



SAFEGUARDING CONSUMERS CONSUMER PROTECTION ENFORCEMENT

LEGISLATION

CONSUMER PROTECTION ENFORCEMENT

The Attorney General's Office proposes amending the Consumer Protection Act (RCW 19.86.080) to:

- Permit reasonable attorney fees to be awarded to a defendant only upon a finding by a judge that the state's action was frivolous or malicious.
- Make it clear that that the Consumer Protection Act applies to any person, corporation, association or partnership that operates from Washington, even when their consumer victim is located outside the state of Washington.

THE PROBLEM

Amendments to the state's Consumer Protection Act, RCW 19.86.080, are needed to protect the state from unjustified attorney fee awards in Consumer Protection Act cases. Changes are also needed to reverse a recent court ruling that essentially makes Washington state a safe harbor for unfair and deceptive business practices by Washington companies if those practices are only targeted at out-of-state consumers.

BACKGROUND

Washington is the only state in the nation that awards defendants attorney fees in a government enforcement action without requiring a determination that the state's case was frivolous or malicious.

This dynamic prevents the Attorney General's Office from pursuing targets that are engaged in unique or particularly complex, but harmful, violations of consumer protection or antitrust laws due to the risk of large attorney fees even for a purely technical "win" on a single claim.

Defense firms rely on this risk and emphasize it during negotiations. In a recent mediation, defense counsel pointedly estimated its attorney fees would be well over \$1 million should the state lose. In contrast, the state's total fees and costs for the same matter were about \$240,000.

Additionally, the state can lose simply because the court reaches a narrow, odd or unexpected result, or because of a split decision. For example, in *State v. Pacific Health Center, Inc.* 135 Wn. App. 149, 173 (2006), the state won at the trial level and the Court imposed restitution and penalties against a defendant for practicing medicine without a license. Although the Supreme Court ruled that it is a Consumer Protection Act (CPA) violation to practice law when you are not licensed to practice law, the Appeals Court would not rule that it is a CPA violation to practice medicine without a license. The Appeals Court dismissed the CPA claim and awarded attorney fees (subsequently settled for \$420,000) without any additional finding that the state's case was frivolous or malicious. Similarly, in an antitrust action filed to enforce a consent decree, *State v. Black*, 100 Wn.2d 793 (1984) the Supreme Court upheld an award of fees against the state despite saying that: 1) if it were the trial court, it may have interpreted the evidence as supporting the state's theory, not defendants'; and 2) under federal interpretations of the same law, the state's position was correct. Ultimately, a special legislative appropriation was necessary to pay fees to the defendants.





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Private plaintiffs who sue and lose a claim under the Consumer Protection Act *do not pay* attorney fees to the defendant. The other 49 states, as well as the District of Columbia and Guam, either do not allow attorney fees to a defendant who prevails when sued by the state or allow recovery of attorney fees only if the government's case is baseless or malicious.

Additionally, the proposed amendments would make it clear that that the Consumer Protection Act applies to any person, corporation, association or partnership that resides in Washington, but does business only with out-of-state consumers. The change is necessary to remedy a recent ruling by the Washington Supreme Court that consumers who do not reside in Washington can not enforce the Consumer Protection Act for acts against a consumer outside Washington by a Washington company - *Schnall v. AT&T Wireless Services, Inc.*, 168 Wn.2d 125 (2010). Without this amendment, the language of the opinion could prevent the Attorney General's Office from taking an enforcement action against a Washington company's acts that are targeted only outside of Washington. This disadvantages other Washington businesses that sell to Washington residents and comply with the law.