

- SUBJECT:** Revising the Deceptive Trade Practices-Consumer Protection Act
- COMMITTEE:** Business and Industry — committee substitute recommended
- VOTE:** 5 ayes — Giddings, Elkins, Kolkhorst, Bohac, Zedler
0 nays
4 absent — Martinez Fischer, J. Moreno, Oliveira, Solomons
- SENATE VOTE:** On final passage, May 6 — 31-0, on Local and Uncontested Calendar
- WITNESSES:** No public hearing
- BACKGROUND:** Business and Commerce Code, sec. 17.47, part of the Deceptive Trade Practices-Consumer Protection Act (DTPA), authorizes the consumer protection division of the Office of the Attorney General (OAG) to seek an injunction in certain cases involving false, misleading, or deceptive acts or practices and to ask the court to assess a civil penalty. A court may issue orders to compensate consumers for actual damage or to restore money or property lost as a result of a defendant's unlawful conduct. A civil penalty may not exceed \$2,000 per violation, not to exceed a total of \$10,000, unless the act was directed against a person at least 65 years old, in which case the penalty may not exceed \$10,000 per violation or a total \$100,000.
- The trier of fact in a lawsuit may be either the judge or the jury, depending on the circumstances.
- DIGEST:** CSSB 1212 would amend the DTPA to increase the civil penalties that could be assessed by the trier of fact. It would increase the penalty cap from \$2,000 to \$20,000 per violation and would remove the cap on the total penalty. The trier of fact could assess an additional penalty of up to \$250,000 if the act was directed against a person at least 65 years old. In determining the amount of penalty to be assessed, the trier of fact would have to consider:
- the seriousness of the violation;
 - the history of previous violations;

- the amount necessary to deter future violations;
- the economic effect on the person against whom the penalty was to be assessed;
- knowledge of the illegality of the act or practice; and
- any other matter that justice might require.

The bill would specify that the OAG's consumer protection division, in bringing an action under this section, acts in the name of the state and not on behalf of an individual, including a person for whom the division asks the court to award relief.

A consumer filing a class action under DTPA, sec. 17.50 would have to send the consumer protection division a copy of the required notice under the statute and a copy of the petition by the 30th day after the date the petition was filed or the 10th day before the date of any hearing on class certification or a proposed settlement, whichever was earlier. If the consumer protection division did not receive notice by the required deadline, the court would have to abate the class action for 60 days. On a showing of good cause, the court could allow the consumer protection division to intervene in a class action as a representative of the public.

The bill would take effect on September 1, 2003.

**SUPPORTERS
SAY:**

CSSB 1212 would help deter bad actors and would improve the OAG's ability to enforce Texas consumer protection laws. The current statutory limits on fines have not been increased since the DTPA was enacted in 1973. Facing such minimal fines, some companies find it much easier to pay the fines and continue harming consumers. Increasing the amount of the fines would increase their deterrent effect and would increase the attorney general's negotiating power to stop the repetition of deceptive practices.

The bill would help ensure the assessment of appropriate penalties in DTPA cases by requiring the trier of fact to weigh certain qualifying factors. While the penalty amount could range as high as \$20,000 per violation, the trier of fact could assess a lower penalty if warranted by the facts of the case.

CSSB 1212 would improve the OAG's ability to monitor class action lawsuits filed under the DTPA by requiring litigants to send the consumer protection

division timely notice of these lawsuits. Although the attorney general has authority to intervene in these suits on behalf of the public when necessary, the OAG rarely learns about the lawsuits in time to intervene. The bill would assist the OAG in its mission to protect the public by enabling the office to receive earlier notice of these lawsuits.

The bill also would clarify the attorney general's authority to seek restitution for consumers without establishing an attorney-client relationship between the attorney general and the individual consumer.

OPPONENTS
SAY:

By setting an upper limit of \$20,000 per violation for a civil penalty under the DTPA, CSSB 1212 could put small businesses that commit minor violations out of business. Although it would be up to the trier of fact to set the penalty amount, the bill's wording would make it likely that a trier of fact would set a significant penalty amount, even for a minor violation. The penalty amount should be left at \$2,000 per violation with a more reasonable cap on the total penalty, perhaps \$100,000.

OTHER
OPPONENTS
SAY:

The bill should be expanded to allow county and district attorneys to recover attorney's fees for DTPA actions. Although consumers, especially elderly consumers, are harmed in their districts, many county and district attorneys do not have the resources to seek DTPA actions, and those who seek them do so at taxpayers' expense. Although the OAG is supposed to protect consumers statewide, it does not have the resources to handle all the smaller violations that could be better dealt with at a county or district level. Allowing county and district attorneys to obtain attorney's fees for these actions would increase consumer protection across the state by giving local prosecutors the resources to pursue these actions.

NOTES:

The Senate engrossed version of SB 1212 would have set a minimum penalty of \$1,000 per violation and would have allowed a maximum additional penalty of \$100,000, rather than \$250,000, for acts directed against the elderly. The committee substitute added the list of factors that a trier of fact would have to consider in assessing a fine.