

SENATE BILL REPORT

SB 5079

As Reported by Senate Committee On:
Judiciary, February 15, 2011

Title: An act relating to the consumer protection act.

Brief Description: Modifying consumer protection act provisions.

Sponsors: Senators Conway, Kline, Pflug, Kohl-Welles, Haugen, Fraser and Chase; by request of Attorney General.

Brief History:

Committee Activity: Judiciary: 1/28/11, 2/15/11 [DPS, w/oRec].

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 5079 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kline, Chair; Harper, Vice Chair; Pflug, Ranking Minority Member; Hargrove, Kohl-Welles, Regala and Roach.

Minority Report: That it be referred without recommendation.

Signed by Senators Baxter and Carrell.

Staff: Aldo Melchiori (786-7439)

Background: The Consumer Protection Act (CPA) prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce directly or indirectly affecting the people of Washington. The CPA allows a person injured by a violation of the act to bring a private cause of action for damages, and it allows the Attorney General (AG) to bring a CPA action in the name of the state or on behalf of persons residing in the state. In an action brought by the AG, the prevailing party may, in the discretion of the court, recover the costs of the action and reasonable attorneys' fees.

A recent state Supreme Court case found that the CPA does not allow nonresidents of Washington to bring CPA claims for acts occurring outside of Washington. The court looked at the definitions and other statutory language in the CPA and concluded that the Legislature intended to limit the CPA to deceptive acts that affect Washington residents. *Schnall v. AT&T Wireless Services, Inc.*, 168 Wn.2d 125, 142 (2010).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Generally in civil actions, each party is responsible for paying their own costs and attorneys' fees, unless otherwise permitted by statute, contract, or recognized grounds in equity. Washington has an attorneys' fee statute that allows a court in a civil action to award a prevailing party reasonable expenses, including attorneys' fees, if the action brought by the nonprevailing party was frivolous and advanced without reasonable cause. The prevailing party must bring a motion and the court will consider all evidence presented at the time of the motion to determine whether the nonprevailing party's position was frivolous and advanced without reasonable cause. The court's findings must be in writing.

Summary of Bill: The attorneys' fee provision in CPA actions brought by the AG is amended. The AG, rather than a prevailing party, may recover the costs of the action and reasonable attorneys' fees. A prevailing defendant in the action may recover reasonable attorneys' fees if the court finds that the state's action was brought in bad faith. Bad faith means implying or involving actual or constructive fraud, a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation not prompted by an honest mistake as to one's rights or duties but by some interested or sinister motive.

The definition of "person" in the CPA is amended to include natural persons or entities residing or located outside the state. The definitions of "trade" and "commerce" are amended to include commerce involving a person outside the state conducted by a person residing in the state.

EFFECT OF CHANGES MADE BY JUDICIARY COMMITTEE (Recommended Substitute): A prevailing defendant may be awarded attorneys' fees if the court finds that the state's action was brought in bad faith. Bad faith means implying or involving actual or constructive fraud, a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation not prompted by an honest mistake as to one's rights or duties but by some interested or sinister motive.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: PRO: The Attorney General's (AG) office protects citizens and businesses in Washington. We need to protect the power of the AG's agency to enforce the CPA. This bill applies to out-of-state victims so they are covered when wronged by acts from businesses inside Washington. Our state must avoid becoming a safe haven for businesses who engage in unfair and deceptive business practices and affect people that are out-of-state. We should not expose the state to attorneys fees when the AG's office, in good faith, brings a CPA action. The AG's office does discovery before filing a case, it's rare we take a case to court unless efforts to settle fail. We allow private attorneys to bring one-way lawsuits, but the AG's office is treated differently. Forty percent of our

current budget is from recoveries. We are General Fund funded. We should not base our decisions to bring cases on concern that we may have to pay prevailing party's costs.

CON: This bill creates an unlevel playing field. This bill would remove an incentive to settle because now the AG's office is afraid of losing and paying attorneys' fees, and so may settle more easily. The current law, combined with this proposal, would encourage the AG to push the envelope, to broadly interpret the CPA in a way that creates a violation. There are businesses that are operating in a way they believe is allowable and the AG office could bring cases just to make law. This should be done by the legislature. The changes in this bill would allow nationwide cases to be brought by Washington. The amendments to trade and commerce should be removed, or make it clear that a person residing outside the state of Washington may bring an individual action but a class action cannot be brought. Businesses don't want to be exposed to class actions that are brought from outside the state. The AG's office is the largest law firm in the state in consumer protection. It brought 188 cases last year and lost once. Where it's an individual that's been wrongly accused and is vindicated in court and it's a small business, that person should be able to recoup their attorneys' fees and costs.

Persons Testifying: PRO: Doug Walsh, AG Office, Consumer Protection.

CON: Patrick Conner, National Federation of Independent Business; Mel Sorenson, WA Defense Trial Lawyers Assn.; Scott Hazelgrove, WA State Auto Dealers Assn.