



TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FIFTH LEGISLATURE, 2009

ON THE FOLLOWING MEASURE:

H.B. NO. 1031, S.D. 1, RELATING TO CHAPTER 480, HAWAII REVISED STATUTES.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

DATE: Thursday, April 2, 2009 **TIME:** 10:15 AM

LOCATION: State Capitol, Room 016

TESTIFIER(S): WRITTEN TESTIMONY ONLY

(For more information, contact Rodney I. Kimura, Deputy Attorney General, at 586-1180)

Chair Taniguchi and Members of the Committee:

The Department of the Attorney General strongly supports this bill, which will provide an opportunity to positively impact the State treasury.

The primary purpose of this bill is to amend chapter 480, Hawaii Revised Statutes, to reconfirm the right of government entities to bring an action for damages notwithstanding their status as indirect purchasers. Additionally, this bill seeks to 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, and clarify that any civil action or proceeding authorized by chapter 480 may be brought in any appropriate court.

This bill proposes to amend section 480-14 as a result of a recent court order in a federal court in California that dismissed with prejudice the claims of certain state agencies (including Hawaii's) as 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 Hawaii 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. The purpose of Act 69, Session Laws of Hawaii 1980, was "to amend chapter 480, Hawaii Revised Statutes, relating to the bringing of actions on behalf of indirect purchasers by the attorney general ... [and to] clarify what was originally intended by the enactment of [the Hawaii antitrust laws]" in light of the ruling issued in *Illinois Brick*. Sen. Standing Committee Report No. 971-80, 1980 Senate Journal at p. 1493.

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," then 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.

However, in 2007, a claim asserted on behalf of state agencies as indirect purchasers was dismissed with prejudice by a federal district court in California because section 480-14(b) did not expressly authorize suits on behalf of indirect purchasers who were state government entities. While we disagree with this ruling, we believe there are ways in which our law could be made clearer.

To counter the potential for this ruling to be adopted in any other case 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) in 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 ten years ago.

In addition to reconfirming the right of government entities to bring an action for damages, this bill seeks to accomplish two further matters. First, this bill seeks to amend section 480-2 to make it clear 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.

Second, 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.

We respectfully request your favorable consideration of this measure.