

Department of Legislative Services  
Maryland General Assembly  
2017 Session

FISCAL AND POLICY NOTE  
Third Reader

Senate Bill 858

(Senator Smith, *et al.*)

Finance

Economic Matters

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Commercial Law - Maryland Antitrust Act - Indirect Purchasers

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This bill expands the basis for an antitrust cause of action by authorizing a person whose business or property has been injured (or threatened with injury) by an antitrust violation to maintain an action for damages, an injunction, or both, against any person who committed the violation – regardless of whether the injured person dealt *directly or indirectly* with the person who committed the violation. To avoid duplicative liability in an action for damages by an intermediate purchaser or seller in the chain of manufacture, production, or distribution, the bill also allows a defendant to prove (as a complete or partial defense) that all or any part of an alleged overcharge was passed on to a later purchaser or ultimate end user who is also maintaining an action for damages.

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Fiscal Summary

**State Effect:** The bill does not materially affect State finances or operations.

**Local Effect:** The bill does not materially affect local government finances or operations.

**Small Business Effect:** Potential meaningful.

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Analysis

**Current Law/Background:**

*Civil Actions under Maryland Antitrust Act*

Under Maryland law, a person whose business or property has been injured or threatened with injury by a violation of the State's antitrust provisions may maintain an action for

damages, an injunction, or both against any person who committed the violation. The United States, the State, or any of the State's political subdivisions may bring an action, regardless of whether it dealt directly or indirectly with the person who violated the State's antitrust provisions. In an action for damages, the defendant may, in order to avoid duplicative liability, prove that all or part of the alleged overcharge was passed on to the plaintiff by an intermediate purchaser or seller. The Attorney General may sue on behalf of the State, any of its political subdivisions, or on behalf of persons residing in the State to recover damages provided under State or federal antitrust provisions. An action brought on behalf of a person residing in the State is presumed superior to any class action brought on behalf of the same persons.

If the court in a State antitrust suit issues an injunction, the plaintiff is entitled to costs and reasonable attorney's fees. If damages are awarded, the plaintiff is entitled to triple damages, with costs and attorney's fees.

A final judgment or decree in a prior criminal proceeding or civil action brought by the State that concludes that the defendant violated the Maryland Antitrust Act is *prima facie* evidence against the defendant in an action for damages brought by another party.

State law allows a person to bring a suit under the Maryland Antitrust Act within four years of when the cause of action accrues, based on the latest violation alleged. However, if the State commences a criminal proceeding concerning the underlying violation, a plaintiff may bring a civil cause of action within one year after the criminal proceeding has concluded, or within four years after the cause of action accrues, whichever is later.

#### *Indirect Purchasers and Antitrust Violators*

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the U.S. Supreme Court held that indirect purchasers may not recover from the antitrust violator under federal antitrust laws. Further, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the court rejected the defense that indirect rather than direct purchasers were the parties injured by the antitrust violation. However, in *California v. ARC America Corp.*, 490 U.S. 93 (1989), the court held that federal antitrust law did not preempt state antitrust laws. Therefore, states are free to authorize suits by indirect purchasers if they so desire. In Maryland, generally, only governmental entities may recover damages as indirect purchasers.

#### *Maryland Antitrust Act*

The Maryland Antitrust Act is designed to promote fair and honest competition, free of conspiracies, combinations, or agreements which unreasonably restrain trade or commerce. The State's antitrust laws are complementary to the federal Sherman Antitrust Act,

contained in 15 U.S.C. §§ 1, *et seq.* The General Assembly has expressed its intent that, in construing the Maryland Antitrust Act, the courts be guided by the interpretation given by the federal courts to the federal statutes dealing with the same or similar matters. (See Commercial Law Article § 11-202.)

Under the State's antitrust laws, a person is prohibited from unreasonably restraining trade or commerce by contract, combination, or conspiracy. A restraint of trade or commerce is interference with the ordinary, usual, and free competitive pricing or distribution of goods or services in an open market. A restraint of trade is unreasonable if it tends to restrict production, raises prices, or otherwise control the market to the detriment of sellers, purchasers, or consumers of goods or services.

Some practices or agreements are *per se* unreasonable restraints of trade by their very nature and are illegal without any inquiry as to their harm, due to the adverse effect they have on competition and trade. Horizontal restraints, such as agreements between competitors to fix, stabilize, raise, or lower the price of goods or services are *per se* violations of State and federal antitrust law. Prior to a line of U.S. Supreme Court decisions beginning in 1977, all vertical resale restraints, such as a restraint imposed by a supplier on its franchisees, were treated as *per se* antitrust violations.

In June 2007, the U.S. Supreme Court held in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 887 (2007), that minimum vertical price fixing, also known as minimum resale price maintenance, should be examined under the "rule of reason standard," rather than the *per se* standard in determining a violation of Section 1 of the Sherman Antitrust Act. The rule of reason standard is a more difficult standard for a plaintiff in an antitrust case to meet. To prevail under the rule of reason standard, the plaintiff must prove the defendant's restraint has a substantial adverse effect on competition in the "relevant market."

**Small Business Effect:** Because the bill allows businesses that are indirect purchasers to maintain actions against violators of the Maryland Antitrust Act, such businesses may be able to recover damages under the bill that would not otherwise be recoverable.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** HB 1415 (Delegate Anderson) - Economic Matters.

**Information Source(s):** Office of the Attorney General; Judiciary (Administrative Office of the Courts); Department of Legislative Services

**Fiscal Note History:** First Reader - March 7, 2017  
md/kdm Third Reader - March 21, 2017

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