

JAN 22 2008

A BILL FOR AN ACT

RELATING TO CHAPTER 480, HAWAII REVISED STATUTES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 480-2, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "§480-2 Unfair competition, practices, declared unlawful.

4 (a) Unfair methods of competition and unfair or deceptive acts
5 or practices in the conduct of any trade or commerce are
6 unlawful.

7 (b) In construing this section, the courts and the office
8 of consumer protection shall give due consideration to the
9 rules, regulations, and decisions of the Federal Trade
10 Commission and the federal courts interpreting section 5(a) (1)
11 of the Federal Trade Commission Act (15 U.S.C. 45(a) (1)), as
12 from time to time amended.

13 (c) No showing that the proceeding or suit would be in the
14 public interest (as these terms are interpreted under section
15 5(b) of the Federal Trade Commission Act) is necessary in any
16 action brought under this section.

17 (d) ~~[No]~~ Except as provided in subsection (f), no person
18 other than a consumer, the attorney general or the director of

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1 the office of consumer protection may bring an action based upon
2 unfair or deceptive acts or practices declared unlawful by this
3 section.

4 (e) Any person may bring an action based on unfair methods
5 of competition declared unlawful by this section.

6 (f) The State or any of its political subdivisions or
7 governmental agencies may bring an action based on unfair
8 methods of competition and unfair or deceptive acts or practices
9 declared unlawful by this section."

10 SECTION 2. Section 480-14, Hawaii Revised Statutes, is
11 amended to read as follows:

12 **"§480-14 Suits by the State; amount of recovery.**

13 (a) Whenever the State [~~, any county, or city and county~~] or any
14 of its political subdivisions or governmental agencies is
15 injured, directly or indirectly, in its business or property by
16 reason of anything forbidden or declared unlawful by this
17 chapter, it may sue to recover threefold the actual damages
18 sustained by it[-

19 ~~(b)]~~, whether direct or indirect. The attorney general may
20 bring an action on behalf of the State or any of its political
21 subdivisions or governmental agencies to recover the damages

1 provided for by this section, or by any comparable provisions of
2 federal law.

3 ~~[(e)]~~ (b) The attorney general of the State shall be
4 authorized to bring a class action for indirect purchasers
5 asserting claims under this chapter. The attorney general or
6 the director of the office of consumer protection may bring a
7 class action on behalf of consumers based on unfair or deceptive
8 acts or practices declared unlawful by section 480-2. Actions
9 brought under this subsection shall be brought as parens patriae
10 on behalf of natural persons residing in the State, to secure
11 threefold damages for injuries sustained by such natural persons
12 to their property by reason of any violation of this chapter.

13 ~~[(d)]~~ (c) If judgment is in favor of the State or any of
14 its political subdivisions or governmental agencies under any
15 provision of this chapter, the attorney general or the director
16 of the office of consumer protection shall be awarded reasonable
17 attorney's fees together with the cost of suit; provided further
18 that in any class action lawsuit brought by the attorney general
19 in behalf of indirect purchasers, the attorney general shall in
20 addition be awarded an amount commensurate with expenses
21 reasonably expected to be expended in distribution of damages to
22 the indirect purchasers."

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1 SECTION 3. Section 480-21, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "§480-21 Court and venue. (a) Any criminal action or
4 proceeding [~~whether civil or criminal,~~] authorized by this
5 chapter shall be brought in any appropriate court in the circuit
6 in which the defendant resides, engages in business, or has an
7 agent [~~unless otherwise specifically provided herein~~].

8 (b) Any civil action or proceeding authorized by this
9 chapter may be brought in any appropriate court."

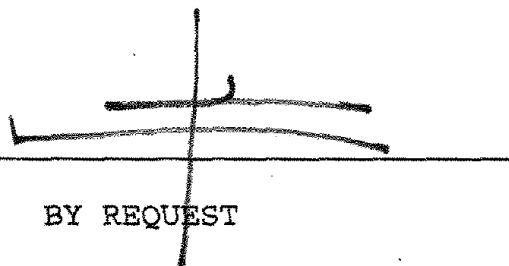
10 SECTION 4. Statutory material to be repealed is bracketed
11 and stricken. New statutory material is underscored.

12 SECTION 5. This Act, upon its approval, shall take effect
13 retroactive to January 1, 1998.

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INTRODUCED BY:



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BY REQUEST

Report Title:

ANTITRUST; UNFAIR COMPETITION.

Description:

Clarifies antitrust and unfair competition law with regard to who can sue in certain instances, including when having made indirect purchases.

JUSTIFICATION SHEET

DEPARTMENT: Attorney General

TITLE: A BILL FOR AN ACT RELATING TO CHAPTER 480, HAWAII REVISED STATUTES.

PURPOSE: To amend chapter 480, Hawaii Revised Statutes, to: (1) reconfirm the right of government entities to bring an action for damages notwithstanding their status as indirect purchasers; (2) clarify the ability of government entities to bring an action based on unfair methods of competition and unfair or deceptive acts or practices declared unlawful by section 480-2, Hawaii Revised Statutes; and (3) clarify that any civil action or proceeding authorized by chapter 480 may be brought in any appropriate court.

MEANS: Amend sections 480-2, 480-14, and 480-21, Hawaii Revised Statutes.

JUSTIFICATION: **Amendment of Section 480-14.** This bill proposes to amend section 480-14 as a result of a recent court order which dismissed with prejudice the claims of state agencies *qua* indirect purchasers.

In *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), the United States Supreme Court held that only direct purchasers may pursue private actions for money damages under federal antitrust laws.

In 1980, the Legislature took steps to clarify the rights of indirect purchasers in the wake of the ruling in *Illinois Brick*, and to dispel any misconceptions regarding the right of indirect purchasers to recover.

In 1980, the Legislature deliberated on a bill, House Bill No. 2668-80, the purpose of which was "to amend chapter 480, Hawaii

Revised Statutes, relating to the bringing of actions on behalf of indirect purchasers by the attorney general." Sen. Standing Committee Report No. 971-80, 1980 Senate Journal at p. 1493.

The Legislature determined it was appropriate to use the measure to "clarify what was originally intended by the enactment of [the Hawaii antitrust laws]" in light of the ruling issued in *Illinois Brick*. *Id.*

First, the Legislature affirmed its commitment to the original basic concept that the antitrust laws were designed to benefit consumers "and others" injured by antitrust violators, and that such intent "was and continues to be the intent of chapter 480." *Id.*

Second, the Legislature expressed its desire to dispel any possible misconception that may be read into the implications of *Illinois Brick* as to the rights of indirect purchasers under Hawaii law, noting that "such right of consumers should be clarified as existing under chapter 480 irrespective of archaic notions of privity between (1) defendant manufacturers, and others and (2) indirect consumers." *Id.*

Third, the Legislature expressed its view that "the fact that anyone has 'paid more than he should and his property has been illegally diminished' is, we think, sufficient basis for invoking the protection intended by our antitrust laws." *Id.*, citing *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 489 (1968).

Finally, the Legislature made it very clear that "indirect purchasers need simply show in some fashion that by reason of antitrust violation their purchase prices were elevated by the consequent illegal

overcharge." Sen. Standing Committee Report No. 971-80, 1980 Senate Journal at p. 1493.

These excerpts from the legislative history, following the ruling in *Illinois Brick*, clearly show that Hawaii law provides that all indirect purchasers, of whatever ilk, have a strong basis and right to invoke the protection of Hawaii's antitrust laws, notwithstanding the ruling in *Illinois Brick*.

Likewise, the right to invoke the protection of Hawaii's antitrust laws extends to Hawaii state agencies. Section 480-14(a) provides a broad remedy and clearly authorizes the State to sue if it is injured by anything forbidden or declared unlawful by chapter 480, Hawaii Revised Statutes.

Section 480-14(b) authorizes the Attorney General to sue on behalf of the State to recover damages provided by this section, or by any comparable provisions of federal law.

In light of the broad remedy in chapter 480 and the actions of the Legislature in 1980, if the State as an indirect purchaser "has paid more than [it] should and [its] property has been illegally diminished," the the State has "a sufficient basis for invoking the protection intended by [Hawaii's] antitrust laws." *Id.*, citing *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. at 489.

Recently, however, a claim asserted on behalf of state agencies *qua* indirect purchasers was dismissed with prejudice by a federal district court because section 480-14(b) did not expressly authorize suits on behalf of government entities *qua* indirect purchasers.

To counter the adverse effects of this ruling in the future, this bill seeks to reconfirm what was "originally intended by

the enactment of [the Hawaii antitrust laws]" in light of the ruling issued in *Illinois Brick*, and thereby reaffirm the Legislature's commitment to the original basic concept that the antitrust laws were designed to benefit consumers "and others" injured by antitrust violators, and that such intent "was and continues to be the intent of chapter 480." Sen. Standing Committee Report No. 971-80, 1980 Senate Journal at p. 1493.

This bill proposes to amend section 480-14(a) to expressly provide that whenever the State or any county is injured, directly or indirectly, in its business or property by reason of anything forbidden or declared unlawful by this chapter, it may sue to recover threefold the actual damages sustained by it.

The bill proposes to include the wording of section 480-14(b) into section 480-14(a), and to redesignate subsections (c) and (d) accordingly.

Further, this bill seeks to make this reconfirmation effective retroactively to foster the ability of the attorney general to assert any appropriate claims that arose after January 1, 1998.

The January 1, 1998 date was chosen because of the limited prospect of there being a claim associated with events that occurred prior to January 1, 1998, the attendant problems associated with garnering the supporting evidence and witnesses for such a claim, and the potential problems associated with fashioning a remedy for a claim associated with events that occurred well over nine years ago.

Amendment of Section 480-2. This bill seeks to clarify that government entities have the ability to bring an action based on unfair methods of competition and unfair or

deceptive acts or practices declared unlawful by section 480-2.

Amendment of Section 480-21. This bill seeks to clarify that any civil action or proceeding authorized by this chapter may be brought in any appropriate court, not just the court in the circuit in which the defendant resides, engages in business, or has an agent. This amendment seeks to ensure that section 480-21 is not used as a basis to dismiss claims based on chapter 480 that are properly asserted in a complaint filed in courts outside of the State.

Impact on the public: The bill is intended to impact antitrust actions brought on behalf of government entities. The public may be indirectly benefitted to the extent amounts are recovered and returned to the general fund, and thereafter used to provide government services and benefits.

Impact on the department and other agencies: The bill may yield mixed results for the department. The bill may impact the department by increasing enforcement activity, workload, and recoveries, including deposits to the antitrust trust fund. However, the bill may reduce the department's workload if it has the effect of curbing illegal activity.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM DESIGNATION: ATG 100

OTHER AFFECTED AGENCIES: Department of Commerce and Consumer Affairs and counties.

EFFECTIVE DATE: This Act shall take effect retroactive to January 1, 1998.