

# HOUSE BILL No. 1068

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## DIGEST OF INTRODUCED BILL

**Citations Affected:** IC 24-5-0.5.

**Synopsis:** Prices charged to retailers by suppliers. Provides that a supplier commits an unconscionable act that is treated the same as a deceptive act under the deceptive consumer sales law if the supplier refuses to sell to a retailer with which the supplier has done business within the previous two years a good that is a food or beverage product at the same price that the supplier sells the good to any other retailer. Establishes exceptions. Provides that certain deceptive consumer sales provisions do not apply to the unconscionable act. Requires a court to award to a retailer the difference between the higher price at which the goods were sold to the retailer and the lower price at which the goods were sold to another retailer if a court finds a supplier has committed an unconscionable act. Requires a court to award to the attorney general, if the attorney general files an action to enjoin the unconscionable act, a civil penalty equal to two times the amount of the difference between the higher price at which the goods were sold to a retailer and the lower price at which the goods were sold to another retailer.

**Effective:** July 1, 2014.

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January 9, 2014, read first time and referred to Committee on Judiciary.

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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 2013 Regular Session and 2013 First Regular Technical Session of the General Assembly.

# HOUSE BILL No. 1068



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 24-5-0.5-4, AS AMENDED BY P.L.250-2013,  
2 SECTION 3, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
3 JULY 1, 2014]: Sec. 4. (a) A person relying upon an uncured or  
4 incurable deceptive act may bring an action for the damages actually  
5 suffered as a consumer as a result of the deceptive act or five hundred  
6 dollars (\$500), whichever is greater. The court may increase damages  
7 for a willful deceptive act in an amount that does not exceed the greater  
8 of:  
9 (1) three (3) times the actual damages of the consumer suffering  
10 the loss; or  
11 (2) one thousand dollars (\$1,000).  
12 Except as provided in subsection (j), the court may award reasonable  
13 attorney fees to the party that prevails in an action under this  
14 subsection. This subsection does not apply to a consumer transaction  
15 in real property, including a claim or action involving a construction  
16 defect (as defined in IC 32-27-3-1(5)) brought against a construction



1 professional (as defined in IC 32-27-3-1(4)), except for purchases of  
2 time shares and camping club memberships. This subsection does not  
3 apply with respect to a deceptive act described in section 3(a)(20) of  
4 this chapter. This subsection also does not apply to a violation of  
5 IC 24-4.7, IC 24-5-12, IC 24-5-14, or IC 24-5-14.5. Actual damages  
6 awarded to a person under this section have priority over any civil  
7 penalty imposed under this chapter.

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

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

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



1 value of property or assets lost;

2 (4) order the supplier to pay to the state the reasonable costs of  
3 the attorney general's investigation and prosecution related to the  
4 action;

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

6 (6) order the department of state revenue to suspend the supplier's  
7 registered retail merchant certificate, subject to the requirements  
8 and prohibitions contained in IC 6-2.5-8-7(i), if the court finds  
9 that a violation of this chapter involved the sale or solicited sale  
10 of a synthetic drug (as defined in IC 35-31.5-2-321) or a synthetic  
11 drug lookalike substance (as defined in IC 35-31.5-2-321.5).

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

15 (e) In any action under subsection (a) or (b), upon the filing of the  
16 complaint or on the appearance of any defendant, claimant, or any  
17 other party, or at any later time, the trial court, the supreme court, or the  
18 court of appeals may require the plaintiff, defendant, claimant, or any  
19 other party or parties to give security, or additional security, in such  
20 sum as the court shall direct to pay all costs, expenses, and  
21 disbursements that shall be awarded against that party or which that  
22 party may be directed to pay by any interlocutory order by the final  
23 judgment or on appeal.

24 (f) Any person who violates the terms of an injunction issued under  
25 subsection (c) shall forfeit and pay to the state a civil penalty of not  
26 more than fifteen thousand dollars (\$15,000) per violation. For the  
27 purposes of this section, the court issuing an injunction shall retain  
28 jurisdiction, the cause shall be continued, and the attorney general  
29 acting in the name of the state may petition for recovery of civil  
30 penalties. Whenever the court determines that an injunction issued  
31 under subsection (c) has been violated, the court shall award  
32 reasonable costs to the state.

33 (g) If a court finds any person has knowingly violated section 3 or  
34 10 of this chapter, other than section 3(a)(19) or 3(a)(20) of this  
35 chapter, the attorney general, in an action pursuant to subsection (c),  
36 may recover from the person on behalf of the state a civil penalty of a  
37 fine not exceeding five thousand dollars (\$5,000) per violation.

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

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



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

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

7 (i) A senior consumer relying upon an uncured or incurable  
8 deceptive act, including an act related to hypnotism, may bring an  
9 action to recover treble damages, if appropriate.

10 (j) An offer to cure is:

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

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

18 If the offer to cure is timely delivered by the supplier, the supplier may  
19 submit the offer to cure as evidence to prove in the proceeding in  
20 accordance with the Indiana Rules of Trial Procedure that the supplier  
21 made an offer to cure.

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

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



1 the Fair Debt Collection Practices Act.

2 **(m) This section does not apply to a violation of section 11 of this**  
 3 **chapter.**

4 SECTION 2. IC 24-5-0.5-5 IS AMENDED TO READ AS  
 5 FOLLOWS [EFFECTIVE JULY 1, 2014]: Sec. 5. (a) No action may be  
 6 brought under this chapter, except under section 4(c) of this chapter,  
 7 unless (1) the deceptive act is incurable or (2) the consumer bringing  
 8 the action shall have given notice in writing to the supplier within the  
 9 sooner of (i) six (6) months after the initial discovery of the deceptive  
 10 act, (ii) one (1) year following such consumer transaction, or (iii) any  
 11 time limitation, not less than thirty (30) days, of any period of warranty  
 12 applicable to the transaction, which notice shall state fully the nature  
 13 of the alleged deceptive act and the actual damage suffered therefrom,  
 14 and unless such deceptive act shall have become an uncured deceptive  
 15 act.

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

20 **(c) This section does not apply to a violation of section 11 of this**  
 21 **chapter.**

22 SECTION 3. IC 24-5-0.5-11 IS ADDED TO THE INDIANA CODE  
 23 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY  
 24 1, 2014]: Sec. 11. (a) **This section does not apply to the following:**

25 **(1) Contracts between a franchisor and a franchisee.**

26 **(2) Transactions concerning the sale of alcoholic beverages (as**  
 27 **defined in IC 7.1-1-3-5).**

28 (b) As used in this section, "good" means any food or beverage  
 29 product that is enclosed in a container or wrapped in any manner  
 30 in advance of the sale of the product at wholesale or retail. The  
 31 term includes chewing gum.

32 (c) As used in this section, "retailer" means a person, and any  
 33 entity affiliated and under common control with the person, that  
 34 engages in the business of selling tangible personal property to  
 35 consumers. For purposes of this section, "retailer" does not include  
 36 a supplier.

37 (d) For purposes of this section, "supplier" does not include a  
 38 retailer.

39 (e) Except as provided in subsection (f), a supplier commits an  
 40 unconscionable act that is treated the same as a deceptive act under  
 41 this chapter if the supplier refuses to sell to a retailer with which  
 42 the supplier has done business within the previous two (2) years a



1 good at the same price that the supplier sells the good to any other  
2 retailer.

3 (f) A supplier that charges a retailer a higher price for a good  
4 than the supplier charges another retailer does not commit an  
5 unconscionable act under subsection (e) if one (1) or more of the  
6 following apply:

7 (1) The supplier charges a retailer a higher price for goods  
8 based on the retailer purchasing a lower quantity of the goods  
9 than another retailer purchases for a single delivery. For  
10 purposes of this subdivision, the number of deliveries is equal  
11 to the number of vehicles used to transport goods to a retailer.

12 (2) The supplier charges a retailer a higher price for the goods  
13 based only on a greater cost to the supplier to deliver the  
14 goods to the retailer.

15 (3) The supplier charges a higher price for the goods in  
16 response to changing conditions affecting the market for or  
17 marketability of the goods including:

18 (A) imminent deterioration of perishable goods;

19 (B) obsolescence of seasonal goods; or

20 (C) distress sales in anticipation of discontinuance of  
21 business in the goods.

22 A perishable good is not considered in imminent deterioration  
23 under subdivision (3)(A) if the good will still be merchantable after  
24 twenty (20) days.

25 (g) A retailer harmed by a violation of this section may bring an  
26 action for damages. If a court finds a supplier has committed an  
27 unconscionable act under this section, the court shall require the  
28 supplier to reimburse a retailer that is a party to the action the  
29 amount of the difference between the higher price at which the  
30 goods were sold to the retailer and the lower price at which the  
31 goods were sold to another retailer.

32 (h) If:

33 (1) the attorney general brings an action to enjoin an  
34 unconscionable act under this section; and

35 (2) the court finds a supplier has committed an  
36 unconscionable act under this section;

37 the attorney general may recover from the supplier on behalf of  
38 the state a civil penalty equal to two (2) times the amount of the  
39 difference between the higher price at which the goods were sold  
40 to a retailer and the lower price at which the goods were sold to  
41 another retailer.

