

BILL ANALYSIS

C.S.H.B. 2846
By: Madden
Business & Industry
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Interested parties report that there are concerns regarding certain aspects of the Deceptive Trade Practices-Consumer Protection Act. In particular, they note that the potential penalty of \$20,000 for a violation applies regardless of the amount of harm caused by a violation and regardless of the number of violations, that language regarding compensation sought by the consumer protection division of the attorney general's office is unclear, and that citizens and businesses who receive investigative demands from the division do not have effective means to contest those demands or dispute the scope of the demands. The parties further note that legislation is needed to provide a civil penalty that is reasonably related to the harm caused by the acts or practices at issue, to clarify that certain provisions apply to identified persons, and to provide better balance to the investigative process. C.S.H.B. 2846 seeks to address these matters relating to certain procedures and civil penalties under the Deceptive Trade Practices-Consumer Protection Act.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 2846 amends the Business & Commerce Code to cap the civil penalty in an action brought by the consumer protection division of the attorney general's office for a temporary restraining order, temporary injunction, or permanent injunction against the use of an unlawful deceptive trade act or practice at not more than the lesser of \$10,000 per violation, \$10,000 plus three times the amount of actual damages caused by the violations, or 25 percent of the net worth of the person against whom or which an action is brought. The bill removes a provision capping the civil penalty at \$20,000 per violation.

C.S.H.B. 2846 specifies that the court is authorized to make such additional orders or judgments as are necessary to compensate identified, rather than identifiable, persons for actual damages or to restore money or certain property. The bill provides that such property is real or personal property that was acquired from identified persons by means of any unlawful act or practice, rather than real or personal property which may have been acquired from unspecified sources by those means. The bill prohibits an award under these provisions, rather than damages, from including damages incurred beyond a point two years prior to the institution of the action by the consumer protection division and prohibits such an award from including money or property acquired beyond that point. The bill authorizes orders of the court to also include the appointment of a receiver or a sequestration of assets if a person has failed to comply with an order under these provisions of the bill within three months after the order has become final and nonappealable. The bill removes a provision authorizing the inclusion of such an appointment in a court order if a person who has been ordered by a court to make restitution under provisions of law relating to restraining orders has failed to do so within three months after the order has become final and nonappealable.

C.S.H.B. 2846, in a provision of law relating to certain reports and examinations, authorizes an authorized member of the consumer protection division of the attorney general's office, if the division has reason to believe that a person is engaging in, has engaged in, or is about to engage in an unlawful deceptive trade act or practice or reasonably believes conducting an investigation is in the public interest, to issue a directive to require the person to file certain information, to examine under oath certain persons, to examine certain merchandise, and to impound certain samples of merchandise under certain conditions. The bill prohibits the consumer protection division from requiring a person to comply with a directive for such actions, other than a directive to impound certain samples of merchandise, before the 31st day after the date the person is issued the directive. The bill authorizes the person, before the 31st day after the date a person is issued a directive, to file a petition, stating good cause, to extend the period in which the person must comply with the directive or to modify or set aside the directive. The bill authorizes the filing of the petition to be in the district court in the county where the parties reside or a district court of Travis County. The bill authorizes the extension of the period in which a person is authorized to file the petition by a written agreement between the person and the consumer protection division. The bill requires a person who files such a petition to comply with the directive as ordered by the court.

C.S.H.B. 2846, in a provision authorizing the filing of a petition to extend the return date for or to modify or set aside a civil investigative demand requiring a person to produce documentary material relevant to the subject matter of an investigation of a possible deceptive trade practice for inspection and copying, changes the period during which the petition may be filed from any time before the return date specified in the demand or within 20 days after the demand is served, whichever period is shorter, to any time before the return date specified in the demand or within 30 days after the demand is served, whichever period is longer. The bill authorizes the extension of the period in which a person is authorized to file the petition by a written agreement between the person and the consumer protection division. The bill requires a person who files a petition to extend the return date for or to modify or set aside the demand to comply with the demand as ordered by the court.

EFFECTIVE DATE

September 1, 2011.

COMPARISON OF ORIGINAL AND SUBSTITUTE

C.S.H.B. 2846 differs from the original by capping the maximum civil penalty in an action brought by the consumer protection division of the attorney general's office for a temporary restraining order, temporary injunction, or permanent injunction against the use of an unlawful deceptive trade act or practice at not more than the lesser of \$10,000 per violation, \$10,000 plus three times the amount of actual damages caused by the violations, or 25 percent of the net worth of the person against whom or which an action is brought, whereas the original caps the maximum total civil penalty in such an action at \$250,000 if the person against whom or which such an action is brought has assets of less than \$25 million and is not owned or controlled by a person with assets of \$25 million or more or at \$1 million if the person against whom or which such an action is brought has assets of \$25 million or more or is owned or controlled by a person with assets of \$25 million or more.

C.S.H.B. 2846 omits a provision included in the original specifying that the additional penalty amount, capped at \$250,000, authorized for a deceptive trade act or practice calculated to acquire or deprive money or other property from a consumer who was 65 years of age or older when the act or practice occurred is a civil penalty.

C.S.H.B. 2846 differs from the original by specifying that the court is authorized to make additional orders or judgments as are necessary to compensate identified persons for actual

damages or to restore money or property, real or personal, that was acquired from such persons by means of any unlawful act or practice, whereas the original references such property which may have been acquired from unspecified sources by those means.

C.S.H.B. 2846 differs from the original by prohibiting an award, rather than damages as in the original, from including damages incurred beyond a specified point. The substitute contains a provision not included in the original prohibiting such an award from including money or property acquired beyond that point.

C.S.H.B. 2846 differs from the original by authorizing orders of the court to also include the appointment of a receiver or a sequestration of assets if a person has failed to comply with an order under these provisions of the bill within three months after the order has become final and nonappealable, whereas the original retains the statutory provision authorizing the inclusion of such an appointment in a court order if a person who has been ordered by a court to make restitution under provisions of law relating to restraining orders has failed to do so within three months after the order has become final and nonappealable.