

SB1231

Measure Title: RELATING TO CHAPTER 480, HAWAII REVISED STATUTES.

Report Title: Antitrust

Description: Clarifies antitrust law to reconfirm the right of government entities to bring an action for damages notwithstanding their status as indirect purchasers.

Companion: HB1004

Package: Gov

Current Referral: CPN, JDL



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

ON THE FOLLOWING MEASURE:

S.B. NO. 1231, RELATING TO CHAPTER 480, HAWAII REVISED STATUTES.

BEFORE THE:

SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

DATE: Wednesday, February 9, 2011 **TIME:** 8:30 a.m.

LOCATION: State Capitol, Room 229

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

Chair Baker 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.