

STAND. COM. REP. NO. 830

Honolulu, Hawaii

March, 2009

RE: H.B. No. 1031

Honorable Calvin K.Y. Say
Speaker, House of Representatives
Twenty-Fifth State Legislature
Regular Session of 2009
State of Hawaii

Sir:

Your Committee on Finance, to which was referred H.B. No. 1031 entitled:

"A BILL FOR AN ACT RELATING TO CHAPTER 480, HAWAII REVISED STATUTES,"

begs leave to report as follows:

The purpose of this bill is to improve Hawaii's antitrust laws by clarifying:

- (1) The ability of government entities to bring an action based on unfair methods of competition and unfair or deceptive acts or practices;
- (2) The right of government entities to bring an antitrust action for damages notwithstanding their status as indirect purchasers; and
- (3) That any civil action or proceeding authorized under Hawaii's antitrust laws may be brought in any appropriate court, and not only the court in the circuit where the defendant resides, does business, or has an agent.

The Department of the Attorney General supported this bill.



As affirmed by the record of votes of the members of your Committee on Finance that is attached to this report, your Committee is in accord with the intent and purpose of H.B. No. 1031 and recommends that it pass Third Reading.

Respectfully submitted on
behalf of the members of the
Committee on Finance,


MARCUS R. OSHIRO, Chair



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

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

18 ~~(b)]~~, whether direct or indirect. The attorney general may
19 bring an action on behalf of the State[~~, any county,~~] or any of
20 its political subdivisions or governmental agencies to recover
21 the damages provided for by this section, or by any comparable
22 provisions of federal law.

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

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

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

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 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 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," 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.

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 ten 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.



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

ON THE FOLLOWING MEASURE:

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

BEFORE THE:

SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

DATE: Wednesday, March 18, 2009 **TIME:** 9:00 AM

LOCATION: State Capitol, Room 229

TESTIFIER(S): Mark J. Bennett, 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. 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.