

USE OF MERCHANT LIKENESS OR TRADEMARK BY THIRD-PARTY DELIVERY SERVICE

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House Bill 5770 (H-3) as reported from committee

Sponsor: Rep. Mike Mueller

1st Committee: Commerce and Tourism

2nd Committee: Ways and Means

Complete to 9-16-20

SUMMARY:

House Bill 5770 would amend the Michigan Consumer Protection Act to prohibit a third-party delivery service from using any likeness or intellectual property of a restaurant or other retailer without prior written consent.

Specifically, the bill would create a new section to prohibit a *third-party delivery service* from using a *likeness*, trademark, or other intellectual property belonging to a *merchant* without obtaining written consent from the merchant to do so. Written consent would have to be reflected in a valid contractual agreement. To enter into a valid agreement, the third-party delivery service would have to be registered to do business in Michigan.

Likeness would mean an identifiable symbol attributed and easily identified as belonging to a specific merchant.

Merchant would mean a restaurant (i.e., a food service establishment under the Food Law) or other retailer.

Third-party delivery service would mean a business entity, other than a merchant, that provides limited delivery services to *customers*.

Customer would mean a person that places an order for a merchant's product through a *marketplace* (defined as a third-party delivery service's proprietary online communication platform where customers can view and search the menus of merchants or place an order for merchants' products for delivery to the customer by the third-party delivery service).

A contractual agreement under the new section that took effect or was extended, renewed, or modified after the effective date of the bill could not require the merchant to indemnify the third-party delivery service, or a registered agent of or independent contractor acting on behalf of the third-party delivery service, for damages or harm that could occur after a product leaves the merchant's place of business. Such a provision would be void and unenforceable.

A violation of the new section would constitute an unfair, unconscionable, or deceptive method, act, or practice in the conduct of trade or commerce and would be considered

unlawful under the act. In addition to other remedies available under the act, the court could assess the defendant a civil fine of up to \$1,000 for each violation. Each day a violation occurred would count as a separate violation.

Furthermore, except in a class action, a person who suffered a loss as a result of a violation of the new section could bring an action to recover actual damages or \$5,000, whichever was greater, together with reasonable attorney fees. The court could also, in its discretion, award punitive damages.

MCL 445.903 et seq.

FISCAL IMPACT:

House Bill 5770 would have an indeterminate fiscal impact on the state and on local units of government. The number of convictions that would result under provisions of the bill is not known. The fiscal impact on local court systems would depend on how provisions of the bill affected caseloads and related administrative costs. An increase in civil fine revenue typically would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues. However, under the Michigan Consumer Protection Act, the attorney general could petition for recovery of the civil fine revenue.

POSITIONS:

A representative of the Michigan Restaurant & Lodging Association testified in support of the bill. (9-15-20)

GrubHub indicated support for the bill. (9-15-20)

TechNet indicated opposition to the bill. (6-17-20)

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