

HOUSE BILL No. 1221

DIGEST OF INTRODUCED BILL

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

Synopsis: Wholesale pricing of nonalcoholic beverages. With certain exceptions, prohibits a supplier of nonalcoholic packaged beverages (supplier) from discriminating among retailers as to sales price, discounts, allowances, or service charges. Provides that the supplier's discrimination is an unconscionable act under the deceptive consumer sales law. Provides that the consumer protection division of the office of the attorney general may request a court to: (1) enjoin the unconscionable act on behalf of identified retailers; (2) award the state a civil penalty equal to twice the amount of the price difference between two retailers; and (3) award an identified retailer twice the amount of the price difference between two retailers plus the retailer's attorney's fees.

Effective: July 1, 2021.

Soliday, Steuerwald, Torr, DeLaney

January 14, 2021, read first time and referred to Committee on Commerce, Small Business and Economic Development.



First Regular Session of the 122nd General Assembly (2021)

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 2020 Regular Session of the General Assembly.

HOUSE BILL No. 1221



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, 2021]: 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
16 no jurisdiction over matters concerning utilities subject to
17 regulation by the utility regulatory commission or by an agency of



1 the United States except that the provisions of subdivision ~~(5)~~(6)
2 shall apply and except as provided in IC 8-1-29.

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

7 ~~(2)~~ (3) For complaints filed after August 31, 1984, the duty to
8 ascertain from the consumer whether the consumer consents to
9 public disclosure by the division of the filing of the complaint,
10 including the consumer's identity and telephone number, if any.

11 ~~(3)~~ (4) The duty to notify the merchant of the nature of the
12 complaint by written communication and request a written reply.

13 ~~(4)~~ (5) Upon receipt of reply, the duty to act as mediator between
14 the parties and attempt to resolve all complaints in a conciliatory
15 manner. The director of the division and the attorney general have
16 discretion whether to mediate complaints involving a de minimis
17 amount of money.

18 ~~(5)~~ (6) If no reply is received or if the parties are unable to resolve
19 their differences, and no violation of federal or state statute or rule
20 is indicated, the duty to provide the complainant with a copy of all
21 correspondence relating to the matter.

22 ~~(6)~~ (7) Whenever a violation of a state or federal law or
23 administrative rule is indicated, the duty to forward to the
24 appropriate state or federal agency a copy of the correspondence
25 and request that the agency further investigate the complaint and
26 report to the division upon the disposition of the complaint.

27 ~~(7)~~ (8) The power to initiate and prosecute civil actions on behalf
28 of the state whenever an agency to which a complaint has been
29 forwarded fails to act upon the complaint within ten (10) working
30 days after its referral, or whenever no state agency has jurisdiction
31 over the subject matter of the complaint.

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

- 35 (1) requested by the person who filed the complaint;
- 36 (2) consented to, in whole or in part, after August 31, 1984, by the
37 person who filed the complaint;
- 38 (3) in furtherance of an investigation by a law enforcement
39 agency; or
- 40 (4) necessary for the filing of an action by the attorney general
41 under IC 24-5-0.5.

42 (c) Notwithstanding subsection (b), the division may publicly



1 disclose information relating to the status of complaints under
 2 subsection ~~(a)(3)~~; (a)(4), (a)(5), (a)(6), ~~and (a)(7)~~, **and (a)(8)**.

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

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

12 SECTION 2. IC 24-5-0.5-4, AS AMENDED BY P.L.156-2020,
 13 SECTION 88, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
 14 JULY 1, 2021]: Sec. 4. (a) A person relying upon an uncured or
 15 incurable deceptive act may bring an action for the damages actually
 16 suffered as a consumer as a result of the deceptive act or five hundred
 17 dollars (\$500), whichever is greater. The court may increase damages
 18 for a willful deceptive act in an amount that does not exceed the greater
 19 of:

- 20 (1) three (3) times the actual damages of the consumer suffering
 21 the loss; or
 22 (2) one thousand dollars (\$1,000).

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

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



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

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

- 21 (1) issue an injunction;
- 22 (2) order the supplier to make payment of the money unlawfully
 23 received from the aggrieved consumers to be held in escrow for
 24 distribution to aggrieved consumers;
- 25 (3) for a knowing violation against a senior consumer, increase
 26 the amount of restitution ordered under subdivision (2) in any
 27 amount up to three (3) times the amount of damages incurred or
 28 value of property or assets lost;
- 29 (4) order the supplier to pay to the state the reasonable costs of
 30 the attorney general's investigation and prosecution related to the
 31 action;
- 32 (5) provide for the appointment of a receiver; and
- 33 (6) order the department of state revenue to suspend the supplier's
 34 registered retail merchant certificate, subject to the requirements
 35 and prohibitions contained in IC 6-2.5-8-7(i), if the court finds
 36 that a violation of this chapter involved the sale or solicited sale
 37 of a synthetic drug (as defined in IC 35-31.5-2-321), a synthetic
 38 drug lookalike substance (as defined in IC 35-31.5-2-321.5
 39 (repealed)) (before July 1, 2019), a controlled substance analog
 40 (as defined in IC 35-48-1-9.3), or a substance represented to be a
 41 controlled substance (as described in IC 35-48-4-4.6).

42 (d) In an action under subsection (a), (b), or (c), the court may void



1 or limit the application of contracts or clauses resulting from deceptive
2 acts and order restitution to be paid to aggrieved consumers.

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

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

21 (g) If a court finds any person has knowingly violated section 3 or
22 10 of this chapter, other than section 3(b)(19), 3(b)(20), or 3(b)(40) of
23 this chapter, the attorney general, in an action pursuant to subsection
24 (c), may recover from the person on behalf of the state a civil penalty
25 of a fine not exceeding five thousand dollars (\$5,000) per violation.

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

- 29 (1) For a knowing or intentional violation, one thousand five
30 hundred dollars (\$1,500).
31 (2) For a violation other than a knowing or intentional violation,
32 five hundred dollars (\$500).

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

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

40 (j) An offer to cure is:

- 41 (1) not admissible as evidence in a proceeding initiated under this
42 section unless the offer to cure is delivered by a supplier to the



1 consumer or a representative of the consumer before the supplier
2 files the supplier's initial response to a complaint; and
3 (2) only admissible as evidence in a proceeding initiated under
4 this section to prove that a supplier is not liable for attorney's fees
5 under subsection (k).

6 If the offer to cure is timely delivered by the supplier, the supplier may
7 submit the offer to cure as evidence to prove in the proceeding in
8 accordance with the Indiana Rules of Trial Procedure that the supplier
9 made an offer to cure.

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

15 (l) If a court finds that a person has knowingly violated section
16 3(b)(20) of this chapter, the attorney general, in an action under
17 subsection (c), may recover from the person on behalf of the state a
18 civil penalty not exceeding one thousand dollars (\$1,000) per
19 consumer. In determining the amount of the civil penalty in any action
20 by the attorney general under this subsection, the court shall consider,
21 among other relevant factors, the frequency and persistence of
22 noncompliance by the debt collector, the nature of the noncompliance,
23 and the extent to which the noncompliance was intentional. A person
24 may not be held liable in any action by the attorney general for a
25 violation of section 3(b)(20) of this chapter if the person shows by a
26 preponderance of evidence that the violation was not intentional and
27 resulted from a bona fide error, notwithstanding the maintenance of
28 procedures reasonably adapted to avoid the error. A person may not be
29 held liable in any action for a violation of this chapter for contacting a
30 person other than the debtor, if the contact is made in compliance with
31 the Fair Debt Collection Practices Act.

32 (m) If a court finds that a person has knowingly or intentionally
33 violated section 3(b)(40) of this chapter, the attorney general, in an
34 action under subsection (c), may recover from the person on behalf of
35 the state a civil penalty in accordance with IC 24-5-14.5-12(b). As
36 specified in IC 24-5-14.5-12(b), a civil penalty recovered under
37 IC 24-5-14.5-12(b) shall be deposited in the consumer protection
38 division telephone solicitation fund established by IC 24-4.7-3-6 to be
39 used for the administration and enforcement of IC 24-5-14.5. In
40 addition to the recovery of a civil penalty in accordance with
41 IC 24-5-14.5-12(b), the attorney general may also recover reasonable
42 attorney fees and court costs from the person on behalf of the state.



1 Those funds shall also be deposited in the consumer protection division
2 telephone solicitation fund established by IC 24-4.7-3-6.

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

5 SECTION 3. IC 24-5-0.5-5 IS AMENDED TO READ AS
6 FOLLOWS [EFFECTIVE JULY 1, 2021]: Sec. 5. (a) No action may be
7 brought under this chapter, except under section 4(c) of this chapter,
8 unless (1) the deceptive act is incurable or (2) the consumer bringing
9 the action shall have given notice in writing to the supplier within the
10 sooner of (i) six (6) months after the initial discovery of the deceptive
11 act, (ii) one (1) year following such consumer transaction, or (iii) any
12 time limitation, not less than thirty (30) days, of any period of warranty
13 applicable to the transaction, which notice shall state fully the nature
14 of the alleged deceptive act and the actual damage suffered therefrom,
15 and unless such deceptive act shall have become an uncured deceptive
16 act.

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

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

23 SECTION 4. IC 24-5-0.5-11 IS ADDED TO THE INDIANA CODE
24 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
25 1, 2021]: Sec. 11. **(a) This section applies only to transactions**
26 **concerning the sale of nonalcoholic packaged beverages. This**
27 **section does not apply to a transaction concerning the sale of**
28 **alcoholic beverages conducted by licensees under IC 7.1.**

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

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

33 **(d) As used in this section, "nonalcoholic packaged beverage"**
34 **means a packaged beverage product that:**

- 35 (1) is not an alcoholic beverage (as defined in IC 7.1-1-3-5);
36 (2) has a volume of at least eight (8) fluid ounces; and
37 (3) is enclosed in a container or wrapped in any manner in
38 advance of the sale of the product at wholesale or retail.

39 **(e) As used in this section, "retailer" means a person, and any**
40 **entity affiliated and under common control with the person, that**
41 **engages in the business of selling tangible personal property to**
42 **consumers. For purposes of this section, "retailer" does not include**



- 1 a supplier.
- 2 (f) For purposes of this section, "supplier" means a supplier:
- 3 (1) in a sale of beverages, contract to sell beverages, or
- 4 franchise agreement to sell beverages; and
- 5 (2) whose gross revenues are at least eighty percent (80%)
- 6 comprised from supplying nonalcoholic packaged beverages.
- 7 For purposes of this section, the term does not include a retailer or
- 8 a supplier that primarily supplies dairy products.
- 9 (g) Except as provided in subsection (h), a supplier may not
- 10 discriminate among retailers by granting a price, discount,
- 11 allowance, or service charge that is not available to all retailers at
- 12 the same time. Not later than the first day of each month, a
- 13 supplier must publish and make available to all retailers a deal
- 14 sheet that lists all prices, discounts, allowances, or service charges
- 15 that are available to retailers for that month. Except as provided
- 16 in subsection (h), a supplier may not offer a price, discount,
- 17 allowance, or service charge that is not published on the monthly
- 18 deal sheet.
- 19 (h) A supplier may only charge a retailer a price for a beverage
- 20 that is different than the price the supplier charges another retailer
- 21 in one (1) or more of the following circumstances:
- 22 (1) The supplier charges the retailer a volume based discount
- 23 price that is:
- 24 (A) based on a volume of not more than one (1) semitrailer
- 25 (as defined in IC 9-13-2-164) load delivered to a single
- 26 location of the retailer per stock keeping unit of the
- 27 beverage; and
- 28 (B) not offered to other retailers or published on the deal
- 29 sheet.
- 30 (2) The supplier charges the retailer a higher price for the
- 31 beverages based only on a greater cost to the supplier to
- 32 deliver the beverages to the retailer.
- 33 (3) The supplier charges a different price for the beverages in
- 34 response to changing conditions affecting the market for or
- 35 marketability of the beverage, including:
- 36 (A) obsolescence of seasonal beverages; or
- 37 (B) distressed sales in anticipation of discontinuance of
- 38 business in beverages.
- 39 Any discounts not published on the monthly deal sheet, other than
- 40 the discounts listed in this subsection, are prohibited, including any
- 41 nonvolume based discounts involving marketing incentives such as
- 42 display and placement requirements.



1 (i) A supplier, franchise, or other distribution agreement to
2 which a supplier is a party may not include an agreement that
3 prohibits the disclosure of the prices, discounts, allowances, or
4 service charges to a retailer.

5 (j) A supplier must offer all retailers capable of receiving
6 delivery of the beverages by a certain means of delivery the choice
7 to receive the beverages by that means of delivery.

8 (k) A supplier of nonalcoholic beverages is prohibited from
9 engaging in any communication, in any form either directly or
10 indirectly, that instructs, encourages, discourages, threatens, or
11 otherwise influences a retailer to stop selling nonalcoholic
12 beverages to a specific consumer or other retailer, or group of
13 consumers or other retailers.

14 (l) A supplier that fails to comply with any provision of this
15 section commits an unconscionable act that is treated the same as
16 a deceptive act under this chapter and is actionable by the attorney
17 general.

18 (m) A retailer may submit a written complaint to the division
19 alleging a violation of this section for investigation by the division.
20 The division may receive, investigate, and prosecute written
21 complaints concerning retailers and suppliers subject to this
22 section.

23 (n) If:

24 (1) the division brings an action to enjoin an unconscionable
25 act under this section on behalf of identified retailers; and

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

28 the division may recover from the supplier on behalf of the state a
29 civil penalty equal to two (2) times the amount of the difference
30 between the higher price at which the beverages were sold to a
31 retailer and the lower price at which the beverages were sold to
32 another retailer. An identified retailer may receive an award equal
33 to two (2) times the amount of the difference between the higher
34 price at which the beverages were sold to the retailer and the lower
35 price at which the beverages were sold to another retailer plus
36 attorney's fees incurred in the action by the retailer.

