
 41 submit the offer to cure as evidence to prove in the proceeding in
 42 accordance with the Indiana Rules of Trial Procedure that the supplier

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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 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.

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