

HOUSE BILL REPORT

HB 2055

As Reported by House Committee On:
Judiciary

Title: An act relating to recovering costs in consumer protection actions.

Brief Description: Concerning the recovery of costs in consumer protection actions.

Sponsors: Representatives Rodne, Morris, Smith, Pedersen, Nealey, Goodman, Orwall, Fagan, Johnson, Harris, Hansen, Moeller, Warnick, Jinkins, Roberts, Kirby, Ross, Pollet and Morrell; by request of Attorney General.

Brief History:

Committee Activity:

Judiciary: 1/14/14, 1/30/14, 2/5/14 [DP].

Brief Summary of Bill

- Modifies the attorneys' fees provisions in the Consumer Protection Act and the computer spyware law to allow the Attorney General, rather than any prevailing party, to recover prevailing party attorneys' fees and costs in an action brought by the Attorney General.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 7 members: Representatives Jinkins, Chair; Hansen, Vice Chair; Goodman, Kirby, Orwall, Roberts and Walkinshaw.

Minority Report: Do not pass. Signed by 6 members: Representatives Rodne, Ranking Minority Member; Nealey, Assistant Ranking Minority Member; Haler, Klippert, Muri and Shea.

Staff: Edie Adams (786-7180).

Background:

Consumer Protection Act.

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.

Under the state's Unfair Business Practices - Consumer Protection Act (CPA), a variety of business practices are declared unlawful. These practices include:

- engaging in unfair methods of competition and unfair or deceptive acts or practices in the conduct of commerce, including contracts or conspiracies in restraint of trade;
- monopolizing or attempting to monopolize trade or commerce;
- entering agreements not to purchase from the competitors of a particular seller when the agreement substantially lessens competition or tends to create a monopoly; and
- acquiring corporate stock when the acquisition substantially lessens competition or tends to create a monopoly.

In addition to the acts specifically declared unlawful by the CPA, a variety of other statutes declare violations of their provisions to be violations of the CPA.

A person injured by a violation of the CPA may bring a private cause of action for injunctive relief and the recovery of actual damages and reasonable attorneys' fees. Recovery may also include the trebling of actual damages (not to exceed \$25,000 for some violations) and civil penalties.

In addition, the CPA allows the Attorney General to bring a CPA action in the name of the state or on behalf of persons residing in the state. An action by the Attorney General may seek to prevent or restrain violations of the act and may seek restoration for persons injured by violation of the CPA. In an action brought by the Attorney General, the prevailing party may, in the discretion of the court, recover the costs of the action and reasonable attorneys' fees. Under case law, trial courts exercising their discretionary power to award or deny attorney's fees to prevailing defendants are to consider: (1) the need to curb serious abuses of governmental power; (2) the necessity of providing fair treatment to vindicated defendants; (3) the strong public interest in continued vigorous state prosecution of consumer protection violations; and (4) the necessity of avoiding hindsight logic in making the determination.

Computer Spyware Law.

Legislation enacted in 2005 generally prohibits the unauthorized installation of computer spyware if installed through deceptive means. Several types of computer spyware activities are prohibited, including collecting personally identifying information or web browsing histories, taking control of a user's computer to send electronic mail or viruses, creating unauthorized financial charges, opening multiple pop-up advertisements, and modifying security settings.

The Attorney General is authorized to bring a civil action to enjoin violations of the computer spyware law and recover either actual damages, or \$100,000 per violation, whichever is greater. In addition, a court may increase the damage award up to three times if the defendant has engaged in a pattern and practice of prohibited activities, but the maximum allowable damage award is \$2 million. The court has the discretion to also award costs and reasonable attorneys' fees to the prevailing party in the action.

Summary of Bill:

In an action brought by the Attorney General to enforce the CPA or the computer spyware law, the court may award costs and reasonable attorneys' fees to the Attorney General as prevailing party, but costs and reasonable attorneys' fee may not be awarded to a prevailing defendant.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The primary function of the Consumer Protection Office is to protect consumers from unfair or deceptive practices and to make sure there is a level playing field for Washington businesses that are playing by the rules. Washington is the only state in the nation that must pay attorneys' fees if the Attorney General does not prevail in a consumer protection enforcement action. Private parties who bring consumer protection suits are not on the hook for attorneys' fees.

The Consumer Protection Office is a modest operation and we think very carefully about which cases we pursue and only bring cases where we think there is a deceptive act or practice harming consumers. We are not interested in pursuing marginal cases that we do not think we can win. Even though we bring good cases, sometimes we lose on a technicality and the taxpayers should not be on the hook for that. The threat of attorneys' fees under the current law makes it hard for us to respond to emerging scams. The fear of an attorneys' fees award means we have to wait for the courts to establish case law through private suits. We should be able to respond more quickly to protect consumers from emerging scams.

(With concerns) This bill will have a detrimental impact on our small businesses. Small businesses are job creators. The CPA is an extremely complex law that businesses do their best to understand. There should be an ability for small businesses to recover these costs. This could be achieved by limiting its application to "qualified party" as defined in the Equal Access to Justice Act.

(Opposed) What small business owner will be willing to stand up to the might of the Attorney General's Office if it is faced with the threat of an enforcement action? The crushing costs of defending these cases can result in the loss of the business. A business that proves its innocence should be made whole by being able to recover the legal expenses incurred in defending the action.

There are at least eight other states where attorneys' fees may be awarded to prevailing defendants. The concept of loser pays is beneficial because it properly balances the competing interests of both sides. Both sides have to calculate the down side risk that if they lose at trial they will have to pay costs and attorneys' fees. This bill removes that downside

for the state, shifting the balance in an unfair manner, and discouraging the state from settling.

Persons Testifying: (In support) Bob Ferguson and Shannon Smith, Washington Attorney General's Office.

(With concerns) Gary Smith, Independent Business Association.

(Opposed) Patrick Connor, National Federation of Independent Business; and Cliff Webster, Washington Liability Reform Coalition.

Persons Signed In To Testify But Not Testifying: None.