

SENATE BILL No. 242

DIGEST OF INTRODUCED BILL

Citations Affected: IC 24-5-27; IC 34-6-2; IC 34-12-4; IC 34-51-3-7.

Synopsis: Deceptive lead generation. Makes false, misleading, or deceptive advertisements for claims related to medical devices and legend drugs and certain other actions a deceptive act, and provides for enforcement mechanisms. Limits certain claims against a manufacturer or seller of legend drugs or medical devices. Limits awards of exemplary or punitive damages against a manufacturer or seller of legend drugs or medical devices.

Effective: April 1, 2020.

Brown L

January 9, 2020, read first time and referred to Committee on Judiciary.



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.

SENATE BILL No. 242

A BILL FOR AN ACT to amend the Indiana Code concerning civil procedure.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 24-5-27 IS ADDED TO THE INDIANA CODE AS
2 A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE APRIL
3 1, 2020]:
4 **Chapter 27. Deceptive Lead Generation**
5 **Sec. 1. As used in this chapter, "commercial communication"**
6 **means any written or oral statement, illustration, or depiction,**
7 **whether in English or another language, that is designed to create**
8 **interest in procuring legal services, whether it appears on or in a**
9 **label, package, package insert, radio, television, brochure,**
10 **newspaper, magazine, pamphlet, leaflet, circular, mailer, book**
11 **insert, free standing insert, letter, catalog, poster, chart, billboard,**
12 **public transit card, point of purchase display, film slide, audio**
13 **program transmitted over a telephone system, telemarketing**
14 **script, on-hold script, upsell script, training materials provided to**
15 **a telemarketing firm, program length commercial, the Internet,**
16 **cellular network, or any other medium, as well as promotional**
17 **materials, items, and Internet web sites.**



1 **Sec. 2.** As used in this chapter, "consumer" refers to an
2 individual who views a commercial communication for personal or
3 familial purposes.

4 **Sec. 3.** As used in this chapter, "lead generation" refers to the
5 use of commercial communication to initiate consumer interest or
6 inquiry into legal services provided in Indiana or another
7 jurisdiction to redress an alleged injury from a medical device or
8 legend drug.

9 **Sec. 4.** As used in this chapter, "legend drug" has the meaning
10 set forth in IC 16-18-2-199.

11 **Sec. 5.** As used in this chapter, "manufacturer" has the meaning
12 set forth in IC 34-6-2-77(a).

13 **Sec. 6.** As used in this chapter, "medical device" has the
14 meaning set forth in IC 34-6-2-79.5.

15 **Sec. 7.** As used in this chapter, "seller" has the meaning set
16 forth in IC 34-6-2-136(a).

17 **Sec. 8. (a)** It is a deceptive act for a person to engage in lead
18 generation that is false, deceptive, or misleading.

19 **(b)** Deceptive acts under this chapter may include the following:

20 **(1)** Advertisements or other commercial communications
21 that:

22 **(A)** cause, or are likely to cause, consumers to fail to use or
23 to discontinue the consumers' medications; or

24 **(B)** remove a medical device;

25 without appropriate medical advice from a person who is
26 independent from the lead generator and any person to whom
27 the consumer would be referred.

28 **(2)** Advertisements or other commercial communications that
29 open with sensationalized warnings or alerts that may mislead
30 consumers to believe the consumers are watching a
31 government sanctioned medical alert or public service
32 announcement.

33 **(3)** Advertisements or other commercial communications
34 that:

35 **(A)** misrepresent the risks associated with a medical device
36 or legend drug;

37 **(B)** leave consumers with the false impression that the risks
38 of the medical device or legend drug exceed the benefits; or

39 **(C)** leave consumers with the false impression that the
40 United States Food and Drug Administration has recalled
41 a medical device or legend drug that is the subject of the
42 advertisement or other commercial communication.



1 (c) A claim misrepresents a fact or is false if the claim is not
2 substantiated by competent and reliable scientific evidence.

3 Sec. 9. It is a deceptive act for a person engaged in lead
4 generation to fail to make the following written and oral
5 disclosures to a consumer who responds to an advertisement or
6 other commercial communication subject to this chapter:

7 (1) The basis used to select the group of participants to which
8 the person engaged in lead generation could make a referral.

9 (2) The terms of any agreement related to:

10 (A) fees or other payments related to the referral; or

11 (B) the income generating potential or volume of referrals
12 that exceed the payments permitted for a legal referral
13 service under Rule 7.2 of the Indiana Rules of Professional
14 Conduct.

15 (3) If the person engaged in lead generation has reason to
16 know that the attorney or law firm to which a consumer is
17 referred is likely to seek co-counsel or refer the consumer's
18 claim to another attorney or another law firm handling other
19 similar claims, that the attorney or law firm to whom the
20 consumer is being referred may not be the lead attorney
21 handling the strategy and negotiations for the consumer's
22 claim.

23 (4) Whether the lead generator is an attorney licensed to
24 practice law in Indiana or a law firm with attorneys licensed
25 to practice law in Indiana.

26 (5) Any other disclosure required under the rules adopted by
27 the attorney general under section 12 of this chapter that the
28 attorney general determines is necessary to permit a
29 consumer to make an informed consent to a referral.

30 Sec. 10. It is a deceptive act for a person engaged in lead
31 generation to permit or regulate a lawyer's professional judgment
32 in rendering legal service.

33 Sec. 11. The provisions set forth in this chapter also apply to
34 deceptive acts by a lawyer referral service that receives any benefit
35 or consideration for the direct or indirect referral of prospective
36 clients to lawyers or law firms, including the following:

37 (1) Matching or connecting a prospective client to a lawyer
38 drawn from a specific group or panel of lawyers or who
39 matches a prospective client with lawyers or law firms.

40 (2) A group or pooled advertising program, offering to refer,
41 match, or otherwise connect prospective legal clients with
42 lawyers or law firms, in which the advertisements for the



1 program use a common telephone number or Internet web
 2 site address and prospective clients are then matched or
 3 referred only to lawyers or law firms participating in the
 4 group or pooled advertising program.

5 (3) Publishing in any media a listing of lawyers or law firms
 6 together in one (1) place.

7 (4) Providing tips or leads for prospective clients to lawyers
 8 or law firms.

9 Sec. 12. The attorney general may adopt rules under IC 4-22-2,
 10 including emergency rules in the manner provided under
 11 IC 4-22-2-37.1, to carry out this chapter. An emergency rule
 12 adopted by the attorney general under this section expires on the
 13 earlier of the following dates:

14 (1) The expiration date in the emergency rule.

15 (2) The date the emergency rule is amended or repealed by a
 16 later rule adopted under IC 4-22-2-24 through IC 4-22-2-36
 17 or under IC 4-22-2-37.1.

18 Sec. 13. The attorney general may, regardless of whether a
 19 complaint has been filed under section 14 of this chapter, bring an
 20 action to enjoin a deceptive act under this chapter. In the action,
 21 the court may do any combination of the following:

22 (1) Issue an injunction.

23 (2) Order the person engaged in lead generation to reimburse
 24 the money unlawfully received from the aggrieved consumers
 25 to be held in escrow for distribution to aggrieved consumers,
 26 void or limit the application of contracts or clauses resulting
 27 from deceptive acts, and order restitution to be paid to
 28 aggrieved consumers.

29 (3) For a knowing or intentional violation against a consumer
 30 who is at least sixty (60) years of age, increase the amount of
 31 restitution ordered under subdivision (2) in any amount up to
 32 three (3) times the amount of damages incurred.

33 (4) Provide for the appointment of a receiver.

34 Sec. 14. (a) If the attorney general does not file an action under
 35 section 13 of this chapter, a manufacturer or seller of medical
 36 devices or legend drugs or a consumer may bring an action to
 37 enjoin a person engaged in lead generation from violating this
 38 chapter.

39 (b) A complaint under this section must be filed not later than
 40 ninety (90) days after the person engaging in lead generation
 41 commits a deceptive act under this chapter.

42 Sec. 15. A court with jurisdiction over an action under section



1 **13 or 14 of this chapter may order the violator to pay court costs**
 2 **and reasonable investigation and litigation fees incurred by the**
 3 **attorney general, a manufacturer or seller of medical devices or**
 4 **legend drugs, or a consumer who prevails in the action.**

5 SECTION 2. IC 34-6-2-73.4 IS ADDED TO THE INDIANA CODE
 6 AS A **NEW SECTION** TO READ AS FOLLOWS [EFFECTIVE
 7 APRIL 1, 2020]: **Sec. 73.4. "Legend drug" has the meaning set forth**
 8 **in IC 16-18-2-199.**

9 SECTION 3. IC 34-6-2-77 IS AMENDED TO READ AS
 10 FOLLOWS [EFFECTIVE APRIL 1, 2020]: **Sec. 77. (a)**
 11 **"Manufacturer", for purposes of IC 34-12-4 and IC 34-51-3-7,**
 12 **means either of the following:**

13 **(1) A person that is engaged in a business to produce, create,**
 14 **make, or construct any product or component of a product,**
 15 **and that:**

16 **(A) designs, manufacturers, or formulates; or**

17 **(B) engages another person to design, manufacture, or**
 18 **formulate;**

19 **a medical device or component or part of a medical device.**

20 **(2) A person that, by compounding, cultivating, harvesting, or**
 21 **mixing, or by another process produces or prepares, legend**
 22 **drugs. The term includes a person that:**

23 **(A) prepares legend drugs in dosage forms by mixing,**
 24 **compounding, encapsulating, or entableting, or by another**
 25 **process; or**

26 **(B) packages or repackages legend drugs.**

27 **The term does not include pharmacists or practitioners (as**
 28 **defined in IC 16-18-2-288(a)).**

29 ~~(a)~~ **(b) "Manufacturer", for purposes of IC 34-20, means a person or**
 30 **an entity who designs, assembles, fabricates, produces, constructs, or**
 31 **otherwise prepares a product or a component part of a product before**
 32 **the sale of the product to a user or consumer. "Manufacturer" includes**
 33 **a seller who:**

34 **(1) has actual knowledge of a defect in a product;**

35 **(2) creates and furnishes a manufacturer with specifications**
 36 **relevant to the alleged defect for producing the product or who**
 37 **otherwise exercises some significant control over all or a portion**
 38 **of the manufacturing process;**

39 **(3) alters or modifies the product in any significant manner after**
 40 **the product comes into the seller's possession and before it is sold**
 41 **to the ultimate user or consumer;**

42 **(4) is owned in whole or significant part by the manufacturer; or**



1 (5) owns in whole or significant part the manufacturer.

2 ~~(b)~~ (c) A seller who discloses the name of the actual manufacturer
3 of a product is not a manufacturer under this section merely because
4 the seller places or has placed a private label on a product.

5 SECTION 4. IC 34-6-2-79.5 IS ADDED TO THE INDIANA CODE
6 AS A **NEW SECTION** TO READ AS FOLLOWS [EFFECTIVE
7 APRIL 1, 2020]: **Sec. 79.5. "Medical device" refers to an**
8 **instrument, an apparatus, an implement, a machine, a contrivance,**
9 **an implant, an in vitro reagent, or other similar or related article,**
10 **including a component part or accessory:**

11 (1) **that is recognized in the official National Formulary or the**
12 **United States Pharmacopoeia, or any supplement to them;**

13 (2) **that is intended for use in the diagnosis of disease or other**
14 **conditions, or in the cure, mitigation, treatment, or prevention**
15 **of disease, in a human being or an animal; or**

16 (3) **that:**

17 (A) **is intended to affect the structure or any function of the**
18 **body of a human being or an animal;**

19 (B) **does not achieve its primary intended purpose through**
20 **chemical action within or on the body of a human being or**
21 **an animal; and**

22 (C) **is not dependent upon being metabolized for the**
23 **achievement of its primary intended purpose.**

24 SECTION 5. IC 34-6-2-103, AS AMENDED BY P.L.132-2015,
25 SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE
26 APRIL 1, 2020]: Sec. 103. (a) "Person", for purposes of IC 34-14, has
27 the meaning set forth in IC 34-14-1-13.

28 (b) "Person", for purposes of IC 34-11-2-11.5, **IC 34-12-4, and**
29 **IC 34-24-4, and IC 34-51-3-7,** means:

30 (1) an individual;

31 (2) a governmental entity;

32 (3) a corporation;

33 (4) a firm;

34 (5) a trust;

35 (6) a partnership; or

36 (7) an incorporated or unincorporated association that exists
37 under or is authorized by the laws of this state, another state, or a
38 foreign country.

39 (c) "Person", for purposes of section 44.8 of this chapter and
40 IC 34-30-29-1, means an adult or a minor.

41 (d) "Person", for purposes of IC 34-26-4, has the meaning set forth
42 in IC 35-31.5-2-234.



- 1 (e) "Person", for purposes of IC 34-30-5, means any of the
 2 following:
 3 (1) An individual.
 4 (2) A corporation.
 5 (3) A partnership.
 6 (4) An unincorporated association.
 7 (5) The state (as defined in IC 34-6-2-140).
 8 (6) A political subdivision (as defined in IC 34-6-2-110).
 9 (7) Any other entity recognized by law.
- 10 (f) "Person", for purposes of IC 34-30-6, means an individual, a
 11 corporation, a limited liability company, a partnership, an
 12 unincorporated association, or a governmental entity that:
 13 (1) has qualifications or experience in:
 14 (A) storing, transporting, or handling a hazardous substance or
 15 compressed gas;
 16 (B) fighting fires;
 17 (C) emergency rescue; or
 18 (D) first aid care; or
 19 (2) is otherwise qualified to provide assistance appropriate to
 20 remedy or contribute to the remedy of the emergency.
- 21 (g) "Person", for purposes of IC 34-30-18, includes:
 22 (1) an individual;
 23 (2) an incorporated or unincorporated organization or association;
 24 (3) the state of Indiana;
 25 (4) a political subdivision (as defined in IC 36-1-2-13);
 26 (5) an agency of the state or a political subdivision; or
 27 (6) a group of such persons acting in concert.
- 28 (h) "Person", for purposes of sections 42, 43, 69, and 95 of this
 29 chapter, means an individual, an incorporated or unincorporated
 30 organization or association, or a group of such persons acting in
 31 concert.
- 32 (i) "Person", for purposes of IC 34-30-10.5, means the following:
 33 (1) A political subdivision (as defined in IC 36-1-2-13).
 34 (2) A volunteer fire department (as defined in IC 36-8-12-2).
 35 (3) An employee of an entity described in subdivision (1) or (2)
 36 who acts within the scope of the employee's responsibilities.
 37 (4) A volunteer firefighter (as defined in IC 36-8-12-2) who is
 38 acting for a volunteer fire department.
 39 (5) A corporation, a limited liability company, a partnership, an
 40 unincorporated association, or any other entity recognized by law.
- 41 (j) "Person", for purposes of IC 34-28-7, means:
 42 (1) an individual;



- 1 (2) a governmental entity;
 2 (3) a corporation;
 3 (4) a firm;
 4 (5) a trust;
 5 (6) a partnership; or
 6 (7) an incorporated or unincorporated association that exists
 7 under or is authorized by the laws of this state, another state, or a
 8 foreign country.
 9 (k) "Person", for purposes of IC 34-31-9, has the meaning set forth
 10 in IC 34-31-9-8.

11 SECTION 6. IC 34-6-2-136 IS AMENDED TO READ AS
 12 FOLLOWS [EFFECTIVE APRIL 1, 2020]: Sec. 136. **(a) "Seller", for**
 13 **purposes of IC 34-12-4 and IC 34-51-3-7, means a person that, in**
 14 **the course of business conducted for that purpose, does either of**
 15 **the following:**

- 16 (1) **Sells, distributes, rents, leases, prepares, blends, packages,**
 17 **labels, or otherwise is involved in placing a medical device or**
 18 **legend drug into the stream of commerce.**
 19 (2) **Installs, repairs, refurbishes, reconditions, or maintains a**
 20 **medical device.**
 21 (b) "Seller", for purposes of IC 34-20, means a person engaged in
 22 the business of selling or leasing a product for resale, use, or
 23 consumption.

24 SECTION 7. IC 34-12-4 IS ADDED TO THE INDIANA CODE AS
 25 A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE APRIL
 26 1, 2020]:

27 **Chapter 4. Legal Actions Involving Medical Device and Legend**
 28 **Drug Manufacturers and Sellers**

29 **Sec. 1. This chapter applies to an action that would otherwise**
 30 **accrue for an injury occurring after March 31, 2020.**

31 **Sec. 2. Except as provided in section 3 of this chapter, a person**
 32 **may not bring or maintain an action against a medical device or**
 33 **legend drug manufacturer or seller for the recovery of damages**
 34 **resulting from, or injunctive relief, abatement, or nuisance relating**
 35 **to, the design, manufacture, marketing, or sale of a medical device**
 36 **or legend drug if any of the following apply:**

- 37 (1) **The medical device or legend drug alleged to have caused**
 38 **the harm was designed, manufactured, packaged, labeled,**
 39 **sold, or represented according to the terms of an approval,**
 40 **conditional approval, clearance, license, or similar**
 41 **determination of the United States Food and Drug**
 42 **Administration.**



1 **(2) The medical device or legend drug complied with all**
 2 **standards, rules, regulations, orders, or other actions of the**
 3 **United States Food and Drug Administration under statutory**
 4 **authority relevant and material to the event or risk allegedly**
 5 **causing the harm, and the medical device or legend drug**
 6 **complied at the time the medical device or legend drug left the**
 7 **control of the manufacturer or seller.**

8 **(3) The act or transaction forming the basis of the claim**
 9 **involves contract provisions, representations, or other**
 10 **practices authorized by, or in compliance with, the rules,**
 11 **regulations, standards, orders of, or a statute enforced by the**
 12 **United States Food and Drug Administration.**

13 **Sec. 3. This chapter may not be construed to prohibit a person**
 14 **from bringing an action against a manufacturer or seller if the**
 15 **claimant establishes that the manufacturer or seller, at any time**
 16 **before the activity or event that allegedly caused the harm, did any**
 17 **of the following:**

18 **(1) Sold the medical device or legend drug after the effective**
 19 **date of a final order of the United States Food and Drug**
 20 **Administration to:**

21 **(A) remove the medical device or legend drug from the**
 22 **market;**

23 **(B) withdraw its approval of the medical device or legend**
 24 **drug; or**

25 **(C) substantially alter its terms of approval of the medical**
 26 **device or legend drug in a manner that would have avoided**
 27 **the claimant's alleged injury.**

28 **(2) Intentionally and in violation of applicable regulations as**
 29 **determined by the final action of the United States Food and**
 30 **Drug Administration withheld from or misrepresented to the**
 31 **United States Food and Drug Administration information**
 32 **material to the approval or maintaining of approval of the**
 33 **medical device or legend drug, and the information is relevant**
 34 **to the harm that the claimant allegedly suffered.**

35 **(3) Made an illegal payment to an official or employee of the**
 36 **United States Food and Drug Administration for the purpose**
 37 **of securing or maintaining approval of the medical device or**
 38 **legend drug.**

39 **(4) After the medical device or legend drug was sold, was**
 40 **found by the United States Food and Drug Administration to**
 41 **have knowingly violated applicable regulations requiring**
 42 **reporting to the United States Food and Drug Administration**



1 of risks of harm, and the unreported information was
 2 material and relevant to the harm that the claimant allegedly
 3 suffered.

4 For the purposes of subdivisions (1) and (4), a medical device or
 5 legend drug is sold when it is delivered or provided to the end user,
 6 even if payment for the medical device or legend drug is not made
 7 until after the delivery or provision of the medical device or legend
 8 drug.

9 **Sec. 4. This chapter does not establish a cause of action to**
 10 **redress an injury that was sustained before April 1, 2020.**

11 SECTION 8. IC 34-51-3-7 IS ADDED TO THE INDIANA CODE
 12 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE
 13 APRIL 1, 2020]: **Sec. 7. (a) This section applies only to a cause of**
 14 **action that would otherwise accrue for an injury occurring after**
 15 **March 31, 2020.**

16 **(b) A medical device or legend drug manufacturer or seller is**
 17 **not liable for exemplary or punitive damages if any of the following**
 18 **applies:**

19 **(1) The medical device or legend drug alleged to have caused**
 20 **the harm was designed, manufactured, packaged, labeled,**
 21 **sold, or represented according to the terms of an approval,**
 22 **conditional approval, clearance, license, or similar**
 23 **determination of the United States Food and Drug**
 24 **Administration.**

25 **(2) The medical device or legend drug complied with all**
 26 **standards, rules, regulations, orders, or other actions of the**
 27 **United States Food and Drug Administration under statutory**
 28 **authority relevant and material to the event or risk allegedly**
 29 **causing the harm, and the medical device or legend drug**
 30 **complied at the time the medical device or legend drug left the**
 31 **control of the manufacturer or seller.**

32 **(3) The act or transaction forming the basis of the claim**
 33 **involves contract provisions, representations, or other**
 34 **practices authorized by, or in compliance with, the rules,**
 35 **regulations, standards, orders of, or a statute enforced by, the**
 36 **United States Food and Drug Administration.**

37 **(c) This section does not apply if the claimant establishes that**
 38 **the manufacturer or seller, at any time before the activity or event**
 39 **that allegedly caused the harm, did any of the following:**

40 **(1) Sold the medical device or legend drug after the effective**
 41 **date of a final order of the United States Food and Drug**
 42 **Administration to:**



- 1 (A) remove the medical device or legend drug from the
 2 market;
 3 (B) withdraw its approval of the medical device or legend
 4 drug; or
 5 (C) substantially alter its terms of approval of the medical
 6 device or legend drug in a manner that would have avoided
 7 the claimant's alleged injury.
- 8 (2) Intentionally and in violation of applicable regulations as
 9 determined by the final action of the United States Food and
 10 Drug Administration, withheld from or misrepresented to the
 11 United States Food and Drug Administration information
 12 material to the approval or maintaining of approval of the
 13 medical device or legend drug, and the information is relevant
 14 to the harm that the claimant allegedly suffered.
- 15 (3) Made an illegal payment to an official or employee of the
 16 United States Food and Drug Administration for the purpose
 17 of securing or maintaining approval of the medical device or
 18 legend drug.
- 19 (4) After the medical device or legend drug was sold, was
 20 found by the United States Food and Drug Administration to
 21 have knowingly violated applicable regulations requiring
 22 reporting to the United States Food and Drug Administration
 23 of risks of harm, and the unreported information was
 24 material and relevant to the harm that the claimant allegedly
 25 suffered.
- 26 For the purposes of subdivisions (1) and (4), a medical device or
 27 legend drug is sold when it is delivered or provided to the end user,
 28 even if payment for the medical device or legend drug is not made
 29 until after the delivery or provision of the medical device or legend
 30 drug.
- 31 (d) This section may not be construed to do any of the following:
- 32 (1) Expand the authority of any state agency or state agent to
 33 adopt or promulgate rules, standards, or regulations if the
 34 authority to do so did not previously exist.
- 35 (2) Reduce the scope or any limitation on liability based on
 36 compliance with the rules or regulations of the United States
 37 Food and Drug Administration applicable to a specific act,
 38 transaction, person, or industry.
- 39 (3) Affect the liability of a service provider based on rates
 40 filed with and reviewed or approved by the United States
 41 Food and Drug Administration.
- 42 (4) Establish a cause of action to redress an injury that was



1 **sustained before April 1, 2020.**
2 **SECTION 9. An emergency is declared for this act.**

