



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-SIXTH LEGISLATURE, 2011**

---

**ON THE FOLLOWING MEASURE:**

H.B. NO. 1004, RELATING TO CHAPTER 480, HAWAII REVISED  
STATUTES.

**BEFORE THE:**

HOUSE COMMITTEE ON FINANCE

**DATE:** Monday, February 28, 2011 **TIME:** 12:30 p.m.

**LOCATION:** State Capitol, Room 308

**TESTIFIER(S):** David M. Louie, Attorney General, or  
Rodney I. Kimura, Deputy Attorney General

---

Chair Oshiro 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. The amendment is in response to an adverse court ruling issued in 2007.

Additionally, this bill seeks to 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, Hawaii Revised Statutes, as a result of a 2007 order issued by a federal court in California that dismissed with prejudice the claims of certain States (including Hawaii) as indirect purchasers.

As a matter of background, 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 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 have a 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 the State of Hawaii and its agencies. Section 480-14(a), Hawaii Revised Statutes, 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), Hawaii Revised Statutes, 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), Hawaii Revised Statutes, 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), Hawaii Revised Statutes, 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), Hawaii Revised Statutes, in section 480-14(a), and to redesignate subsections (c) and (d) accordingly.

Finally, 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.

## GOODSILL ANDERSON QUINN &amp; STIFEL

A LIMITED LIABILITY LAW PARTNERSHIP LLP

LISA WOODS MUNGER

ALI PLACE, SUITE 1800 • 1099 ALAKEA STREET  
HONOLULU, HAWAII 96813DIRECT DIAL:  
(808) 547-5744MAIL ADDRESS: P.O. BOX 3196  
HONOLULU, HAWAII 96801INTERNET:  
lmunger@goodsill.comTELEPHONE (808) 547-5600 • FAX (808) 547-5880  
info@goodsill.com • www.goodsill.com

February 26, 2011

Chair Marcus R. Oshiro  
House Committee on Finance  
Hawaii State Capitol, Room 306  
Honolulu, Hawaii 96813

VIA FACSIMILE: 586-6001

Re: HB 1004, Relating to Chapter 480, Hawaii Revised Statutes  
Hearing on Monday, February 28, 2011 at 12:30 p.m.

Dear Chair Oshiro and Members of the Committee:

My name is Lisa Munger, and I am a partner with Goodsill Anderson Quinn & Stifel. I submit this testimony in **strong opposition** to this measure on my own behalf, not on behalf of any client of the firm. I have practiced in the field of antitrust law since 1978, and I am the author of the Hawaii Chapter of the State Antitrust Practice and Statutes Treatise published by the American Bar Association (3d Edition, 2004).

According to its description, this measure "clarifies antitrust law to reconfirm the right of government entities to bring an action for damages notwithstanding their status as indirect purchasers." This description is not correct. This measure is not a "clarification," it is a change in the law. Current law does not permit government entities to bring actions for damages as indirect purchasers. Hence the last administration submitted this measure last session to change the law to its advantage in then-pending litigation.

While that litigation settled, the problems with this bill remain. If there is to be a change in law to allow government indirect purchaser claims, then the individuals and businesses sued should be afforded the same defenses and protections that are afforded in indirect purchaser cases brought under existing law by private parties. These defenses are shown in my attachment, which is a copy of Hawaii Revised Statutes Section 480-13(c) with the protections of current law highlighted. Without these protections, individuals and businesses are subject to six-fold damages: treble damages paid to direct purchasers and treble damages paid to indirect purchasers. This is just wrong.

I would urge the committee to defer this measure until the Attorney General's Office discusses it with those attorneys in the community who practice in this area. Last session the legislature wisely deferred this measure so that appropriate revisions could be made. As the bill has not been changed to afford the defenses and protections provided under current law, I urge that the measure again be deferred. I regret that I may not be able to testify in person due to a court appearance, but I am happy to discuss this matter with members of the committee.

Very truly yours,

  
Lisa Woods Munger

## ATTACHMENT TO THE TESTIMONY OF LISA MUNGER

§480-13 Suits by persons injured; amount of recovery, injunctions. (a) Except as provided in subsections (b) and (c), any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter:

- (1) May sue for damages sustained by the person, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than \$1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorney's fees together with the costs of suit; provided that indirect purchasers injured by an illegal overcharge shall recover only compensatory damages, and reasonable attorney's fees together with the costs of suit in actions not brought under section 480-14(c); and
  - (2) May bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, the plaintiff shall be awarded reasonable attorney's fees together with the costs of suit.
- (b) Any consumer who is injured by any unfair or deceptive act or practice forbidden or declared unlawful by section 480-2:
- (1) May sue for damages sustained by the consumer, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than \$1,000 or threefold damages by the plaintiff sustained, whichever sum is the greater, and reasonable attorney's fees together with the costs of suit; provided that where the plaintiff is an elder, the plaintiff, in the alternative, may be awarded a sum not less than \$5,000 or threefold any damages sustained by the plaintiff, whichever sum is the greater, and reasonable attorney's fees together with the costs of suit. In determining whether to adopt the \$5,000 alternative amount in an award to an elder, the court shall consider the factors set forth in section 480-13.5; and
  - (2) May bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, the plaintiff shall be awarded reasonable attorney's fees together with the costs of suit.
- (c) The remedies provided in subsections (a) and (b) shall be applied in class action and de facto class action lawsuits or proceedings, including actions brought on behalf of direct or indirect purchasers; provided that:

- (1) The minimum \$1,000 recovery provided in subsections (a) and (b) shall not apply in a class action or a de facto class action lawsuit;
- (2) In class actions or de facto class actions where both direct and indirect purchasers are involved, or where more than one class of indirect purchasers are involved, a defendant shall be entitled to prove as a partial or complete defense to a claim for compensatory damages that the illegal overcharge has been passed on or passed back to others who are themselves entitled to recover so as to avoid the duplication of recovery of compensatory damages;
- (3) That portion of threefold damages in excess of compensatory damages shall be apportioned and allocated by the court in its exercise of discretion so as to promote effective enforcement of this chapter and deterrence from violation of its provisions;
- (4) In no event shall an indirect purchaser be awarded less than the full measure of compensatory damages attributable to the indirect purchaser;
- (5) In any lawsuit or lawsuits in which claims are asserted by both direct purchasers and indirect purchasers, the court is authorized to exercise its discretion in the apportionment of damages, and in the transfer and consolidation of cases to avoid the duplication of the recovery of damages and the multiplicity of suits, and in other respects to obtain substantial fairness;
- (6) In any case in which claims are being asserted by a part of the claimants in a court of this State and another part of the claimants in a court other than of this State, where the claims arise out of same or overlapping transactions, the court is authorized to take all steps reasonable and necessary to avoid duplication of recovery of damages and multiplicity of suits, and in other respects, to obtain substantial fairness;
- (7) In instances where indirect purchasers file an action and obtain a judgment or settlement prior to the completion of a direct purchaser's action in courts other than this State, the court shall delay disbursement of the damages until such time as the direct purchaser's suits are resolved to either final judgment, consent decree or settlement, or in the absence of a direct purchaser's lawsuit in the courts other than this State by direct purchasers, the expiration of the statute of limitations, or in such

manner that will minimize duplication of damages to the extent reasonable and practicable, avoid multiplicity of suit, and obtain substantial fairness; and

- (8) In the event damages in a class action or de facto class action remain unclaimed by the direct or indirect purchasers, the class representative or the attorney general shall apply to the court and such funds shall escheat to the State upon showing that reasonable efforts made by the State to distribute the funds have been unsuccessful.
- (d) The remedies provided in this section are cumulative and may be brought in one action. [L 1961, c 190, §11; Supp, §205A-11; HRS §480-13; am L 1969, c 108, §1; am L 1974, c 33, §1; am L 1980, c 69, §3; gen ch 1985; am L 1987, c 274, §4; am L 1998, c 179, §2; am L 2001, c 79, §1; am L 2002, c 229, §3; am L 2005, c 108, §3]