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No. 91393-5

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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SANDRA C. THORNELL,

Respondent,

v.

SEATTLE SERVICE BUREAU, INC.,  
d/b/a NATIONAL SERVICE BUREAU, INC., and  
STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Appellants.

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**APPENDIX OF LEGISLATIVE  
HISTORY PROVIDED BY  
APPELLANT  
STATE FARM MUTUAL  
AUTOMOBILE INSURANCE  
COMPANY'S RESPONSE TO  
PLAINTIFF'S AMICUS BRIEFS**

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Judiciary Committee

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SSB 5228

**Title:** An act relating to actions under chapter 19.86 RCW, the consumer protection act.

**Brief Description:** Revising provisions concerning actions under the consumer protection act.

**Sponsors:** Senate Committee on Judiciary (originally sponsored by Senators Kline, McCaslin and Weinstein; by request of Attorney General).

**Brief Summary of Substitute Bill**

- Allows the Attorney General to sue on behalf of indirect purchasers of goods or services sold in violation of the Unfair Business Practices - Consumer Protection Act.

**Hearing Date:** 3/23/07

**Staff:** Bill Perry (786-7123).

**Background:**

Under the state's Unfair Business Practices - Consumer Protection Act (CPA), various business practices are declared unlawful. These practices include:

- engaging in unfair methods of competition and unfair or deceptive acts or practices in the conduct of commerce, including contracts, trusts or conspiracies in restraint of trade;
- monopolizing or attempting to monopolize trade;
- entering agreements not to purchase from the competitors of a particular seller when the agreement substantially lessens competition or tends to create a monopoly; and
- acquiring corporate stock when the acquisition substantially lessens competition or tends to create a monopoly.

Several statutes elsewhere in the code also declare violations of their provisions to be violations of the CPA.

A party injured by a violation of the CPA may bring an action for damages. Recovery may include the trebling of actual damages (not to exceed \$10,000 for some violations) and reasonable

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

attorneys' fees. For some violations, civil penalties of up to \$100,000 in the case of an individual, and up to \$500,000 in the case of a corporation, may also be imposed. A civil penalty of up to \$2,000 per violation may be imposed for each violation amounting to an unfair method of competition or an unfair or deceptive act in the conduct of commerce. In addition, the Attorney General may bring an action to restrain a person from violating the CPA.

The CPA's grant of authority to the Attorney General is expressly for the purposes of bringing an action "in the name of the state." Such an action by the Attorney General may seek to prevent or restrain violations of the act and may seek restoration for persons injured by violation of the CPA. As an outgrowth of federal court rulings, a question has arisen as to whether the authority of the Attorney General extends to bringing an action for a CPA violation on behalf of persons who are themselves "downstream" or "indirect" purchasers of goods or services. An example of an indirect purchaser might be the ultimate consumer of a product that was bought from a retailer who bought from a producer who violated the act. The retailer would be the direct purchaser, and the consumer would be the indirect purchaser of the product.

The U.S. Supreme Court in *Illinois Brick Co v. Illinois*, 431 U.S. 720 (1977), held that under federal antitrust law, indirect purchasers may not bring an action. Only a party who directly purchases from the violator can sue. However, *Illinois Brick* left open the possibility of states enacting their own laws to allow indirect purchasers to sue for unfair business practices. Many states have enacted so-called "Illinois Brick Repealer" laws. Some of these laws allow an indirect purchaser to bring a suit directly, while others allow such suits only when brought by the Attorney General on behalf of the indirect purchasers.

Washington has not enacted an "Illinois Brick Repealer." However, based in part on dicta from the state Court of Appeals decision in *Blewett v. Abbott Laboratories*, 86 Wn. App 782 (1997), the state Attorney General has brought suits on behalf of indirect purchasers under the common law doctrine of *parens patriae*. In *Blewett v. Abbott Laboratories*, while the court rejected a CPA suit by indirect purchasers by citing *Illinois Brick*, the court noted that some of the CPA's restrictive language with respect to suits brought by indirect purchasers does not extend to suits brought by the Attorney General. The common law *parens patriae* doctrine allows the state to bring legal actions or seek remedies on behalf of individuals in order to protect them from harm. The Attorney General reports, however, that in at least one multistate case, a federal judge has rejected the Attorney General's attempts to sue on behalf of indirect purchasers.

### **Summary of Bill:**

The Attorney General is given explicit authority to bring *parens patriae* actions under the CPA on behalf of persons residing in the state.

In cases in which the Attorney General has brought an antitrust action under the CPA, the court is authorized to order restoration for an injured party regardless of whether the injury was the result of a direct or indirect purchase of goods or services.

The ability of the state itself to sue for damages under the CPA is expressly made applicable to cases in which the state is indirectly injured by an antitrust violation of the act.

Courts are required to prevent duplicate recoveries for a single CPA violation and are encouraged to consolidate cases where practicable.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of session in which bill is passed.

# SENATE BILL REPORT

## SB 5228

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As Reported By Senate Committee On:  
Judiciary, February 20, 2007

**Title:** An act relating to actions under chapter 19.86, the consumer protection act.

**Brief Description:** Protecting indirect purchasers for injuries arising from state antitrust law violations.

**Sponsors:** Senators Kline, McCaslin and Weinstein; by request of Attorney General.

**Brief History:**

**Committee Activity:** Judiciary: 1/31/07, 2/20/07 [DPS, DNP].

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### SENATE COMMITTEE ON JUDICIARY

**Majority Report:** That Substitute Senate Bill No. 5228 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kline, Chair; Tom, Vice Chair; McCaslin, Ranking Minority Member; Murray and Weinstein.

**Minority Report:** Do not pass.

Signed by Senator Carrell.

**Staff:** Dawn Noel (786-7472)

**Background:** Under the state's Unfair Business Practices - Consumer Protection Act (CPA), various business practices are declared unlawful. These practices include engaging in monopoly, and the restraint of trade or competition.

The Attorney General may bring an action to restrain a person from violating the CPA. An action by the Attorney General may seek to prevent violations of the act and may seek relief for persons injured by violation of the CPA. As a result of a federal court ruling, a question has arisen as to whether the Attorney General is authorized to bring an action for a CPA violation on behalf of persons who are "indirect purchasers" of goods or services. An example of an indirect purchaser might be the ultimate consumer of a product that was bought from a retailer who bought from a producer who violated the act. The retailer would be the direct purchaser, and the consumer would be the indirect purchaser of the product.

Many states have enacted laws that allow an indirect purchaser to bring a suit directly, while others allow such suits only when brought by the Attorney General on behalf of the indirect purchasers. Washington has not enacted either type of law. However, based in part on the

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state court of appeals decision in *Blewett v. Abbott Laboratories*, 86 Wn. App 782 (1997), the state Attorney General has brought suits on behalf of indirect purchasers under the common law doctrine of *parens patriae*, which permits the state (literally as "parent of the country") to bring legal actions on behalf of individuals in order to protect them from harm. The Attorney General reports, however, that in at least one multi-state case, a federal judge has rejected the Attorney General's attempts to sue on behalf of indirect purchasers.

**Summary of Bill:** The bill as referred to committee not considered.

**EFFECT OF CHANGES MADE BY RECOMMENDED SUBSTITUTE AS PASSED COMMITTEE (Judiciary):** The Attorney General is given explicit authority to bring *parens patriae* actions under the CPA on behalf of persons residing in the state. In cases in which the Attorney General has brought an action under the CPA for antitrust violations, the court is authorized to order restoration for an injured party regardless of whether the injury was the result of a direct or indirect purchase of goods or services. The ability of the state itself to sue for damages under the CPA is expressly made applicable to cases in which the state is indirectly injured by a violation of the act's antitrust provisions.

Courts are required to (1) exclude from the amount of monetary relief awarded in antitrust actions brought by the Attorney General any amount already awarded for the same violation; and (2) consider consolidating or coordinating related actions to avoid duplicate recovery. The title is broadened to account for the generally applicable *parens patriae* authority conferred upon the Attorney General, which is intended to extend to actions brought based on any violation of the CPA (including consumer protection violations for unfair and deceptive trade practices), not just of its antitrust provisions.

**Appropriation:** None.

**Fiscal Note:** Available.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Staff Summary of Public Testimony:** PRO: This bill would allow the state Attorney General (AG) to bring an action as *parens patriae*, and would allow a court to make additional orders or judgments that are typically ancillary to the usual damages. Based on a federal ruling, the AG now runs the risk of a federal judge disagreeing with a longstanding interpretation which this bill would codify. The AG has brought in \$48 million on behalf of consumers based on this interpretation. Washington is in the small minority of states which has not clarified the availability of indirect purchaser remedies. It is important to restore integrity to the AG to protect citizens and small businesses in Washington.

**Persons Testifying:** PRO: Senator Kline, prime sponsor; Mark Brevard, Attorney General's Office; Larry Shannon, Washington State Trial Lawyers Association.

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Good afternoon.

Attached for filing with the Washington State Supreme Court is State Farm's Response to Plaintiff's Amicus Briefs and an appendix in the above matter.

If I may be of further assistance, please give me a call.

### **Diane Marsh**

#### **Legal Assistant**

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