

HB

225

STATE OF ALASKA

DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

Frank H. Murkowski, Governor

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April 17, 2003

Representative Lesil McGuire
House Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, AK 99801

Re: HB 225 – “An act relating to certain civil actions brought by the attorney general under monopoly and restraint of trade statutes; relating to the award of damages in actions brought under those statutes”

Dear Representative McGuire:

I am writing to request that you schedule HB 225 for a hearing at your earliest convenience. This bill has passed out of the House Special Committee on Economic Development International Trade and Tourism.

This bill updates the Alaska antitrust statutes consistent with recent United States Supreme Court precedent to provide a statutory basis for the attorney general to bring a parens patriae action on behalf of state businesses, residents, and governmental entities as indirect purchasers for violations of antitrust statutes and to recover damages. In contrast to other states, under current Alaska antitrust statutes, indirect purchasers are without any remedy for antitrust injuries.

Parens patriae actions typically involve civil actions on behalf of numerous persons and sometimes on behalf of numerous governmental entities. Accordingly, the bill provides for proof of antitrust damages by way of statistical methods consistent with federal law.

The bill also removes the current requirement in the antitrust statutes that any antitrust plaintiff must prove willful conduct before a court may award treble damages.

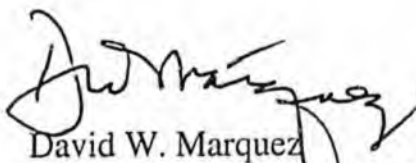
Representative Lesil McGuire
House Judiciary Committee

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If you have any questions about this legislation, please do not hesitate to contact my office.

Sincerely,

GREGG D. RENKES
Attorney General

By: 
David W. Marquez
Assistant Attorney General

DWM:lb

Cc: Mike Tibbles, Legislative Director, Office of the Governor
Deborah Behr, Legislation and Regulations Attorney, Department of Law

SPONSOR STATEMENT

In 1977, the US Supreme Court issued a ruling in a seminal antitrust case called *Illinois Brick Co. v. Illinois*. The case held that federal antitrust laws do not allow "indirect purchasers" to recover damages from "upstream" antitrust violators. The Court further held, however, that states are free to formulate their own public policy on the issue of anti trust lawsuits brought on behalf of indirect purchasers. Since the *Illinois Brick* decision, over 30 states have passed laws that allow recovery of damages by indirect purchasers under various state antitrust statutes. This legislation would update Alaska antitrust statutes to allow the Attorney General to bring actions on behalf of indirect purchasers.

An indirect purchaser is a person who does not buy the suspect product directly from the wrongdoer. For example, suppose two drug manufacturers conspire to keep prescription drug prices high. A consumer who buys the drug from a pharmacy is an "indirect purchaser" because the pharmacy has not violated the antitrust laws. Currently, only direct purchasers, such as the distributor who bought directly from the drug manufacturer, have the option to bring suit for antitrust violations like price-fixing. Since these entities rarely pass on the overcharges they recover, indirect consumers don't really benefit from the suit.

This legislation also removes the requirement of proof of willfulness for treble damages, and provides for statistical methods of proof consistent with federal law. This allows the Attorney General to bring antitrust suits on behalf of Alaska's indirect purchasers, under Alaska law in an Alaskan court, rather than federal court.

SECTIONAL ANALYSIS – HB 225 and SB 161

“An Act relating to certain civil actions brought by the attorney general under monopoly and restraint of trade statutes; relating to the award of damages in actions brought under those statutes; and providing for an effective date.”

Section 1. AS 45.50.576 is amended as follows:

Sec. 45.50.576. Suits by persons injured; treble damages.

This section is being modified to remove the requirement that a defendant be found to have acted “willfully” before treble damages can be awarded. Removing this requirement will make this section consistent with other state and Federal antitrust acts. *See* 15 U.S.C. § 15a.

Subsection (b) is modified to remove duplicative language and make the section consistent with the new section added below.

Section 2. AS 45.50 is amended to add a new section as follows:

Sec. 45.50.577. Enforcement by attorney general.

This new section will accomplish several things. Currently, the State of Alaska, through the attorney general, is without authority to bring an action on behalf of consumers for “indirect damages.” Indirect damages are damages that a consumer may suffer because of an antitrust violation that occurred “upstream” from the consumer transaction. For example, when a consumer purchases drugs from a pharmacy, the price may be artificially high because of an illegal deal made between two competing manufacturers. The price increase that results from this illegal agreement is passed down to the wholesaler, then to the distributor, then to the retailer, who finally passes the increase to the consumer.

The entity “directly” harmed in the above scenario is the wholesaler who bought the drugs directly from the manufacturer. Thus, under current antitrust law, the only person who can bring an antitrust action against the manufacturers is the wholesaler, or other persons who bought directly from the manufacturer (some

state agencies make these direct purchases). This rule of law was enunciated in a U.S. Supreme Court decision called *Illinois Brick Co. v. Illinois*. That case left open, however, the opportunity for individual states to enact their own laws that would allow the recovery of these “indirect” damages under state-specific antitrust statutes. In response to this case, several states have enacted such laws, called “*Illinois Brick* repealer” statutes because they repeal the effect of the *Illinois Brick* decision.

Alaska has been involved in several multi-state antitrust actions in the last several years. Ever since the tobacco litigation, states’ attorneys general have cooperated with each other to bring these actions against antitrust violators for various kinds of illegal antitrust conduct. The claims Alaska has been able to assert in these cases, however, are limited to claims on behalf of state agencies that have been directly harmed by the alleged illegal conduct. We have limited and questionable authority to make claims on behalf of consumers for their “indirect purchases” of drugs and other products. For example, Alaska lost out on several hundred thousand dollars in consumer relief recently in the “Vitamins” case. That case involved allegations of illegal contracts between vitamin manufacturers. Alaska was initially excluded from the settlement because we did not have an “*Illinois Brick* repealer.” We eventually received about \$100,000, while other states that had such a statute received about \$1 million.

This section provides that the attorney general can bring an action in superior court in the name of the state, and on behalf of consumers and nonstate governmental entities (which includes municipalities) for the recovery of **both** direct and indirect damages.

Subsections (a) and (b) accomplish the above.

Subsection (c) requires the court to exclude from any monetary award any amount that duplicates amounts that have already been awarded for the same injury. The court can also allocate part of an award to persons who have excluded their claims under subsection (e).

Subsection (d) allows the recovery of costs, full reasonable attorney’s fees, and treble damages if the state is the prevailing party.

Subsections (e) and (f) require publication of the proposed action and an opportunity for a person or governmental entity to elect to be excluded from the action. Any judgment issued in the action precludes claims by anyone who does not elect to be excluded.

Subsection (g) provides that any action brought under this section cannot be dismissed without approval of the court.

Subsection (h) provides that any recovery under this section must be distributed in accordance with court instructions, and requires that everyone on whose behalf the action was brought be given an opportunity to recover the participant's appropriate portion of the proceeds.

Subsection (i) provides that only the attorney general can seek monetary relief for persons who suffer indirect injury sustained by a violation of the antitrust laws.

Section 3. AS 45.50 is amended by adding a new section as follows:

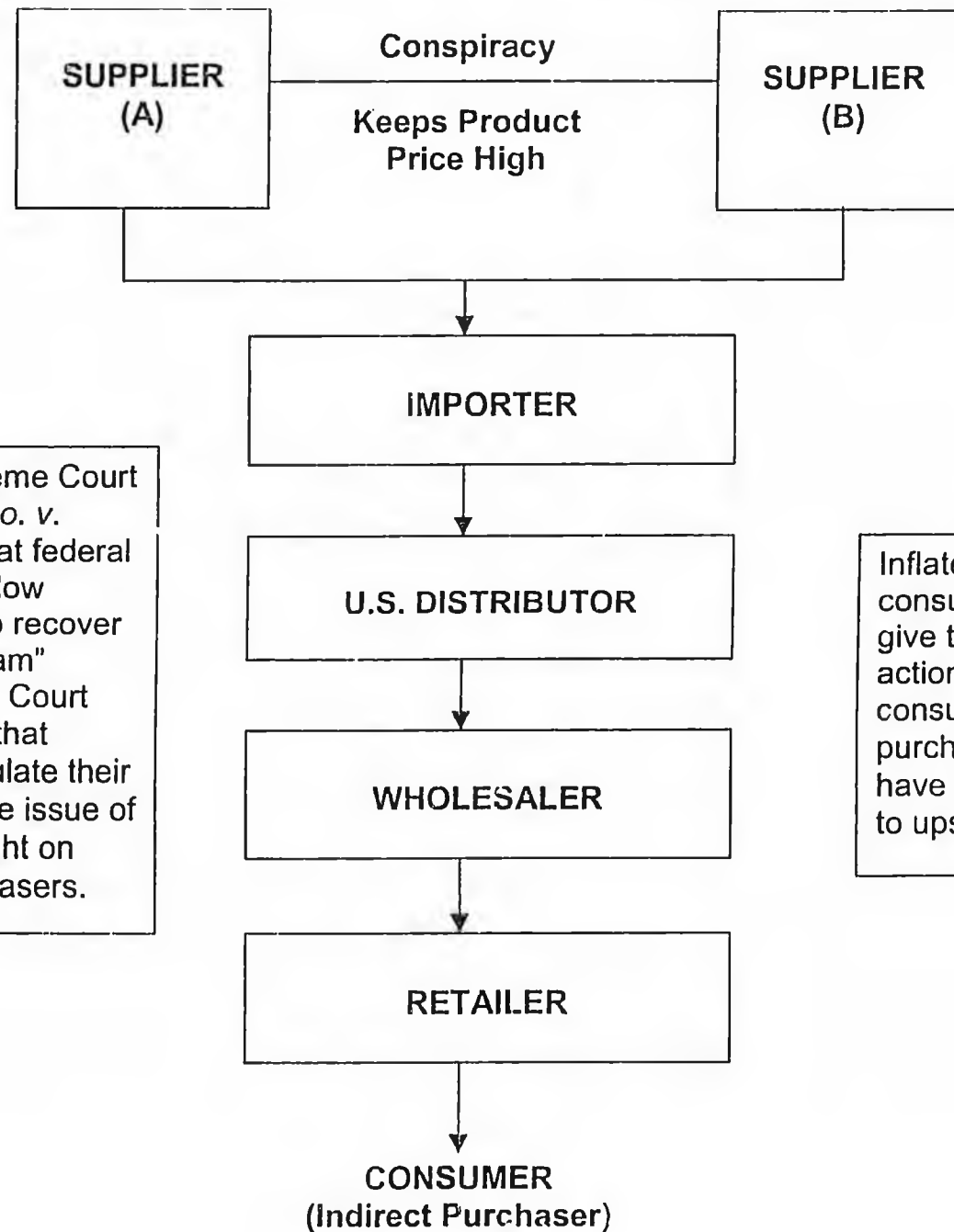
Sec. 45.50.579. Proof of aggregate damages.

This section provides that the attorney general can recover aggregate damages using accepted sampling methods approved by the court.

Section 4. Applicability. AS 45.50.596 is amended as follows:

This section provides that the Act applies to actions occurring on or after the effective date of the Act.

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In 1977 the U.S. Supreme Court decided *Illinois Brick Co. v. Illinois*, which states that federal antitrust laws do not allow "indirect purchasers" to recover damages from "upstream" antitrust violators. The Court further held, however, that states are free to formulate their own public policy on the issue of antitrust lawsuits brought on behalf of indirect purchasers.

Inflated price passed on to consumer. This legislation will give the AG authority to bring actions on behalf of consumers who are "indirect purchasers" of products that have artificially high prices due to upstream antitrust behavior.

FISCAL NOTE

STATE OF ALASKA
2003 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: HB 225
 (H) Publish Date: 3/28/03

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
 Title: "An Act relating to certain civil actions . . .
monopoly and restraint of trade statutes; . . . damages . . ." BRU Civil Division
 Component Fair Business Practices
 Sponsor Rules Committee
 Requester Governor Component No. 2206

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*****	*****	*****	*****	*****	*****

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type-Do not abbreviate)						
TOTAL	*****	*****	*****	*****	*****	*****

Estimate of any current year (FY2003) cost: 0.0
 Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill updates Alaska antitrust statutes consistent with a recent United States Supreme Court precedent to allow the attorney general to bring a cause of action on behalf of both direct and indirect purchasers. Current Alaska statutes allow a cause of action only for purchasers who buy directly from the person or manufacturer that violated antitrust statutes. Because these type of actions typically involve civil actions on behalf of numerous persons and sometimes on behalf of numerous governmental entities, the bill provides for proof of antitrust damages by way of statistical methods consistent with federal law. The bill also removes the current requirement in the antitrust statutes that any antitrust plaintiff must prove willful conduct before a court may award treble damages. Federal law does not have this requirement, encouraging plaintiffs to resolve issues important to Alaska businesses and consumers in federal court, rather than state court.

Costs associated with passage of this bill will depend on the number and complexity of actions brought by the attorney general in any given year, and are too speculative to quantify at this time.

Prepared by: Joan M. Kasson Phone (907) 465-5370
 Division Attorney General's Office Date/Time 1/27/03 8:29 AM
 Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General Date 1/27/2003
 Agency Department of Law