

**Testimony of David A. Balto
Before the Maryland Senate
Finance Committee**

Senate Bill 858

March 15, 2017

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Chairman Middleton, Vice-Chair Astle, and other distinguished members of the Finance Committee, thank you for the opportunity to testify on S.B. 858. I testify in support of this legislation, which would enable Maryland consumers who have been harmed by anticompetitive conduct resulting in overcharges or other competitively harmful conduct to recover damages from the firm even if the consumer purchased from a middleman; and would allow the Maryland Attorney General to sue on these consumers' behalf for overcharges in any industry. As I detail in my testimony, there is a gap in effective antitrust enforcement because "indirect purchasers," i.e., consumers who purchase from a middleman, cannot recover damages. Under current law consumers cannot recover damages when they do not directly purchase from the wrongdoer. This legislation will permit these indirect purchaser suits and bring Maryland law in line with over 30 other states that permit these indirect purchaser suits.

My testimony today is based on over 30 years of experience as an antitrust practitioner, the majority of which I spent as a trial attorney in the Antitrust Division of the Department of Justice and in several senior management positions including Policy Director of the Federal Trade Commission and attorney advisor to Chairman Robert Pitofsky. I have represented both plaintiffs (consumers) and defendants in indirect purchaser antitrust litigation. I have experienced first-hand the benefits indirect purchaser statutes can have on deterring problematic competitive conduct including cartels overcharging consumers and states.¹

The message is simple: this legislation will protect consumers and the State by giving both consumers and the Attorney General the ability to recover damages from those who violate the antitrust laws in the state of Maryland. The current state of the law harms Maryland consumers and the state by denying them the ability to recover damages where the consumers do not purchase directly from the wrongdoer.

My testimony explains why the legislation is essential for the full protection of Maryland's antitrust laws:

- Current law creates a significant gap in antitrust enforcement;
- Thirty-six (37) states and the District of Columbia permit these types of indirect purchaser suits;
- Consumers are suffering significant economic harm from anticompetitive practices that cannot be addressed because of the gap in current law: and
- The Congressionally appointed, bipartisan Antitrust Modernization Commission, after carefully evaluating all the policy arguments concluded in 2007 that this type of legislation is essential to protect consumers.

¹ This testimony represents my own views and not necessarily the views of any former, current or future clients.

S.B. 858 allows the Attorney General to bring *parens patriae* cases on behalf of consumers as indirect purchasers in any industry.

Before MD. Code Ann. Com. Law § 11-209 was enacted, the law prevented the state or harmed indirect purchasers to sue cartels and other bad actors unless it (or its agents) were direct purchasers of the wrongdoers. The law expanded the Attorney General's ability to bring suit against cartels whether consumers were direct or indirect purchasers in the following industries: food, drugs, medical equipment, cosmetics and commercial (animal) feed. However, under current state law, only the Attorney General and not consumers can bring indirect purchaser suits.

Since the passage of Maryland's law, the State has brought several *parens patriae* cases on behalf of indirect purchasers, for example in the drug market, which have resulted in substantial benefits to the States and consumers. But under current law, Maryland's ability to bring such cases is limited of course to the specific industries mentioned above.² For example, the Attorney General was a plaintiff in the *Ticor* case,³ in which 23 states and the District of Columbia representing indirect purchaser consumers alleged numerous drug companies blocked generic drug manufacturers from breaking into the market for cholesterol drug TriCor by filing meritless patent infringement suits. The case resulted in a \$22.5 million settlement, which was split among plaintiff states. And the Maryland Attorney General is currently litigating the *Suboxone* case.⁴ In that case 42 states and the District of Columbia allege an unlawful product-hopping and sham petition scheme by defendants in which defendants aimed to prevent or delay less expensive generic versions of Suboxone from entering the market to preserve their monopoly profits from the sale of Suboxone. Because of the exemption to sue on behalf of consumers for drug purchases, the state has benefited and will continue to benefit from pursuing these damages (and disgorgement in the case of *Suboxone*).

While the current law has benefitted consumers in allowing the Attorney General to bring indirect purchaser antitrust cases, its limitations are causing it to miss out on damages that other states are able to recover. For example, indirect purchaser laws of other states have totaled recoveries in the billions of dollars.⁵ This includes a \$355 million settlement payout by the vitamin cartel a few years ago to settle private class actions and *parens patriae* cases brought by 24 states' attorneys general. The multidistrict lawsuit alleged antitrust violations against a cartel of six vitamin manufacturer that inflated vitamin prices in violation of federal and state antitrust laws. States attorneys general represented classes of consumer and commercial indirect purchasers to whom the overcharge for vitamins was passed on in the form of artificially high prices for products containing vitamins. Moreover, if Maryland's law extended to all industries

² Judge Phyllis Hamilton dismissed Maryland's indirect purchaser claims in *In Re Dynamic Random Access Memory Antitrust Litigation*, Case No. 02-md-01486 (N.D.Cal.)(motion to dismiss, Sept. 2007), finding that Maryland could not bring indirect purchaser claims under their own antitrust and consumer protection statutes. Maryland missed out on the opportunity to share in a \$310 million settlement by indirect purchasers, as described more fully below.

³ *State of Florida et al. v. Abbot Laboratories et al.*, Case No. 08-cv-00155 (D.Del).

⁴ *State of Wisconsin et al. v. Indivior Inc. f/k/a Reckitt Benckiser Pharmaceuticals, Inc. et al.*, Case No. 16-cv-5073 (E.D.Pa.).

⁵ For examples of specific industries and cases which Maryland was unable to participate in due to the limitations in current law see written testimony of John R. Tennis, Office of the Maryland Attorney General, before this committee (March 15, 2017).

there could have been a possibility of its participation in the multidistrict indirect purchaser DRAM suit, in which large technology firms in 2013, including Samsung and Toshiba, agreed to pay \$310 million to settle a series of class actions over anti-competitive conduct in the dynamic random-access memory market.⁶

It is time for Maryland law to adopt the approach of the vast majority of other states. 37 states and the District of Columbia have some form of indirect purchaser statute, which allow them to recover damages on behalf of the state and its consumers.⁷ Expanding the law for the State to pursue indirect purchaser claims on behalf of consumers in any industry will only serve to benefit residents of the state of Maryland.

The law should be amended to permit indirect purchasers to bring suit in their own right.

S.B. 858 expands existing law to allow consumers to bring suit and ultimately recover for damages when they are aggrieved or overcharged, even if they are an indirect purchaser. Consumers in the majority of states already have that right. That makes sense.. After all the consumer is usually the one who suffers the most harm from unlawful cartel pricing.⁸

One may ask if the direct purchaser is being overcharged why is it not simply sufficient for the direct purchaser to bring suit? The answer is that while the middleman (or the direct purchaser) can sue a firm for overcharges, it rarely does. That is because the middlemen will generally pass any overcharges on to the end purchaser, the consumer.⁹ Because they can pass on the higher prices, middlemen then often go unharmed by price fixing since they are ultimately not the party bearing the overcharge. Additionally, middlemen often have to deal with the same supplier in the future who is fixing prices so the risk of angering their supplier is often a deterrent to a lawsuit.¹⁰ If only direct purchasers are permitted to sue for damages, then the purchasers – usually the indirect purchasers -- that ultimately absorbed the overcharges from an antitrust violation will remain uncompensated.

The intent of the antitrust laws are to protect consumers.¹¹ As consumers are the most aggrieved parties as the ultimate bearer of the anticompetitive overcharges in the market, they should have the option to bring suit in these instances.

⁶ *In Re Dynamic Random Access Memory Antitrust Litigation*, Case No. 02-md-01486 (N.D.Cal.).

⁷ Mark Lemley and Christopher Leslie, *Antitrust Arbitration and Illinois Brick*, 100 Iowa L. Rev. 2115 (2015).

⁸ 2 Phillip E. Areeda, Herbert Hovenkamp & Roger D. Blair, *Antitrust Law* 15, at 740 (2d ed. 2000) (Indirect Purchaser statutes “rest on the assertion that the policy of *Illinois Brick* is unfair because it gives a windfall to direct purchasers and denies any recovery to indirect purchasers, particularly consumers, who may have suffered most of the harm.”).

⁹ Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 Harv. L. Rev. 1717, 1726 (1990) (“In general, it appears that more of the monopoly overcharge is passed on than absorbed.”).

¹⁰ *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) (“We recognize that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers.”).

¹¹ *See Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 530, 530 n.20 (1983) (“The legislative history of the section shows that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets. . . . The original proposal, which merely allowed recovery of the amount of actual

The Congressionally-appointed Bipartisan Antitrust Modernization Commission thoroughly evaluated the policy arguments and concluded this type of legislation was necessary.

There are several policy considerations that have arisen in consideration of indirect purchaser legislation, including whether such legislation is a deterrent to anticompetitive conduct, and whether such legislation allows for duplicate recovery against antitrust defendants.¹² These issues were thoroughly evaluated and debated by the bipartisan Antitrust Modernization Commission in 2007. Ultimately, the Antitrust Modernization Commission concluded, after substantial analysis in this area, “indirect purchaser litigation [supplements effective antitrust] deterrence.”¹³ The current law allowing limited indirect purchaser plaintiff status by the Attorney General coupled with the ability of any direct purchaser to bring suit may act as a partial deterrent to anticompetitive conduct; however, indirect purchaser lawsuits and state *parens patriae* actions will strengthen that deterrent. As the Antitrust Modernization Commission reported, indirect purchasers can bring actions in circumstances in which direct purchasers choose not to sue, for example, to avoid injuring business relationships with suppliers.¹⁴ Moreover, data presented to the Commission on this issue showed that indirect purchaser suits can provide additional deterrence by increasing the liability faced by violators.¹⁵ It seems logical that adopting S.B. 858 will only serve to additionally deter anticompetitive conduct against Maryland residents and consumers.

One of the main policy considerations across states concerning indirect purchaser legislation is that such legislation involves the potential for duplicative recoveries.¹⁶ The concern is indirect purchaser litigation exposes defendants to duplicative recoveries, meaning the direct purchaser recovers for treble damages for the overcharge as they are entitled under the antitrust laws, and indirect purchasers also recover for treble the amount of the overcharges direct purchasers pass downstream. However, the legislation does not permit duplicative recoveries. In fact, the current law contains a provision which S.B. 858 keeps intact that prevents duplicative recoveries against the same defendant. As a result, such concern is not present here and it does not need to be a consideration by the legislature.

Conclusion

S.B. 858 comports with the vast majority of states who have enacted indirect purchaser legislation. Such legislation is vital to Maryland consumers as it will allow individual recovery for overcharges based on anticompetitive conduct. Consumers ultimately shoulder overcharges

enhancement in price, was successively amended to authorize double-damages and then treble-damages recoveries, in order to provide otherwise remediless small consumers with an adequate incentive to bring suit. . . .”).

¹² See, generally, Antitrust Modernization Commission: Report and Recommendations (2007), available at http://www.law.nyu.edu/sites/default/files/upload_documents/AMC_Final_Report.pdf.

¹³ Id. at 273.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id. at 274.

which are often passed downstream by direct purchasers who often do not have incentive to bring lawsuits against firms violating the antitrust laws. As the Antitrust Modernization Commission found, “federal *Illinois Brick/Hanover Shoe* policy provides a ‘windfall’ to purchasers who have passed on an overcharge, while depriving any recovery at all to purchasers who actually bear the overcharge. Such a system that compensates the uninjured and denies recovery to the injured seems fundamentally unfair.”¹⁷ The Committee should recommend this legislation should be passed by the House and Senate.

I look forward to answering your questions.

¹⁷ Id at vi.