

HOUSE BILL REPORT

SSB 5078

As Passed House - Amended:

April 10, 2023

Title: An act relating to protecting public safety by establishing duties of firearm industry members engaged in the sale, manufacturing, distribution, importing, or marketing of firearms, ammunition, component parts, or accessories, to adopt and implement reasonable controls to prevent the diversion of firearms and related products to straw purchasers, firearm traffickers, unauthorized individuals, and individuals who pose a risk to themselves or others, to prohibit such firearm industry members from creating or maintaining a public nuisance, and providing for investigation and enforcement by the attorney general.

Brief Description: Protecting public safety by establishing duties of firearm industry members.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senators Pedersen, Dhingra, Frame, Hasegawa, Hunt, Keiser, Kuderer, Lias, Nguyen, Nobles, Rolfes, Saldaña, Stanford, Trudeau, Valdez and Wellman; by request of Office of the Governor, Attorney General).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 3/14/23, 3/24/23 [DPA];

Appropriations: 3/30/23, 3/31/23 [DPA(CRJ)].

Floor Activity:

Passed House: 4/10/23, 57-41.

Brief Summary of Substitute Bill (As Amended by House)

- Prohibits firearm industry members from knowingly creating, maintaining, or contributing to a public nuisance; and from designing, selling, and marketing firearm industry products that promote conversion of legal products into illegal products, or which target minors or individuals prohibited from purchasing or possessing firearms.

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.

- Requires firearm industry members to establish, implement, and enforce reasonable controls to prevent sale and distribution to certain individuals, prevent loss and theft of firearm industry products, and ensure compliance with state and federal law; and to take reasonable precautions to prevent sale or distribution of firearm industry products to distributors and retailers that have failed to establish and implement reasonable controls.
- Establishes that violations constitute a public nuisance and are per se actionable under the Consumer Protection Act.
- Authorizes the Attorney General to investigate suspected violations and bring enforcement actions against firearm industry members.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: Do pass as amended. Signed by 7 members: Representatives Hansen, Chair; Farivar, Vice Chair; Entenman, Goodman, Peterson, Thai and Walen.

Minority Report: Do not pass. Signed by 2 members: Representatives Walsh, Ranking Minority Member; Graham, Assistant Ranking Minority Member.

Minority Report: Without recommendation. Signed by 2 members: Representatives Cheney and Rude.

Staff: John Burzynski (786-7133).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: Do pass as amended by Committee on Civil Rights & Judiciary. Signed by 18 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Berg, Chopp, Davis, Fitzgibbon, Hansen, Lekanoff, Pollet, Riccelli, Ryu, Senn, Simmons, Slatter, Stonier and Tharinger.

Minority Report: Do not pass. Signed by 12 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; Chandler, Connors, Couture, Dye, Harris, Rude, Sandlin, Schmick and Steele.

Staff: Jessica Van Horne (786-7288).

Background:

The Protection of Lawful Commerce in Arms Act.

A federal law known as the Protection of Lawful Commerce in Arms Act (PLCAA) prohibits certain legal actions against specific entities engaged in firearms-related commerce. Specifically, the law bars any civil action or proceeding, or an administrative proceeding, brought by any person against a manufacturer or seller of a qualifying firearm, ammunition, or component part shipped or transported in interstate or foreign commerce, or a trade association, if the action or proceeding seeks damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, that results from the criminal or unlawful misuse of a qualified product by the person or a third party.

The foregoing restriction is subject to several exceptions. Among other claims, PLCAA does not bar actions in which a manufacturer or seller of a qualified product knowingly violated a state or federal statute applicable to the sale or marketing of the product, if the violation was a proximate cause of the harm for which relief is sought.

Public Nuisance.

State law provides that public nuisance is actionable under both criminal and civil law. In relevant part, nuisance consists of unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures, or endangers the comfort, repose, health, or safety of others, or in any way renders other persons insecure in life, or in the use of property.

A nuisance rises to the level of a criminal public nuisance if it affects a considerable number of persons, even if the extent of damage is unequal. Committing, maintaining, or refusing to remove a public nuisance constitutes a misdemeanor. For civil purposes, a nuisance constitutes a public nuisance if it affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal.

Authorized remedies against a public nuisance include criminal prosecution, a civil action, and abatement. Any private person may maintain a civil action for a public nuisance, if it is specially injurious to himself or herself, but not otherwise.

The Consumer Protection Act.

The Consumer Protection Act (CPA) prohibits unfair methods of competition, and unfair or deceptive acts or practices in trade or commerce. If a person is injured in their business or property by a violation of the CPA, the person may bring a civil action to enjoin further violations and recover actual damages, costs, and reasonable attorney's fees. In addition, the court may award treble damages up to \$25,000. The Attorney General may also bring an action in the name of the state or on behalf of persons residing in the state, against any person to enjoin violations of the CPA and obtain restitution. The Attorney General may also seek civil penalties up to the statutorily authorized maximums against any person who violates the CPA.

Summary of Amended Bill:

Firearm Industry Member Duties.

Firearm industry members are prohibited from engaging in certain acts:

- *Public Nuisance.* Firearm industry members are prohibited from knowingly creating, maintaining, or contributing to a public nuisance in this state through the sale, manufacture, distribution, importing, or marketing of a firearm industry product.
- *Promoting Conversion; Targeting Minors or Other Individuals.* Firearm industry members are prohibited from manufacturing, distributing, importing, marketing, offering for wholesale, or offering for retail sale a firearm industry product that is designed, sold, or marketed in a manner that: (1) foreseeably promotes conversion of legal firearm industry products into illegal firearm industry products; or (2) is targeted at minors or individuals who are legally prohibited from purchasing or possessing firearms.

Additionally, firearm industry members are required to establish specific controls and take specific precautions:

- *Reasonable Controls.* Firearm industry members are required to establish, implement, and enforce reasonable controls regarding their manufacture, sale, distribution, importing, use, and marketing of firearm industry products.
- *Reasonable Precautions.* Firearm industry members are required to take reasonable precautions to ensure they do not sell or distribute a firearm industry product to a downstream distributor or retailer of firearm industry products that fails to establish and implement reasonable controls.

"Reasonable controls" means reasonable procedures, safeguards, and business practices, including but not limited to screening, security, and inventory practices, that are designed and implemented to: (1) prevent the sale or distribution of a firearm industry product to a straw purchaser, a firearm trafficker, a person prohibited from possessing a firearm under state or federal law, or a person who the firearm industry member has reasonable cause to believe is at substantial risk of using a firearm industry product to harm themselves or unlawfully harm another, or of unlawfully possessing or using a firearm industry product; (2) prevent the loss of a firearm industry product or theft of a firearm industry product from a firearm industry member; and (3) ensure that the firearm industry member complies with all provisions of state and federal law and does not otherwise promote the unlawful sale, manufacture, distribution, importing, possession, marketing, or use of a firearm industry product.

Public Nuisance.

A violation of the foregoing duties is classified as a public nuisance. A firearm industry member's conduct in violation of this act constitutes a proximate cause of the public nuisance if the harm is a reasonably foreseeable effect of the conduct, notwithstanding any intervening actions, including but not limited to criminal actions by third parties.

Consumer Protection Act.

The Legislature finds that the acts or practices covered by this section are matters vitally

affecting the public interest for the purpose of applying the Consumer Protection Act (CPA). A violation of this act is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the CPA.

Investigation and Enforcement by the Attorney General.

Whenever the Attorney General believes a person may have information or knowledge relevant to an investigation of a possible violation of this act, the Attorney General may execute and serve a civil investigative demand requiring such person to produce documents, permit inspection and copying, answer written interrogatories, and give oral testimony, subject to the limits of the statute governing civil investigative demands.

Any person or entity that receives a civil investigative demand and objects to answering in whole or in part may file in Superior Court a petition to extend the time to respond or to modify or set aside a demand.

The Attorney General is prohibited from sharing with a law enforcement agency conducting a criminal investigation any materials or information obtained through a civil investigative demand, unless disclosure is required by a search warrant.

Whenever it appears to the Attorney General that a firearm industry member has violated the requirements of this act, the Attorney General may commence an action to seek and obtain any remedies available for violations of the state laws governing nuisance claims. Additionally, the Attorney General may seek and obtain punitive damages up to three times the actual damages sustained by the state, reasonable attorneys' fees, and the costs of the action.

Legal Actions.

To prevail in an action under this act, the party seeking relief is not required to demonstrate that the firearm industry member acted with the purpose to engage in a public nuisance or otherwise cause harm to the public.

The bill contains multiple savings clauses:

- The Attorney General's authority to investigate a possible violation and commence a legal action in response to a violation shall not be construed or implied to deny, abrogate, limit, or impair any person's right to bring a private right of action in response to a violation pursuant to: (1) the sections of the revised code governing public nuisance claims, to seek damages, abatement, or any other remedy available for a public nuisance; or (2) the CPA to seek damages, equitable relief, or any other remedy available under the CPA.
- Nothing in the operative section of the bill shall be construed or implied to deny, abrogate, limit, or impair in any way the right of the Attorney General to pursue a legal action under any other law, including the CPA, or an obligation or requirement placed on a firearm industry member by any other law.

- Nothing in the operative section of the bill shall be construed or implied to deny, abrogate, limit, or impair any statutory or common law right, remedy, or prohibition otherwise available to any party, including the Attorney General.

Defined Terms.

The bill defines a number of terms including the following:

- "Firearm industry member" means a person engaged in the wholesale or retail sale, manufacturing, distribution, importing, or marketing of a firearm industry product, or any officer or agent to act on behalf of such a person or who acts in active concert or participation with such a person.
- "Firearm industry product" means a product that meets any of the following conditions: (1) the firearm industry product was sold, made, distributed, or marketed in this state; (2) the firearm industry product was intended to be sold, made, distributed, or marketed in this state; or (3) the firearm industry product was used or possessed in this state, and it was reasonably foreseeable that the product would be used or possessed in this state.
- "Product" means: (1) a firearm; (2) ammunition; (3) a component part of a firearm or ammunition, including a completed frame or receiver or unfinished frame or receiver; (4) an accessory or device that is designed or adapted to be inserted into, affixed onto, or used in conjunction with a firearm, if the device is marketed or sold to the public and that is designed, intended, or able to be used to increase a firearm's rate of fire, concealability, magazine capacity, or destructive capacity, or to increase the firearm's stability and handling when the firearm is repeatedly fired; or (5) a machine or device that is marketed or sold to the public that is designed, intended, or able to be used to manufacture or produce a firearm or any other product listed in this definition.

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 (Civil Rights & Judiciary):

(In support) This bill is an attempt to have participants in the firearm industry, including manufacturers and retailers, become significantly interested in reducing and preventing gun violence. It creates a duty to impose reasonable controls, including background checks, enforcing laws on prohibited purchasers and firearms, requirements to track inventory, taking basic steps to prevent sales to straw purchasers and those at risk of harming themselves or others, and creating a tool for enforcement against industry members who fail to use reasonable controls. No single firearm safety measure will be completely effective but taken together a web of measures can help protect the entire community.

Public nuisance law has a long tradition in Washington going back to the territorial days. The idea of nuisance law is that those who produce or sell dangerous products have a responsibility to keep the community safe. The interaction of nuisance and firearms is longstanding. One of the earliest uses of public nuisance law was for gunpowder manufacture and storage. Gunpowder was fundamental to the exercise of the constitutional right to bear arms. There is a long and consistent history of the exercise of firearm rights imposing some risks to community safety that need to be balanced.

The experience of other states with similar laws, such as Connecticut, New York, New Jersey, Delaware, and California, shows that lawsuits are rare and firearm industry participants have not been wiped out. The firearm industry complies to ensure they are doing their part.

Parents of children killed by gun violence support the bill. Firearms are not toys. Industry members must take accountability and responsibility for the victims of gun violence. Guns are getting into the hands of people who are not licensed or who have mental health issues. There is a strong correlation between weak gun laws and more deaths, including homicides and accidental killing. This bill will help ensure firearm sales and marketing in Washington are in sync with the state's laws, ensure the gun industry complies with lawful business practices, and allow Washingtonians to hold gun industry members accountable for misconduct.

While most firearm industry members operate responsibly, they need to be held accountable when their practices allow firearms to get into unlawful hands. The firearms industry should be treated like any other whose products can be misused, such as industries that produce pharmaceuticals or toxic chemicals.

The Protection of Lawful Commerce in Arms Act shields irresponsible individuals from accountability. But that law invites states to pass their own laws to regulate firearms. Lawsuits brought against manufacturers of weapons used in mass shootings seeking to hold the industry responsible for their reckless and irresponsible marketing have been dismissed because of the immunity granted by federal law and some state laws. These laws make it impossible to obtain discovery and investigate wrongdoing, and to hold industry members responsible for their negligence and recklessness. Immunity is inconsistent with the ideal that everyone should be able to have their day in court and hold corporations responsible. This immunity is unique to the gun industry, leaves the industry unchecked, and has contributed to violence and ruined lives. This bill will encourage the firearm industry to rethink its irresponsible sales and strategies.

This legislation could be strengthened. The House should restore a private right of action for individuals who suffer harm. People who have suffered harm should be able to seek justice against irresponsible industry members. There will be no tidal wave of litigation because most industry members comply with the law.

(Opposed) Firearm dealers operate lawfully, are very familiar with state and federal regulations, and teach responsible firearm use. Existing laws cover background checks, processing, and identifying purchasers. The Bureau of Alcohol, Tobacco, Firearms, and Explosives already strictly controls dealers, and does a good job of making sure dealers follow the laws.

The hunting community is responsible for a wildlife success story that makes Washington the envy of the world. Hunters contribute to ecosystem support, funding government, and supporting the local economy. Instead of acknowledging this success, the Legislature is discussing its destruction. This bill will crater the sporting community.

It is damaging, hurtful, and unfair to label industry members a public nuisance. Some industry members are active participants in their communities, donate to charities, promote firearm safety, care more about people than money, work towards suicide prevention and awareness, and provide firearm storage for any seeking it.

This bill will result in frivolous lawsuits against industry members, turn the law on its head, and hold the industry responsible for the illegal acts of others. Industry members cannot foresee how a weapon will be misused. When a child is tragically killed in a car accident, the state does not blame the car manufacturer or dealership; instead, the driver is held accountable.

The bill is directed at destroying the firearm industry and provides the Attorney General with the tools to conduct a witch hunt and force the industry out of existence. This law will allow the state to target and bankrupt firearm industry members with no evidence of wrongdoing or malice. This bill will decimate the industry, result in excessive liability insurance, and businesses outside the state will refuse to do business in Washington for fear of litigation. Without a firearm industry, Washingtonians will not have access to firearms.

This bill will increase costs for industry members, who will face increased insurance premiums. At least one dealer is already paying over \$18,000 per year for insurance.

The recent rise in crime has resulted in many new customers, including women, shopping for self-defense.

This law is a blatant violation of the Constitution and federal law. Even setting aside the Supreme Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen* and the lack of any history of holding the firearm industry accountable for the acts of others, the Supreme Court has already rejected the argument that firearm rights can be balanced away in the interest of public safety. A similar law targeting the firearm industry in New Jersey has been enjoined. The legal threshold for obtaining a preliminary injunction is high, but it was granted. There is no advantage to the economic disruption this bill will cause when it will simply be found unconstitutional. The costs of litigation will merely be imposed on the taxpayers.

The practices this bill targets are already illegal. Making them unlawful again will not change anything. Current laws allow the state to address gun violence, but the Attorney General is choosing not to prosecute.

The majority opposes this bill. Gun owners are tired of the repeated infringements the Legislature has imposed on them year after year.

Staff Summary of Public Testimony (Appropriations):

(In support) The Governor proposed three bills that are critical to addressing gun violence. This bill would address industry accountability, and ensure that businesses engaging in the import, sales, and marketing of firearms operate in sync with state law. It will make sure that sellers and manufacturers face consequences when they engage in irresponsible business practices by making violations enforceable under the Consumer Protection Act (CPA). It will also keep guns out of the wrong hands and reduce the risk of violence. While most members of the firearms industry are following the law, there are also bad actors. The Office of the Attorney General (ATG) should receive sufficient funding to conduct enforcement. The striking amendment makes clear that there is a private right of action, and that the ATG will be sharing the burden of enforcement with individuals who can also take steps to make the firearms industry accountable. This results in a reduced fiscal note compared to previous versions.

This bill will hold firearms businesses liable when they fail to ensure weapons don't end up in the wrong hands. It will also treat the gun industry like every other industry, so that they face real consequences for irresponsible conduct, and allow survivors to seek justice in court. Addressing bad actors will level the playing field for those businesses that are acting lawfully.

(Opposed) The firearms industry is a major employer and generator of revenue for the state through retail and manufacturing. This bill would result in the state losing revenue from a major industry, and financially decimate lawful businesses by subjecting them to lawsuits and increasing their potential liability. Out-of-state businesses will no longer sell in Washington. Additionally, the bill will create excessive prosecution, and that will burden taxpayers. The inclusion of the private right of action is fiscally irresponsible. The bill generally endangers the right to keep and bear arms, and constitutional provisions regarding commerce.

This bill greatly expands the definition of "public nuisance" that will bring in innocent businesses and could be broadly misapplied to entities such as parcel delivery services. It would give the ATG unbridled discretion and powers, and result in power imbalances in the state. The bill misapplies state nuisance laws and the CPA. The bill will negatively impact legal businesses and law-abiding citizens wishing to purchase firearms at taxpayers' expense, while not addressing illegal businesses and the illegal industry.

In other states, the firearms industry has successfully been granted a preliminary injunction to stop very similar laws. Taxpayers will be on the hook for defending this bill in court when it is not likely to come into effect.

Persons Testifying (Civil Rights & Judiciary): (In support) Senator Jamie Pedersen, prime sponsor; Donnitta Sinclair; Barbara Serrano, Office of the Governor; Ben Brysacz, Attorney General's Office; Jim Parsons; Ashley Brooks, Yelm City Council; and Dustin Williamson, Everytown for Gun Safety.

(Opposed) Hiedi Lee, Minuteman Ammunition; Bryan Lynn, Sportsmens Alliance; Robin Ball, Sharpshooting Indoor Range; Austin Harlan, The Range, LLC; Aoibheann Cline, National Rifle Association; and Troy Nichols, National Shooting Sports Foundation.

Persons Testifying (Appropriations): (In support) April Schentrup; Barbara Serrano, Office of the Governor; and Laura Clinton, Office of the Attorney General.

(Opposed) Aoibheann Cline, National Rifle Association; Eric Pratt; Julie Barrett, Conservative Ladies of Washington; Troy Nichols, National Shooting Sports Foundation; and Teo Morca.

Persons Signed In To Testify But Not Testifying (Civil Rights & Judiciary): More than 20 persons signed in. Please see committee staff for information.

Persons Signed In To Testify But Not Testifying (Appropriations): None.