

# HOUSE BILL No. 1121

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## DIGEST OF INTRODUCED BILL

**Citations Affected:** IC 4-6-9-4; IC 24-5-0.5.

**Synopsis:** Wholesale pricing of nonalcoholic beverages. Provides, with certain exceptions, that suppliers in transactions with retailers for the sale of nonalcoholic packaged beverages (beverages) may not: (1) charge retailers different prices at the same time for beverages; and (2) offer a discount price to a retailer that has not been published on a monthly deal sheet distributed to all retailers. Provides that a supplier may charge a retailer a different price not published on the monthly deal sheet if: (1) the discount is a volume based discount of not more than one semitrailer load delivered to a single location of the retailer per stock keeping unit of the beverage; (2) the supplier charges a retailer a higher price for the beverages based only on a greater cost to the supplier to deliver the beverages to the retailer; or (3) the supplier charges a different price for the beverages in response to changing conditions affecting the market for or marketability of the beverage. Provides that a supplier who fails to comply commits an unconscionable act that is treated the same as a deceptive act under the deceptive consumer sales law. Provides that the consumer protection division of the office of the attorney general (division) may prosecute complaints of retailers against suppliers. Provides that certain deceptive consumer sales provisions do not apply to the unconscionable act. Provides that if the division files an action to enjoin the unconscionable act, the division may be awarded a civil penalty equal to two times the amount of the difference between the higher price at which the beverages were sold to a retailer and the lower price at which the beverages were sold to another retailer. Provides that a retailer may receive an award equal to two times the  
(Continued next page)

**Effective:** July 1, 2020.

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**Soliday, Huston, Steuerwald,  
DeLaney**

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January 8, 2020, read first time and referred to Committee on Commerce, Small Business and Economic Development.



Digest Continued

difference between the higher price at which the beverages were sold to the retailer and the lower price at which the beverages were sold to another retailer, plus attorney's fees. Makes technical corrections.



Introduced

Second Regular Session of the 121st General Assembly (2020)

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 2019 Regular Session of the General Assembly.

## HOUSE BILL No. 1121

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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 4-6-9-4, AS AMENDED BY P.L.215-2016,  
2 SECTION 48, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
3 JULY 1, 2020]: Sec. 4. (a) The division has the following powers and  
4 duties:  
5 (1) The power to investigate any written consumer complaint  
6 made by a nonmerchant arising from a transaction between a  
7 merchant as defined in the Uniform Commercial Code and a  
8 nonmerchant concerning sales, leases, assignments, awards by  
9 chance, or other dispositions of goods, services, or repairs, and  
10 intangibles to a person for purposes that are primarily personal,  
11 familial, household, charitable, or agricultural, or a solicitation to  
12 supply any of the above things. When a consumer trades in or  
13 sells a motor vehicle to another consumer or nonconsumer, the  
14 consumer shall be considered to be a nonconsumer and shall be  
15 subject to the provisions of this chapter. The division shall have



1 no jurisdiction over matters concerning utilities subject to  
 2 regulation by the utility regulatory commission or by an agency of  
 3 the United States except that the provisions of subdivision (5)  
 4 shall apply and except as provided in IC 8-1-29.

5 **(2) The power to receive, investigate, and prosecute any**  
 6 **written complaints made by a retailer arising from a**  
 7 **transaction between a retailer and a supplier concerning**  
 8 **nonalcoholic packaged beverages under IC 24-5-0.5-11.**

9 ~~(2)~~ (3) For complaints filed after August 31, 1984, the duty to  
 10 ascertain from the consumer whether the consumer consents to  
 11 public disclosure by the division of the filing of the complaint,  
 12 including the consumer's identity and telephone number, if any.

13 ~~(3)~~ (4) The duty to notify the merchant of the nature of the  
 14 complaint by written communication and request a written reply.

15 ~~(4)~~ (5) Upon receipt of reply, the duty to act as mediator between  
 16 the parties and attempt to resolve all complaints in a conciliatory  
 17 manner. The director of the division and the attorney general have  
 18 discretion whether to mediate complaints involving a de minimis  
 19 amount of money.

20 ~~(5)~~ (6) If no reply is received or if the parties are unable to resolve  
 21 their differences, and no violation of federal or state statute or rule  
 22 is indicated, the duty to provide the complainant with a copy of all  
 23 correspondence relating to the matter.

24 ~~(6)~~ (7) Whenever a violation of a state or federal law or  
 25 administrative rule is indicated, the duty to forward to the  
 26 appropriate state or federal agency a copy of the correspondence  
 27 and request that the agency further investigate the complaint and  
 28 report to the division upon the disposition of the complaint.

29 ~~(7)~~ (8) The power to initiate and prosecute civil actions on behalf  
 30 of the state whenever an agency to which a complaint has been  
 31 forwarded fails to act upon the complaint within ten (10) working  
 32 days after its referral, or whenever no state agency has jurisdiction  
 33 over the subject matter of the complaint.

34 (b) All complaints and correspondence in the possession of the  
 35 division under this chapter are confidential unless disclosure of a  
 36 complaint or correspondence is:

37 (1) requested by the person who filed the complaint;

38 (2) consented to, in whole or in part, after August 31, 1984, by the  
 39 person who filed the complaint;

40 (3) in furtherance of an investigation by a law enforcement  
 41 agency; or

42 (4) necessary for the filing of an action by the attorney general



1 under IC 24-5-0.5.

2 (c) Notwithstanding subsection (b), the division may publicly  
3 disclose information relating to the status of complaints under  
4 subsection ~~(a)(3)~~; (a)(4), (a)(5), (a)(6), ~~and~~ (a)(7), **and (a)(8)**.

5 (d) Except for a residential telephone number published in the most  
6 recent quarterly telephone sales solicitation listing by the division  
7 under IC 24-4.7-3 and except as provided in subsection (e), all  
8 consumer information provided for the purposes of registering for or  
9 maintaining the no telephone sales solicitation listing is confidential.

10 (e) The name, address, and telephone number of a registrant of the  
11 most recent quarterly no telephone sales solicitation listing may be  
12 released for journalistic purposes if the registrant consents to the  
13 release of information after June 30, 2007.

14 SECTION 2. IC 24-5-0.5-4, AS AMENDED BY P.L.80-2019,  
15 SECTION 8, AND AS AMENDED BY P.L.242-2019, SECTION 7,  
16 AND AS AMENDED BY THE TECHNICAL CORRECTIONS BILL  
17 OF THE 2020 GENERAL ASSEMBLY, IS CORRECTED AND  
18 AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]:  
19 Sec. 4. (a) A person relying upon an uncured or incurable deceptive act  
20 may bring an action for the damages actually suffered as a consumer as  
21 a result of the deceptive act or five hundred dollars (\$500), whichever  
22 is greater. The court may increase damages for a willful deceptive act  
23 in an amount that does not exceed the greater of:

24 (1) three (3) times the actual damages of the consumer suffering  
25 the loss; or

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

27 Except as provided in subsection (j), the court may award reasonable  
28 attorney fees to the party that prevails in an action under this  
29 subsection. This subsection does not apply to a consumer transaction  
30 in real property, including a claim or action involving a construction  
31 defect (as defined in IC 32-27-3-1(5)) brought against a construction  
32 professional (as defined in IC 32-27-3-1(4)), except for purchases of  
33 time shares and camping club memberships. This subsection does not  
34 apply with respect to a deceptive act described in section 3(b)(20) of  
35 this chapter. This subsection also does not apply to a violation of  
36 IC 24-4.7, IC 24-5-12, IC 24-5-14, or IC 24-5-14.5. Actual damages  
37 awarded to a person under this section have priority over any civil  
38 penalty imposed under this chapter.

39 (b) Any person who is entitled to bring an action under subsection  
40 (a) on the person's own behalf against a supplier for damages for a  
41 deceptive act may bring a class action against such supplier on behalf  
42 of any class of persons of which that person is a member and which has



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

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

- 25 (1) issue an injunction;  
26 (2) order the supplier to make payment of the money unlawfully  
27 received from the aggrieved consumers to be held in escrow for  
28 distribution to aggrieved consumers;  
29 (3) for a knowing violation against a senior consumer, increase  
30 the amount of restitution ordered under subdivision (2) in any  
31 amount up to three (3) times the amount of damages incurred or  
32 value of property or assets lost;  
33 (4) order the supplier to pay to the state the reasonable costs of  
34 the attorney general's investigation and prosecution related to the  
35 action;  
36 (5) provide for the appointment of a receiver; and  
37 (6) order the department of state revenue to suspend the supplier's  
38 registered retail merchant certificate, subject to the requirements  
39 and prohibitions contained in IC 6-2.5-8-7(i), if the court finds  
40 that a violation of this chapter involved the sale or solicited sale  
41 of a synthetic drug (as defined in IC 35-31.5-2-321), ~~or~~ a  
42 synthetic drug lookalike substance (as defined in



1 IC 35-31.5-2-321.5 (*repealed*) (*before July 1, 2019*), a controlled  
 2 substance analog (as defined in IC 35-48-1-9.3), or a substance  
 3 represented to be a controlled substance (as described in  
 4 IC 35-48-4-4.6).

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

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

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

26 (g) If a court finds any person has knowingly violated section 3 or  
 27 10 of this chapter, other than section 3(b)(19), ~~or 3(b)(20), or 3(b)(38)~~  
 28 **3(b)(40)** of this chapter, the attorney general, in an action pursuant to  
 29 subsection (c), may recover from the person on behalf of the state a  
 30 civil penalty of a fine not exceeding five thousand dollars (\$5,000) per  
 31 violation.

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

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

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

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



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

4 (j) An offer to cure is:

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

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

12 If the offer to cure is timely delivered by the supplier, the supplier may  
 13 submit the offer to cure as evidence to prove in the proceeding in  
 14 accordance with the Indiana Rules of Trial Procedure that the supplier  
 15 made an offer to cure.

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

21 (l) If a court finds that a person has knowingly violated section  
 22 3(b)(20) of this chapter, the attorney general, in an action under  
 23 subsection (c), may recover from the person on behalf of the state a  
 24 civil penalty not exceeding one thousand dollars (\$1,000) per  
 25 consumer. In determining the amount of the civil penalty in any action  
 26 by the attorney general under this subsection, the court shall consider,  
 27 among other relevant factors, the frequency and persistence of  
 28 noncompliance by the debt collector, the nature of the noncompliance,  
 29 and the extent to which the noncompliance was intentional. A person  
 30 may not be held liable in any action by the attorney general for a  
 31 violation of section 3(b)(20) of this chapter if the person shows by a  
 32 preponderance of evidence that the violation was not intentional and  
 33 resulted from a bona fide error, notwithstanding the maintenance of  
 34 procedures reasonably adapted to avoid the error. A person may not be  
 35 held liable in any action for a violation of this chapter for contacting a  
 36 person other than the debtor, if the contact is made in compliance with  
 37 the Fair Debt Collection Practices Act.

38 (m) *If a court finds that a person has knowingly or intentionally*  
 39 *violated section ~~3(b)(38)~~ 3(b)(40) of this chapter, the attorney general,*  
 40 *in an action under subsection (c), may recover from the person on*  
 41 *behalf of the state a civil penalty in accordance with*  
 42 *IC 24-5-14.5-12(b). As specified in IC 24-5-14.5-12(b), a civil penalty*



1 *recovered under IC 24-5-14.5-12(b) shall be deposited in the consumer*  
 2 *protection division telephone solicitation fund established by*  
 3 *IC 24-4.7-3-6 to be used for the administration and enforcement of*  
 4 *IC 24-5-14.5. In addition to the recovery of a civil penalty in*  
 5 *accordance with IC 24-5-14.5-12(b), the attorney general may also*  
 6 *recover reasonable attorney fees and court costs from the person on*  
 7 *behalf of the state. Those funds shall also be deposited in the consumer*  
 8 *protection division telephone solicitation fund established by*  
 9 *IC 24-4.7-3-6.*

10 **(n) This section does not apply to a violation of section 11 of this**  
 11 **chapter.**

12 SECTION 3. IC 24-5-0.5-5 IS AMENDED TO READ AS  
 13 FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 5. (a) No action may be  
 14 brought under this chapter, except under section 4(c) of this chapter,  
 15 unless (1) the deceptive act is incurable or (2) the consumer bringing  
 16 the action shall have given notice in writing to the supplier within the  
 17 sooner of (i) six (6) months after the initial discovery of the deceptive  
 18 act, (ii) one (1) year following such consumer transaction, or (iii) any  
 19 time limitation, not less than thirty (30) days, of any period of warranty  
 20 applicable to the transaction, which notice shall state fully the nature  
 21 of the alleged deceptive act and the actual damage suffered therefrom,  
 22 and unless such deceptive act shall have become an uncured deceptive  
 23 act.

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

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

30 SECTION 4. IC 24-5-0.5-11 IS ADDED TO THE INDIANA CODE  
 31 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY  
 32 1, 2020]: Sec. 11. (a) **This section applies only to transactions**  
 33 **concerning the sale of nonalcoholic packaged beverages.**

34 (b) **As used in this section, "beverage" means a nonalcoholic**  
 35 **packaged beverage.**

36 (c) **As used in this section, "division" means the consumer**  
 37 **protection division of the office of the attorney general.**

38 (d) **As used in this section, "nonalcoholic packaged beverage"**  
 39 **means any nonalcoholic packaged beverage product that:**

40 (1) **is not an alcoholic beverage (as defined in IC 7.1-1-3-5);**

41 (2) **has a volume of at least eight (8) fluid ounces; and**

42 (3) **is enclosed in a container or wrapped in any manner in**



1 advance of the sale of the product at wholesale or retail.

2 (e) As used in this section, "retailer" means a person, and any  
3 entity affiliated and under common control with the person, that  
4 engages in the business of selling tangible personal property to  
5 consumers. For purposes of this section, "retailer" does not include  
6 a supplier.

7 (f) For purposes of this section, "supplier" means a supplier in  
8 a:

- 9 (1) sale of;  
10 (2) contract to sell; or  
11 (3) franchise agreement to sell;

12 beverages. For purposes of this section, the term does not include  
13 a retailer.

14 (g) Except as provided in subsection (h), a supplier may not  
15 discriminate between retailers by granting a price, discount,  
16 allowance, or service charge that is not available to all retailers at  
17 the same time. Not later than the first day of each month, a  
18 supplier must publish and make available to all retailers a deal  
19 sheet that lists all prices, discounts, allowances, or service charges  
20 that are available to retailers for that month. Except as provided  
21 in subsection (h), a supplier may not offer a price, discount,  
22 allowance, or service charge that is not published on the monthly  
23 deal sheet.

24 (h) A supplier may only charge a retailer a price for a beverage  
25 that is different than the price the supplier charges another retailer  
26 in one (1) or more of the following circumstances:

27 (1) The supplier charges the retailer a volume based discount  
28 price that is:

29 (A) based on a volume of not more than one (1) semitrailer  
30 (as defined in IC 9-13-2-164) load delivered to a single  
31 location of the retailer per stock keeping unit of the  
32 beverage; and

33 (B) not offered to other retailers or published on the deal  
34 sheet.

35 (2) The supplier charges a retailer a higher price for the  
36 beverages based only on a greater cost to the supplier to  
37 deliver the beverages to the retailer.

38 (3) The supplier charges a different price for the beverages in  
39 response to changing conditions affecting the market for or  
40 marketability of the beverage, including:

41 (A) obsolescence of seasonal beverages; or

42 (B) distressed sales in anticipation of discontinuance of



- 1                   **business in beverages.**  
2                   **Any discounts not published on the monthly deal sheet, other than**  
3                   **the discounts listed in this subsection, are prohibited, including any**  
4                   **nonvolume based discounts involving marketing incentives such as**  
5                   **display and placement requirements.**  
6                   **(i) A supplier, franchise, or other distribution agreement to**  
7                   **which a supplier is a party may not include an agreement that**  
8                   **prohibits the disclosure of the prices, discounts, allowances, or**  
9                   **service charges to a retailer.**  
10                  **(j) A supplier must offer all retailers capable of receiving**  
11                  **delivery of the beverages by a certain means of delivery the choice**  
12                  **to receive the beverages by that means of delivery.**  
13                  **(k) A supplier who fails to comply with any provision of this**  
14                  **section commits an unconscionable act that is treated the same as**  
15                  **a deceptive act under this chapter and is actionable by the attorney**  
16                  **general.**  
17                  **(l) A retailer may submit a written complaint to the division**  
18                  **alleging a violation of this section for investigation by the division.**  
19                  **The division may receive, investigate, and prosecute written**  
20                  **complaints concerning retailers and suppliers subject to this**  
21                  **section.**  
22                  **(m) If:**  
23                       **(1) the division brings an action to enjoin an unconscionable**  
24                       **act under this section on behalf of identified retailers; and**  
25                       **(2) the court finds a supplier has committed an**  
26                       **unconscionable act under this section;**  
27                  **the division may recover from the supplier on behalf of the state a**  
28                  **civil penalty equal to two (2) times the amount of the difference**  
29                  **between the higher price at which the beverages were sold to a**  
30                  **retailer and the lower price at which the beverages were sold to**  
31                  **another retailer. An identified retailer may receive an award equal**  
32                  **to two (2) times the amount of the difference between the higher**  
33                  **price at which the beverages were sold to the retailer and the lower**  
34                  **price at which the beverages were sold to another retailer plus**  
35                  **attorney's fees incurred in the action by the retailer.**

