

SENATE BILL REPORT

ESSB 5191

As Amended by House, April 10, 2021

Title: An act relating to regulating unfair business practices and prohibiting predatory price increases during states of emergency.

Brief Description: Regulating unfair business practices and prohibiting predatory price increases during states of emergency.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Darneille, King, Billig, Carlyle, Conway, Das, Hasegawa, Hunt, Kuderer, Liias, Lovelett, Nguyen, Nobles, Randall, Salomon, Stanford and Wilson, C.; by request of Attorney General).

Brief History:

Committee Activity: Law & Justice: 2/08/21, 2/11/21 [DPS, DNP].

Floor Activity: Passed Senate: 3/3/21, 29-20.

Passed House: 4/10/21, 52-45.

Brief Summary of Engrossed First Substitute Bill

- Prohibits excessive price increases for certain goods and services during a state of emergency.
- Provides investigative and enforcement authority with the attorney general.
- Imposes a civil penalty of no more than \$25,000 per violation.
- Prohibits an additional civil penalty from being assessed for the same violation under the Consumer Protection Act.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5191 be substituted therefor, and the substitute bill do pass.

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

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Darneille, Kuderer and Salomon.

Minority Report: Do not pass.

Signed by Senators Padden, Ranking Member; McCune, Assistant Ranking Member; Holy and Wagoner.

Staff: Tim Ford (786-7423)

Background: The Consumer Protection Act (CPA), first enacted in 1961, prohibits unfair or deceptive practices in trade or commerce. It includes prohibitions on anti-competitive behavior and restraints on trade. The Legislature has enacted dozens of statutes covering specific areas of the marketplace, violation of which constitute per se violations of the CPA. The attorney general and private consumers can bring actions to enforce violations of the CPA.

Maximum civil penalties for violation of the CPA are set out as follows:

- violation of any injunction issued under the CPA—\$25,000;
- any contract, trust, or conspiracy in restraint of trade or commerce or monopolization or attempt to monopolize any part of trade or commerce—\$100,000 for an individual or \$500,000 for a corporation; and
- unfair methods of competition and unfair or deceptive acts or practices in trade or commerce—\$2,000 for each violation.

When the attorney general brings an action in the name of the state or on behalf of a private citizen to restrain a person from engaging in unlawful acts under the CPA, the court may award costs, including reasonable attorneys' fees, to the prevailing party.

Summary of Engrossed First Substitute Bill: In the event of a state of emergency no person shall sell, rent, or offer to sell or rent at an excessive price the following goods and services:

- building materials;
- consumer food items;
- goods or services used for emergency cleanup;
- emergency supplies;
- gasoline;
- health care services;
- housing;
- medical supplies;
- repair or reconstruction services;
- transportation, freight, and storage services; and
- personal protective equipment.

The Governor may modify this list by executive order as appropriate.

This law is automatically implemented upon when the Governor declares a state of emergency. The restrictions are for the county or counties where the state of emergency has been declared.

A state of emergency means an event for which a state of emergency has been declared by the Governor of the state of Washington.

An excessive price means a price more than 15 percent greater than the price at which the person sold, rented, or offered for sale or rent the same product or service immediately prior to the state of emergency. When the price prior to the state of emergency can not be determined, an excessive price shall be presumed where the price is more than 15 percent greater than the price of the same product or service offered for sale or rent by other similarly situated sellers prior to the state of emergency. The baseline price for the good or service is adjusted on the one-year anniversary of the state of emergency.

However, it is not a violation if the price increase is attributable to a cost imposed by a supplier or attributable to costs for labor or materials.

The attorney general may investigate violations of this new law. The attorney general may issue subpoenas or civil investigative demands under the authority of the consumer protection act where there is a reason to believe a person has violated this new law. The attorney general may issue a cease and desist letter to stop violations. If the recipient of a cease and desist letter does not comply within five calendar days of receipt of the order, the attorney general may file an action in superior court to enforce the order. The court may enjoin a person from violations and may impose a civil penalty of not more than \$10,000 per violation of the cease and desist order. In a successful action to enforce a cease and desist order the court shall award the attorney general costs of the legal action, reasonable costs of the investigation, and reasonable attorney fees. Additionally, every person who violates this new law must pay a civil penalty of no more than \$25,000 per violation. No additional civil penalty shall be assessed for the same violation under the Consumer Protection Act pursuant to RCW 19.86.140.

A violation of the new law, including a violation of the cease and desist letter, is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the consumer protection act. The remedies of this new law are in addition to any other remedies provided by law.

The attorney general must produce and maintain on its website translated versions of this new law in the top ten languages spoken in Washington State, and at the discretion of the attorney general, in other languages.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: The shelves of stores were empty in the early days of the pandemic including hand sanitizer and other products. Hand sanitizer was available online for over \$200 per bottle. We are among a handful of states that did not have protections for consumers during an emergency and 36 states do protect consumers. We looked at other state laws in selecting 10 percent as the threshold for an excessive price. Any time there is an emergency the scammers appear and price gouging is a real concern. The elderly are more vulnerable to the COVID-19 virus and are most in need of personal protective equipment. Yet many low-income individuals and elderly on a fixed income will not be able to buy essential goods and services if price gouging is not restricted. First responders are also affected by price gouging and they are on the front line to provide emergency services.

CON: This is going to cause chaos in small businesses. Businesses have all types of costs associated with providing a clean, healthy, and sanitized environment. This bill sets up a litigious process where the price increase may not be directly related to a product or service but is absolutely necessary for the small business to incur that cost in order to stay open.

OTHER: The 10 percent threshold is too narrow and could be caused by seasonal increases in products. The potentially liable person is the one who sets the price and it should not go up the supply chain. There need to be changes in the definition of emergency supplies to be a general items for the protection of health and welfare rather than a list of items. The definition for excessive price should not be a percent but rather should be a price that greatly exceeds the price prior to the state of emergency. The price should be a 25 percent threshold. Businesses should be compared to other like businesses.

Persons Testifying: PRO: Senator Jeannie Darneille, Prime Sponsor; Teresa Green, Tacoma Fire Department; Brittany Gregory, Washington State Office of the Attorney General; Cynthia Alexander, Washington State Office of the Attorney General; Cathleen MacCaul, AARP Washington State.

CON: Gary Smith, Independent Business Association.

OTHER: Bruce Beckett, Washington Retail Association; Rose Feliciano, Internet Association; Catherine Holm, Washington Food Industry Association.

Persons Signed In To Testify But Not Testifying: No one.

EFFECT OF HOUSE AMENDMENT(S):

- Limits the definition of housing to a short-term stay commercial enterprise including, but not limited to, a hotel or motel.
- Excludes property governed by the Residential Landlord-Tenant Act or the Manufactured/Mobile Home Landlord-Tenant Act from the definition of housing.
- Establishes that persons with authority to adjust or regulate prices do not violate the act if they make commercially reasonable efforts to prevent or remove offers to sell or rent a covered good or service at an excessive price.
- Ends the restriction on price increases upon termination of the state of emergency or 60 days after the state of emergency is declared, whichever comes first.
- Provides the restrictions may only be extended, renewed, or reimposed with legislative approval.
- Establishes that the expiration of restrictions does not impact rights or remedies under the Consumer Protection Act.