

BILL ANALYSIS

C.S.H.B. 1639
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Business & Industry
Committee Report (Substituted)

BACKGROUND AND PURPOSE

In *Illinois v. Illinois Brick*, 431 U.S. 720 (1977), the United States Supreme Court held that only those entities purchasing directly from antitrust violators may seek to recover damages for harm suffered as a result of an antitrust violation.

In the 31 years since this court decision, approximately 25 states, including California and New York, have passed some form of legislation permitting indirect purchasers to recover for violations of state antitrust law. Approximately 13 additional states, including Florida, permit indirect purchaser recoveries under state-court interpretation of pre-existing statutes, including consumer protection statutes. The Supreme Court upheld state indirect purchaser statutes generally in *California v. ARC America Corp.*, 490 U.S. 93 (1989).

The Texas antitrust statute does not expressly address an indirect purchaser's ability to seek redress. However, the Texas Supreme Court concluded in a 1995 case, *Abbott Laboratories, Inc. v. Segura*, a plaintiff cannot use the Texas Deceptive Trade Practices Act to bring an indirect purchaser damages action for what was essentially an antitrust violation. Texas is virtually alone among large states lacking an indirect purchaser cause of action in antitrust damage actions.

The committee substitute for House Bill No. 1639 creates a right of action on behalf of Texas consumers and governmental entities who have been indirectly injured, i.e., did not purchase directly from the violator, by a violation of the Texas Free Enterprise and Antitrust Act (TFEAA). The bill gives the attorney general the exclusive authority to enforce this right of action. The bill also clarifies the attorney general's authority to represent Texas consumers for direct injury resulting from violation of the TFEAA.

The procedures outlined in C.S.H.B. No. 1639 closely parallel the procedures already followed by the attorney general in federal cases.

Enactment of C.S.H.B. No. 1639 will ensure that damages can be recovered for Texas consumers on par with damages recovered by other states that have adopted such legislation.

RULEMAKING AUTHORITY

It is the opinion of the Committee on Business and Industry that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

SECTION 1. Amends Subchapter C, Chapter 15, Business & Commerce Code by adding Section 15.211. This section provides that the attorney general may bring suit on behalf of a governmental entity and, as *parens patriae*, on behalf of an individual residing in this state for damages incurred directly or indirectly because of a violation of Subsection (a), (b), or (c) of Section 15.05 of the Act. In any suit brought under Subsection (a), the attorney general is required to give public notice of the suit or notice to affected individuals as required by the court. An individual may elect to be excluded from the suit under certain conditions. The damages awarded in a suit brought by the attorney general on behalf of an individual shall be distributed to ensure that each individual has a reasonable opportunity to secure a fair share of the damages. In a suit in which claims are asserted against a defendant by both the attorney general on behalf of indirect purchasers and by direct purchasers, the court, on the defendant's motion, shall take all necessary steps to avoid duplicate liability for the same injury.

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SECTION 2. Transition provision.

SECTION 3. Effective date.

EFFECTIVE DATE

Immediately if passed with a vote of two thirds of the members of each house or September 1, 2005.

COMPARISON OF THE SUBSTITUTE TO THE ORIGINAL BILL

- In Section 15.211 (a) the substitute deleted “Subject to this section” and created a new 15.211 (b) (with renumbering of subsections) to make it clear that all the remaining requirements of the Section 15.211 apply only to suits brought under the AG’s *parens patriae* authority.
- Section 15.211 (b)(1) [previously section 15.211 (b)] is the notice provision that has been changed to incorporate “the best practicable notice” language.
- Previous Section 15.211 (d) has been deleted. This provision directed that individuals who did not opt out could not bring own suit while Attorney General suit was pending
- Section 15.211 (b) (3) [previously section 15.211 (e)], which refers to the *res judicata* effect as to claims of any individual who does not opt out as provided in earlier section, has been slightly reworded.
- Section 15.211 (b)(5) [previously section 15.211 (g)], has been reworded to delete “ on defendant’s motion, the court will take all necessary steps” and simply directs the court to avoid imposing duplicate liability on a defendant in the event suits are brought on behalf of both direct and indirect purchasers
- Section 15.211 c) has been added.