

Department of Legislative Services  
Maryland General Assembly  
2004 Session

**FISCAL AND POLICY NOTE**

**Revised**

Senate Bill 470

(Senator Grosfeld, *et al.*)

Finance

Judiciary and Health and Government Operations

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**Civil Actions - Defenses - Sales of Food, Drugs, Cosmetics, and Other Health-Related Products**

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This bill provides that a person that sells, distributes, or otherwise disposes of any drug, medicine, cosmetic, food, food additive, commercial feed, or medical device may not, in an action brought under the State's antitrust laws, assert as a defense that the person did not deal directly with the plaintiff. To avoid duplicative damages, the bill allows a seller or distributor to prove, as a complete or partial defense, that all or part of an alleged overcharge was passed on to another person who paid that overcharge.

The bill applies prospectively only to cases brought on or after the October 1, 2004 effective date.

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**Fiscal Summary**

**State Effect:** The bill's changes could be handled with existing budgeted resources of the Antitrust Division of the Office of the Attorney General.

**Local Effect:** None.

**Small Business Effect:** Meaningful.

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**Analysis**

**Current 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

U.S., 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 or any of its political subdivisions to recover damages provided under State or federal antitrust provisions.

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

**Background:** In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the 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 response to the *ARC America* decision, 27 states and the District of Columbia have authorized indirect purchasers to sue violators of state antitrust laws. Five states, including Maryland, have authorized only governmental entities to recover as indirect purchasers. Other states allow indirect purchasers to recover damages caused by overcharging under other legal theories.

**Small Business Effect:** Small businesses that sell products covered by this bill, including pharmacies, health care providers, and health food stores, could bring actions as indirect purchasers and recover triple damages under the State's antitrust laws.

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### **Additional Information**

**Prior Introductions:** Two bills that would have allowed all "indirect" purchasers to sue for alleged violations of the State's antitrust laws were introduced in 2001. SB 484 was referred to the Senate Budget and Taxation Committee, but no further action was taken. HB 1118 received a hearing before the House Appropriations Committee, but no further action was taken.

**Cross File:** None.

**Information Source(s):** Department of Health and Mental Hygiene, Office of the Attorney General, Department of Legislative Services

**Fiscal Note History:** First Reader - February 25, 2004  
mam/jr Revised - Senate Third Reader - April 9, 2004

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