

SUBJECT: Suits on behalf of those injured by unlawful practices in restraint of trade

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 5 ayes — Giddings, Elkins, Darby, Bailey, Bohac

0 nays

2 present not voting — Castro, Martinez

2 absent — Solomons, Zedler

WITNESSES: For — (*Registered, but did not testify*: Beth O'Brien, Public Citizen)

Against — None

On — Scott Ozmun, Texas Trial Lawyers Association; Tommy Prud'homme, Texas Attorney General

BACKGROUND: In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the U.S. Supreme Court generally held that only overcharged direct purchasers, and not subsequent indirect purchasers, are entitled to recover damages from companies found engaging in price-fixing and in violation of federal antitrust laws.

A decade later, the U.S. Supreme Court revisited the holding of *Illinois Brick Co.* and held that the rule limiting federal antitrust recoveries to direct purchasers did not prevent indirect purchasers from recovering damages flowing from state antitrust law violations (*California v. ARC America Corp.*, 490 U.S. 93 (1989)).

Since the court's decision in *Illinois Brick Co.*, approximately 25 states, including California, Florida, and New York, have enacted legislation permitting indirect purchasers to recover damages in cases of antitrust violations. Texas has not yet established a cause of action for these cases.

Business and Commerce Code, sec. 15.05 states that every contract, combination, or conspiracy in restraint of trade or commerce is unlawful.

DIGEST:

CSHB 1662 would amend the Business and Commerce Code to allow the attorney general to bring suit on behalf of a governmental entity, as *parens patriae* or in the care of the state, or on behalf of an individual residing in Texas for damages occurred directly or indirectly because of an unlawful business practice in restraint of trade under Business and Commerce Code, sec. 15.05.

In any suit brought by the attorney general as *parens patriae*, the attorney general would have to give the best practicable notice by any means necessary to give due process of law to affected individuals. An individual on whose behalf the attorney general brought suit could elect to be excluded from the suit by providing a notice of the individual's election to opt out with the presiding court or by filing a separate individual action in the applicable district court. Notice would include the date by which the individual would have to elect to be excluded.

Damages awarded in a final judgment would be distributed to ensure that each individual had a reasonable opportunity to secure a fair share. If the attorney general asserted more than one claim against substantially the same conduct of the defendant, the court would have to avoid imposing duplicate damages for the same injury.

The rights under the bill only would apply to the attorney general and would not abolish a right of another person, including another governmental entity, to sue on its own behalf.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2007, and would apply only to a suit arising out of an injury that an individual suffered on or after that date.