

HOUSE BILL NO. 5199

October 24, 2023, Introduced by Reps. Scott, Tsernoglou, Hope, Byrnes, Rheingans, Hood, Price, Morgan, Steckloff, McFall, MacDonell, Wilson, Hill, Liberati and Breen and referred to the Committee on Regulatory Reform.

A bill to amend 1976 PA 331, entitled
"Michigan consumer protection act,"
by amending the title and sections 2, 5, and 10 (MCL 445.902,
445.905, and 445.910), the title as amended by 2022 PA 153, section
2 as amended by 2018 PA 189, and section 5 as amended by 2020 PA
296, and by adding sections 5a and 21a.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1

TITLE

1 An act to prohibit certain methods, acts, and practices in
 2 trade or commerce; to prescribe certain powers and duties; to
 3 provide for certain remedies, damages, and penalties; to provide
 4 for the promulgation of rules; to provide for certain
 5 investigations; ~~and to prescribe penalties; and to create the~~
 6 **consumer protection and antitrust revolving enforcement and**
 7 **education fund.**

8 Sec. 2. (1) As used in this act:

9 (a) Subject to subsection (2), "business opportunity" means
 10 the sale or lease of any products, equipment, supplies, or services
 11 for the purpose of enabling the purchaser to start a business, and
 12 in which the seller represents 1 or more of the following:

13 (i) That the seller will provide locations or assist the
 14 purchaser in finding locations for the use or operation of vending
 15 machines, racks, display cases, or other similar devices, or
 16 currency operated amusement machines or devices, on premises
 17 ~~neither that are not owned nor or~~ leased by the purchaser or
 18 seller.

19 (ii) That the seller may, in the ordinary course of business,
 20 purchase any or all products made, produced, fabricated, grown,
 21 bred, or modified by the purchaser using whole or in part the
 22 supplies, services, or chattels sold to the purchaser.

23 (iii) The seller guarantees that the purchaser will derive
 24 income from the business opportunity that exceeds the price paid
 25 for the business opportunity; or that the seller will refund all or
 26 part of the price paid for the business opportunity, or repurchase
 27 any of the products, equipment, supplies, or chattels supplied by
 28 the seller, if the purchaser is unsatisfied with the business
 29 opportunity. As used in this subparagraph, "guarantee" means a

1 written or oral representation that would cause a reasonable person
2 in the purchaser's position to believe that income is assured.

3 (iv) That the seller will provide a sales program or marketing
4 program ~~which~~**that** will enable the purchaser to derive income from
5 the business opportunity that exceeds the price paid for the
6 business opportunity. This subparagraph does not apply to the sale
7 of a marketing program made in conjunction with the licensing of a
8 federally registered trademark or a federally registered service
9 mark, or to the sale of a business opportunity for which the
10 purchaser pays less than \$500.00 in total for the business
11 opportunity from any time before the date of sale to any time
12 within 6 months after the date of sale.

13 (b) "Documentary material" includes the original or copy of a
14 book, record, report, memorandum, paper, communication, tabulation,
15 map, chart, photograph, mechanical transcription, or other tangible
16 document or recording, wherever situated.

17 (c) **"Nonprofit organization" means an entity incorporated to**
18 **carry out any lawful purpose that does not involve pecuniary profit**
19 **or gain for its directors, officers, shareholders, or members.**

20 (d) ~~(e)~~—"Performing group" means a vocal or instrumental group
21 seeking to use the name of another group that has previously
22 released a commercial sound recording under that name.

23 (e) ~~(d)~~—"Person" means an individual, corporation, limited
24 liability company, trust, partnership, incorporated or
25 unincorporated association, or other legal entity.

26 (f) ~~(e)~~—"Recording group" means a vocal or instrumental group
27 that meets both of the following:

28 (i) At least 1 of the members of the group has previously
29 released a commercial sound recording under the group's name.

(ii) At least 1 of the members of the group has a legal right to use the group's name, by virtue of use or operation under the group's name without abandoning the name of or affiliation with the group.

(g) "Small business" means a business concern incorporated or doing business in this state, including an affiliate of the business concern, that is independently owned and operated and that employs fewer than 250 full-time employees or that has gross annual sales of less than \$6,000,000.00.

(h) ~~(f)~~—"Sound recording" means a work that results from the fixation on a material object of a series of musical, spoken, or other sounds regardless of the nature of the material object, such as a disk, tape, or other phono-record, in which the sounds are embodied.

(i) ~~(g)~~—"Trade or commerce" means the conduct of a business providing, **directly or indirectly**, goods, property, or ~~service~~ **services that are primarily used by a nonprofit organization or small business or** for personal, family, or household purposes. ~~and~~ **Trade or commerce** includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity, **and includes the provision of goods, property, or services for the purpose of enhancing an individual's education, income, or employability.** ~~"Trade or commerce"~~ **Trade or commerce** does not include the purchase or sale of a franchise, as **that term is** defined in section 2 of the franchise investment law, 1974 PA 269, MCL 445.1502, but does include a pyramid promotional scheme, as **that term is** defined in section 2 of the pyramid promotional scheme act, **2018 PA 186**, MCL

1 445.2582.

2 (2) As used in this act, "business opportunity" does not
3 include a sale of a franchise, as **that term is** defined in section 2
4 of the franchise investment law, 1974 PA 269, MCL 445.1502, or the
5 sale of an ongoing business if the owner of the business sells and
6 intends to sell only that single business opportunity.

7 Sec. 5. (1) If the attorney general has probable cause to
8 believe that a person has engaged, is engaging, or is about to
9 engage in a method, act, or practice that is unlawful under section
10 3, and gives notice ~~pursuant to~~ **required by** this section, the
11 attorney general may bring an action in accordance with principles
12 of equity to restrain the defendant by temporary or permanent
13 injunction from engaging in the method, act, or practice. ~~The~~

14 (2) **An action under this section** may be brought in the circuit
15 court of the county where the defendant is established or conducts
16 business or, if the defendant is not established in this state, in
17 the circuit court of Ingham County.

18 (3) The court **in an action under this section** may award costs
19 to the prevailing party. ~~Except as otherwise provided in this~~
20 ~~section,~~

21 (4) **Subject to subsection (5), for each** persistent and knowing
22 violation of section 3, the court **in an action under this section**
23 may assess the defendant a civil fine of not more than \$25,000.00.
24 ~~For a violation of section 3(1)(kk), each performance or production~~
25 ~~is a separate violation. For a violation of section 3l, the court~~
26 ~~may assess the defendant a civil fine of not more than \$1,000.00~~
27 ~~per violation. Each day a violation of section 3l occurs counts as a~~
28 ~~separate violation.~~

29 (5) **For a persistent and knowing violation of section 3**

1 relating to an advertisement, all of the following may be
2 considered a separate violation:

3 (a) Each person solicited by the defendant.

4 (b) Each advertisement distributed by the defendant.

5 (c) Each misrepresentation or deceptive statement contained in
6 the advertisement.

7 (d) Each time that the advertisement was received, published,
8 broadcast, or otherwise disseminated by the defendant.

9 (6) ~~(2)~~ Unless waived by the court on good cause shown not
10 less than 10 days before the commencement of an action under this
11 section, the attorney general shall notify the person of ~~his or her~~
12 **the** intended action and give the person an opportunity to cease and
13 desist from the alleged unlawful method, act, or practice or to
14 confer with the attorney general in person, by counsel, or by other
15 representative as to the proposed action before the proposed filing
16 date.

17 (7) The notice **under subsection (6)** may be given to the person
18 by mail, postage prepaid, to ~~his or her~~ **the person's** usual place of
19 business or, if the person does not have a usual place of business,
20 to ~~his or her~~ **the person's** last known address, or, if the person is
21 a corporation, only to a resident agent who is designated to
22 receive service of process or to an officer of the corporation.

23 (8) ~~(3)~~ A prosecuting attorney or law enforcement officer
24 receiving notice of an alleged violation of this act, or of a
25 violation of an injunction, order, decree, or judgment issued in an
26 action brought ~~pursuant to~~ **under** this section, or of an assurance
27 under this act, shall immediately forward written notice of the
28 violation together with any information ~~he or she may have~~ **that the**
29 **prosecuting attorney or law enforcement officer has** to the office

1 of the attorney general.

2 (9) ~~(4)~~ A person ~~who~~ **that** knowingly violates the terms of an
3 injunction, order, decree, or judgment issued under this section
4 shall forfeit and pay to the state a civil fine of not more than
5 \$5,000.00 for each violation.

6 (10) For the purposes of this section, the court issuing an
7 injunction, order, decree, or judgment shall retain jurisdiction,
8 the cause ~~shall~~ **must** be continued, and the attorney general may
9 petition for recovery of a civil fine as provided by this section.

10 Sec. 5a. (1) Subject to subsections (2), (3), and (4), a
11 person that targeted an elder person or vulnerable adult in a
12 violation of this act or a related statute may be ordered to pay a
13 civil fine of not more than \$25,000.00, unless the violation that
14 targeted the elder person or vulnerable adult was persistent and
15 knowing, in which case the person may be ordered to pay a civil
16 fine of not more than \$50,000.00.

17 (2) For a violation of this act or a related statute that
18 involved an advertisement that was targeted at an elder person or
19 vulnerable adult, all of the following may be considered as a
20 separate violation:

21 (a) Each elder person or vulnerable adult solicited by the
22 defendant.

23 (b) Each advertisement distributed by the defendant.

24 (c) Each misrepresentation or deceptive statement contained in
25 the advertisement.

26 (d) Each time that the advertisement was received, published,
27 broadcast, or otherwise disseminated by the defendant.

28 (3) In determining the amount of the civil fine under
29 subsection (1), the court may consider any of the following:

1 (a) Whether the violation was made in good or bad faith.

2 (b) The injury to the public.

3 (c) The defendant's ability to pay.

4 (d) The public's interest in eliminating the benefits to the
5 defendant that were derived from the violation.

6 (e) The necessity of vindicating the authority of this state
7 and the strong need to defer any future violation.

8 (4) The civil fine described in subsection (1) is supplemental
9 and cumulative to any other civil fine or relief available under
10 this act or any other law of this state.

11 (5) As used in this section:

12 (a) "Elder person" means an individual who is 80 years of age
13 or older.

14 (b) "Related statute" means a law that indicates that a
15 violation of the law is a violation of this act.

16 (c) "Vulnerable adult" means any of the following:

17 (i) An individual that is 18 years of age or older and who
18 because of age, developmental disability, mental illness, or
19 physical disability requires supervision or personal care or lacks
20 the personal and social skills required to live independently,
21 whether or not the individual has been determined by a court to be
22 incapacitated.

23 (ii) An adult, as that term is defined in section 3 of the
24 adult foster care facility licensing act, 1979 PA 218, MCL 400.703.

25 (iii) An adult, as that term is defined in section 11 of the
26 social welfare act, 1939 PA 280, MCL 400.11.

27 Sec. 10. (1) The attorney general may bring a class action on
28 behalf of persons residing in or injured in this state ~~for the~~ to
29 **recover** actual damages **or \$250.00, whichever is greater**, caused by

1 any of the following:

2 (a) A method, act, or practice in trade or commerce defined as
3 unlawful under section 3.

4 (b) A method, act, or practice in trade or commerce declared
5 to be unlawful under section ~~3(1)~~ **3(1)** by a final judgment of the
6 circuit court or an appellate court of this state which is either
7 reported officially or made available for public dissemination
8 ~~pursuant to~~ **under** section 9 by the attorney general not less than
9 30 days before the method, act, or practice on which the action is
10 based occurs.

11 (c) A method, act, or practice in trade or commerce declared
12 by a ~~circuit court~~ **Circuit Court** of ~~appeals~~ **Appeals** or the ~~supreme~~
13 ~~court~~ **Supreme Court** of the United States to be an unfair or
14 deceptive act or practice within the meaning of section 5(a)(1) of
15 the federal trade commission act, 15 U.S.C. ~~45(a)(1)~~, **USC 45**, in a
16 decision ~~which~~ **that** affirms or directs the affirmance of a cease
17 and desist order issued by the ~~federal trade commission~~ **Federal**
18 **Trade Commission** if the order is final within the meaning of
19 section 5(g) of the federal trade commission act, 15 U.S.C. ~~45(g)~~,
20 **USC 45**, and ~~which~~ **that** is officially reported not less than 30 days
21 before the method, act, or practice on which the action is based
22 occurs. For purposes of this subdivision, a method, act, or
23 practice ~~shall~~ **is** not ~~be deemed to be~~ unfair or deceptive within
24 the meaning of section 5(a)(1) of the federal trade commission act,
25 **15 USC 45**, solely because the method, act, or practice is made
26 unlawful by another federal ~~statute~~ **law** that refers to or
27 incorporates section 5(a)(1) of the federal trade commission act,
28 **15 USC 45**.

29 (2) On motion of the attorney general and without bond in an

1 action under this section, the court may make an appropriate order
 2 ~~to reimburse~~ **do 1 or more of the following:**

3 (a) **Reimburse** persons ~~who that~~ have suffered damages. ~~to~~
 4 ~~carry~~

5 (b) **Carry** out a transaction in accordance with the aggrieved
 6 persons' reasonable expectations. ~~to strike~~

7 (c) **Strike** or limit the application of unconscionable clauses
 8 of contracts to avoid an unconscionable result. ~~or to grant~~

9 (d) **Grant** other appropriate relief.

10 (3) The court after a hearing **in an action under this section**
 11 may appoint a receiver or order sequestration of the defendant's
 12 assets if it appears to the satisfaction of the court that the
 13 defendant threatens or is about to remove, conceal, or dispose of
 14 ~~his the~~ assets to the detriment of members of the class.

15 (4) ~~(3)~~ If at any stage of the proceedings **in an action under**
 16 **this section** the court requires that notice be sent to the class,
 17 the attorney general may petition the court to require the
 18 defendant to bear the cost of the notice.

19 (5) In determining **under subsection (4)** whether to impose the
 20 cost on the defendant or the state, the court shall consider the
 21 probability that the attorney general will succeed on the merits of
 22 the action.

23 (6) ~~(4)~~ If ~~the a~~ defendant **in an action under this section**
 24 shows by a preponderance of the evidence that a violation of this
 25 act resulted from a bona fide error notwithstanding the maintenance
 26 of procedures reasonably adapted to avoid the error, the amount of
 27 recovery ~~shall must~~ be limited to actual damages.

28 (7) ~~(5)~~ An action ~~shall must~~ not be brought by the attorney
 29 general under this section more than 6 years after the occurrence

1 of the method, act, or practice ~~which~~**that** is the subject of the
2 action ~~not~~**or** more than 1 year after the last payment in a
3 transaction involving the method, act, or practice ~~which~~**that** is
4 the subject of the action, whichever period of time ends on a later
5 date.

6 **Sec. 21a. (1) The consumer protection and antitrust revolving**
7 **enforcement and education fund is created in the state treasury.**

8 **(2) The state treasurer shall deposit attorney fees, costs,**
9 **and proceeds in accordance with subsection (3) and may deposit**
10 **damages, restitution, and refunds in accordance with subsection (4)**
11 **and money or assets received from any other source into the fund.**

12 **(3) Except as otherwise directed by a court or agreed to by**
13 **the parties, attorney fees, costs, and proceeds must be deposited**
14 **into the fund as follows:**

15 **(a) If the attorney fees, costs, and proceeds total less than**
16 **\$500,000.00, an amount equal to 100% of the total must be deposited**
17 **into the fund.**

18 **(b) If the attorney fees, costs, and proceeds total between**
19 **\$500,000.00 and \$1,000,000.00, an amount equal 50% of the total**
20 **must be deposited into the fund.**

21 **(c) If the attorney fees, costs, and proceeds total more than**
22 **\$1,000,000.00, an amount equal to 10% of the total must be**
23 **deposited into the fund.**

24 **(4) Except as otherwise directed by a court or agreed to by**
25 **the parties, all of the following damages, restitution, or refunds**
26 **must be deposited into the fund as follow:**

27 **(a) Any de minimus amount of damages, restitution or refunds.**

28 **(b) Any amount of the damages, restitution, or refunds that**
29 **relate to persons that could not be identified by the department of**

1 attorney general.

2 (5) The state treasurer shall direct the investment of money
3 in the fund and credit interest and earnings from investments in
4 the fund.

5 (6) Money in the fund at the close of the fiscal year remains
6 in the fund and does not lapse to the general fund.

7 (7) The department of attorney general is the administrator of
8 the fund for audits of the fund.

9 (8) The department of attorney general shall expend money from
10 the fund on appropriation to do any of the following:

11 (a) Fund positions and pay expenses related to the enforcement
12 of any of the following:

13 (i) This act.

14 (ii) A law relating to anticompetitive conduct within trade or
15 commerce.

16 (iii) A law whose purpose includes protecting charitable gifts
17 or charitable assets.

18 (b) Educate the public regarding consumer protection matters,
19 as determined by the attorney general.

20 (9) As used in this section:

21 (a) "Attorney fees, costs, and proceeds" means attorney fees,
22 costs, and proceeds obtained by the department of attorney general
23 from a designated action.

24 (b) "Damages, restitution, or refunds" means damages,
25 restitution, or refunds obtained by the attorney general from a
26 designated action.

27 (c) "Designated action" means a judgment, settlement,
28 compromise, or assurance of discontinuance or voluntary compliance,
29 or other agreement relating to any of the following:

1 (i) An alleged violation of this act or any other law whose
2 purpose includes protecting persons against fraudulent or other
3 unfair or deceptive trade practices.

4 (ii) Any alleged anticompetitive conduct within trade or
5 commerce.

6 (iii) An alleged violation of law whose purpose includes
7 protecting charitable gifts or charitable assets.

8 (d) "Fund" means the consumer protection and antitrust
9 revolving enforcement and education fund.