

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
**KEN HECHLER**  
**ADMINISTRATIVE LAW DIVISION**

Do Not Mark In this Box

FILED

1989 AUG 11 PM 4: 29

OFFICE OF THE SECRETARY OF STATE

Form #3

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE  
AND  
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Attorney General TITLE NUMBER: 142

CITE AUTHORITY W. Va. Code 47-18-20

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 9

TITLE OF RULE BEING PROPOSED: Proposed legislative rule pertaining to allowing persons who are indirectly injured by violations of the West Virginia Antitrust Act to recover damages.

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

David M. Huch

FISCAL NOTE FOR PROPOSED RULES

Proposed legislative rule pertaining to allowing persons  
 Rule Title: who are indirectly injured by violations of the West  
Virginia Antitrust Act to recover damages.

Type of Rule:  X  Legislative   Interpretive   Procedural

Agency Office of the Attorney General Address Antitrust Division,  
812 Quarrier Street, 5th Floor, Charleston, West Virginia 25301

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$	\$	\$	\$	\$
Personal Services	0	0	0	0	0
Current Expense	0	0	0	0	0
Repairs and Alterations	0	0	0	0	0
Equipment	0	0	0	0	0
Other	0	0	0	0	0

2. Explanation of above estimates:

No additional personnel, equipment or facilities will be required to implement the provisions of this rule.

3. Objectives of these rules:

The objective of this rule is to clarify the application of the West Virginia Antitrust Act and allow persons who are indirectly injured by violations of the West Virginia Antitrust Act to recover damages.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

A positive economic impact may be felt since citizens, political subdivisions, and the State and its public bodies may recover for indirect injury suffered as a result of violations of the West Virginia Antitrust Act.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

A positive economic impact may be felt since citizens, political subdivisions, and the State and its public bodies may recover for indirect injury suffered as a result of violations of the West Virginia Antitrust Act.

C. Economic Impact on Citizens/Public at Large.

A positive economic impact may be felt since citizens, political subdivisions, and the State and its public bodies may recover for indirect injury suffered as a result of violations of the West Virginia Antitrust Act.

Date: August 11, 1989

Signature of Agency Head or Authorized Representative

Daniel N. Huch

DATE: August 11, 1989

TO: The Honorable James F. Humpreys  
Chairman, Legislative Rule-Making  
Review Committee

FROM: Charles G. Brown  
Attorney General

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LEGISLATIVE RULE-MAKING REVIEW COMMITTEE  
QUESTIONNAIRE

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LEGISLATIVE RULE TITLE:

Proposed legislative rule pertaining to allowing persons who are indirectly injured by violations of the West Virginia Antitrust Act to recover damages.

1. Authorizing statute citation:

Chapter 47, Article 18, Section 20 of the West Virginia Code of 1931, as amended.

2. a. Date filed in State Register with Notice of Hearing:

July 5, 1989.

b. What other notice, including advertising, did you give of the hearing?

Press releases were distributed to various news agencies announcing the proposed rule and a hearing on the proposed rule.

Legislative Rule-Making  
Review Committee Questionnaire  
Proposed Legislative Rule, 142 C.S.R. Series 9  
August 11, 1989  
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c. Date of hearing:

August 8, 1989.

d. Attach list of persons who appeared at the hearing, comments received, amendments, and reasons for amendments.

No person attended the public hearing. Also, no person not affiliated with the Office of the Attorney General made comments regarding the proposed rule.

e. Date you filed in the State Register the agency approved proposed Legislative Rule following public hearing:

August 11, 1989.

f. Name and telephone number of agency person to contact for additional information:

Daniel N. Huck, Deputy Attorney General, or Robert William Schulenberg III, Senior Assistant Attorney General, Antitrust Division, Office of the Attorney General, 812 Quarrier Street, Fifth Floor, Charleston, West Virginia 25301.

Telephone: (304) 348-0246.

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

Not applicable.

b. Date of hearing:

Not applicable.

Legislative Rule-Making  
Review Committee Questionnaire  
Proposed Legislative Rule, 142 C.S.R. Series 9  
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- c. On what date did you file in the State Register the findings and determinations required together with the reasons therefore?

Not applicable.

- d. Attach the findings and determinations and reasons:

Not applicable.

TITLE 142  
WEST VIRGINIA LEGISLATIVE RULE  
ATTORNEY GENERAL  
SERIES 9

Title: Proposed legislative rule pertaining to allowing persons who are indirectly injured by violations of the West Virginia Antitrust Act to recover damages.

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SUMMARY OF PROPOSED LEGISLATIVE RULE AND  
STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE

The Antitrust Division of the Office of the Attorney General is promulgating a rule designed to allow any person who has been injured directly or indirectly as a result of anticompetitive activities violative of the West Virginia Antitrust Act, Chapter 47, Article 18, Section 1 et seq. of the West Virginia Code of 1931, as amended, to recover provable damages.

The rule is divided into two sections. The first section, entitled "General," addresses the scope, authority, filing date, effective date, construction, and severability of the rule. The second section, entitled "Damages Recoverable by Persons Indirectly Injured," allows any person (whether a natural person, business, or governmental unit or body) who may have suffered injury as a result of anticompetitive injury by violations of the West Virginia Antitrust Act to recover proven damages.

The need for this rule is underscored by several years of active or proposed litigation by the State of West Virginia under state and federal antitrust law which has resulted in an inability to assure maximum restitution to individual persons or governmental bodies who have suffered injury as a result of anticompetitive activities. Further, the rule is necessary to clarify the language of Chapter 47, Article 19, Section 9 of the West Virginia Code of 1931, as amended.

For more information, please contact Daniel N. Huck, Deputy Attorney General, or Robert William Schulenberg III, Senior Assistant Attorney General, Office of the Attorney General, Antitrust Division, 812 Quarrier Street, Fifth Floor, Charleston, West Virginia 25301.

TITLE 142  
WEST VIRGINIA LEGISLATIVE RULE  
ATTORNEY GENERAL  
SERIES 9

Title: Proposed legislative rule pertaining to allowing persons who are indirectly injured by violations of the West Virginia Antitrust Act to recover damages.

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Section 142-9-1.

General.

142-9-2.

Damages Recoverable by Persons Indirectly Injured.

TITLE 142

LEGISLATIVE RULE  
ATTORNEY GENERAL  
SERIES 9

Title: Proposed legislative rule pertaining to allowing persons who are indirectly injured by violations of the West Virginia Antitrust Act to recover damages.

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Section 142-9-1. General.

1.1 Rule Designation - This rule is legislative.

1.2 Scope - This rule shall apply to any action brought by any person under the provisions of Chapter 47, Article 18, Section 9 of the West Virginia Code, or any action brought by the Attorney General as parens patriae under the provisions of Chapter 47, Article 18, Section 17 of the Code.

1.3 Authority - Chapter 47, Article 18, Section 20 of the Code.

1.4 Purpose - The purpose of this rule is to allow persons who are indirectly injured by violations of the West Virginia Antitrust Act to maintain an action for damages; to allow the Attorney General, as parens patriae, to maintain an action on behalf of such persons who have suffered indirect injury under Chapter 47, Article 18, Section 17 of the Code; and to bring the application of the West Virginia Antitrust Act into conformity with the laws of other jurisdictions.

1.5 Filing Date -

1.6 Effective Date - This rule shall be effective upon passage of the bill of authorization.

1.7 Repeal of Former Rule - Not Applicable.

1.8 Construction - This rule shall be liberally construed to effectuate the beneficial purposes of the West Virginia Antitrust Act.

1.9 Severability - If, for any reason, any section, sentence, clause, phrase, or provision of this rule or the application thereof to any person or circumstance is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other sections, sentences,

Title 142  
Attorney General  
Proposed Legislative Rule  
Section 142-9-1

clauses, phrases, or provisions or their application to any other person or circumstance, and to this end, each and every section, sentence, clause, phrase, or provision of this rule is hereby declared to be severable.

Section 142-9-2. Damages Recoverable By Persons Indirectly Injured.

Any person who shall be injured directly or indirectly by reason of a violation of the West Virginia Antitrust Act, Chapter 47, Article 18, Section 1 et seq. of the Code, may bring an action for damages under Chapter 47, Article 18, Section 9 of the Code. The State and any of its political subdivisions shall be deemed a person within the meaning of this rule.

BEFORE THE WEST VIRGINIA ANTITRUST DIVISION

IN THE MATTER OF

HEARING ON PROPOSED LEGISLATIVE RULE  
PERTAINING TO ALLOWING PERSONS WHO HAVE  
BEEN INDIRECTLY INJURED BY REASON OF UNLAWFUL  
ANTITRUST ACTIVITIES TO RECOVER DAMAGES  
PURSUANT TO SECTION 9 OF THE WEST VIRGINIA  
ANTITRUST ACT, WEST VIRGINIA CODE 47-18-9

L & S Building  
812 Quarrier Street  
Fourth Floor  
Charleston, West Virginia  
August 8, 1989

The above-entitled matter came on for hearing  
at 9:18 a.m. before:

ROBERT WILLIAM SCHULENBERG III, Hearing Officer

APPEARANCES: No appearances

N. JOAN THAXTON COURT REPORTERS, INC. (304) 988-3970

I N D E X

<u>Rule Making Exhibits</u>	<u>Marked</u>	<u>Received</u>
No. 1, Letter dated 7-18-89	4	4
No. 2, Sign In Sheets	4	4
No. 3, Resolution of 7-12-89	10	10

P R O C E E D I N G S

HEARING OFFICER SCHULENBERG: On the record. My name is Robert William Schulenberg III, Senior Assistant Attorney General, Office of the Attorney General, assigned to the Antitrust Division.

Today is August 8th, 1989. The time is 9:18 by my watch.

We are here today for a public hearing on the Attorney General's Proposed Legislative Rule pertaining to allowing persons who have been indirectly injured by reason of unlawful Antitrust activities pursuant to Section 9 of the West Virginia Antitrust Act, West Virginia Code Chapter 47, Article 18, Section 9.

The Reporter has been present in the room since approximately 25 minutes until 9:00. The public hearing was scheduled to commence at or about 9:00 today; however, there have been no persons appearing in this matter.

Attached to the rule making record, the comment record, are the sign-in sheets, which for the purpose of this rule, of course, are unexecuted or unentered, as well as a copy of a letter dated July 18, 1989 to Attorney General Brown.

(WHEREUPON, the letter dated July 18, 1989 was marked for purposes of identification as Rule Making Exhibit No. 1 and was received in evidence.)

(WHEREUPON, the sign in sheets were marked for identification as Rule Making Exhibit No. 2 and was received in evidence.)

It is a duplicate original not on letterhead containing favorable comments for this proposed legislative rule.

The comments are from the Attorney

General's Director of the Antitrust Division, Daniel N. Huck. The original has been signed by Mr. Huck through me and has been placed in the rule making record as of the 19th day of July, 1989.

In addition to those favorable comments from the Attorney General's staff, I would like to point out that the notice for the rule for the public hearing and the comment period was filed in a timely manner with the Office of the Secretary of State on the 5th day of July, 1989, filed in the Office of the Secretary of State.

In addition to the copy of the proposed Legislative Rule, Title 142, Series 9 was a fiscal note for the proposed rule, a summary of the proposed rule, and a Notice of public hearing on the proposed rule disclosing that the hearing was to be held on August 8, 1989 at the time of 9:00 a.m.

We have not received any additional

written comments to the rule other than the comments that have been placed by Division Staff.

In addition to the proposed rule and the notice of filing in the State Register, a press release was sent out to various media on July 9, 1989.

The rule was disclosed in the copy of that press release. The purpose of the rule was disclosed within the copy of that press release.

I would note that in the July 10th Charleston Gazette a notice that the Attorney General has proposed a rule was filed or was published in the Gazette.

In addition to the comments that have been made on the record, I would like to note that there will be some amendments to the original fiscal note, which was filed with the rule.

Under Part 4, Explanation of the Overall Economic Impact of the Proposed Rule contained within the fiscal note, Parts A, B, and C

will be changed to the extent that they will offer benefit to the State Government political subdivisions, groups of citizens, and the public at large.

In the initial fiscal note, the response to those comments was "none." However, after further review, there will be or there appears to be the possibility of a positive economic impact on state government in the sense that because indirect purchasers or other persons indirectly injured as a result of violations of the Antitrust laws, Federal Antitrust Laws, have no cause of action and may not recover damages.

Our rule would permit the recovery of indirect purchaser damages or other indirect injury by state government or the political subdivisions of the state or the citizens and public at large, as well as businesses will suffer indirect damage.

Therefore, this is somewhat of an

expansion of the federal law -- on the federal law, rather, and it is primarily a clarification of the provisions of 47-18-9.

In effect, there is no additional relief being allowed under West Virginia law since it can be construed under Chapter 47, Article 18, Section 9 that indirect purchasers may be able to recover damages.

This is just merely a clarification that fits within the purposes of the rule making process.

Right now, those are all of the comments that I will make. We will hold the oral comment period open until approximately 10:00, whereupon if no one attends, the oral portion of the rule making record will be closed.

The written portion of the comment period will be closed at about 5:00 p.m. today to allow persons who may have mailed comments or otherwise communicated in writing to successfully

effectuate delivery of their comments favorable or unfavorable.

Therefore, we will hold this oral comment period open for approximately another 35 minutes.

(WHEREUPON, a recess was taken, after which the following proceedings were had.)

HEARING OFFICER SCHULENBERG: We are back on the record. There are a couple of additional items I would like to note.

Notice of this meeting was published -- or rather an article pertaining to this public hearing was published today in the Charleston Gazette on the front page of the inside section.

Also, as an exhibit to this hearing, I would offer as an exhibit next a copy of the National Association of Attorneys General resolution.

This resolution was passed by the National Association unanimously without exception according to my information.

The resolution pertains to allowing indirect purchasers to recover.

The National Association of Attorneys General consists of all 50 Attorneys General of the United States -- of each state of the United States.

Therefore, I would submit this as an exhibit to the rule making record.

(WHEREUPON, the resolution was marked for identification as Rule Making Exhibit No. 3 and was received in evidence.)

I would also like to note for the record that I am not the original Hearing Examiner or Hearing Officer assigned to this rule making proceeding.

While I did draft the proposed legislative rule, the hearing was originally to be conducted by my division director, Dan Huck, and other persons.

However, as a result of certain problems which have arisen beyond any human's control, I was called in as a substitute hearing examiner or hearing officer for the purposes of this proceeding.

To that extent, I will now be responsible and I assume responsibility of finally promulgating this rule and delivering the appropriate number of copies of the rule comments and other matters to the Legislative Rule Making Review Committee and the Office of the Secretary of State.

Finally, I would note for the record that to the best of my knowledge as a result of any of the publication of conversations that have been had with persons who may be interested in

the proposed rule, we have not received any comments or requests for copies either by telephone or in writing or by facsimile transmission.

Therefore, the time being 10:00 a.m., Tuesday, August 8, 1989, I hereby declare the oral comment period for this proposed rule closed and will declare that the written comment period for this proposed rule be closed as of 5:00 p.m. this evening, August 8, 1989.

Finally, for the record, I would note that there is still no one in attendance at this public hearing.

Thank you very much.

(WHEREUPON, at 10:00 a.m., the hearing was adjourned.)

REPORTER'S CERTIFICATE

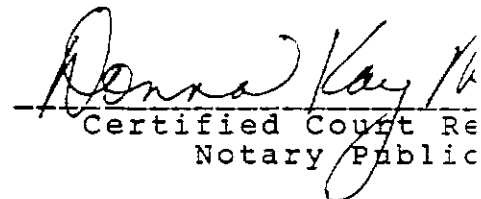
STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to wit:

I, Donna Kay Miller, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the testimony adduced or proceedings had in the aforementioned case as set forth in the caption hereof.

Given under my hand this 11th day of August, 1989.

My Commission expires November 4, 1992.

  
\_\_\_\_\_  
Certified Court Reporter  
Notary Public

July 18, 1989

The Honorable Charles G. Brown  
Attorney General of the  
State of West Virginia  
Room E-26, State Capitol  
Charleston, West Virginia 25305

Re: Comments on the Proposed Legislative Rule  
Pertaining to Allowing Persons Who Have Been  
Indirectly Injured by Reason of Unlawful  
Antitrust Activities to Recover Damages Pursuant  
to Section 9 of the West Virginia Antitrust Act,  
W.Va. Code 47-18-9

Dear Attorney General Brown:

Please accept these comments for filing in support of the proposed legislative rule which would allow persons who have been injured indirectly by reason of violations of the West Virginia Antitrust Act ("the Act") to recover damages ("the Rule"). These comments, however, should not be construed as a limitation of the proposed rule.

W.Va. Code § 47-18-22 authorizes the Attorney General to engage in rule making to aid in the enforcement or administration of the West Virginia Antitrust Act. However, such rules must be promulgated in accordance with the Administrative Procedures Act. See, W.Va. Code § 29A-31-1. Rules passed through a rule making procedure done in accordance with the Administrative Procedures Act have the force of law. See, W.Va. Code § 29A-1-2(d)(1).

W.Va. Code § 47-18-9 permits "any person" (whether a natural person, public entity or business) who is injured by reason of a violation of the West Virginia Antitrust Act to bring an action for recovery of treble damages, costs, and a reasonable attorney's fee. This section of the Act would appear on its face to allow relief for indirect as well as direct injuries. As the West Virginia

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July 18, 1989  
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Supreme Court of Appeals has previously declared, the word "any", when used in a statute, means any. See, Thomas v. Firestone Tire and Rubber Co., \_\_\_ W.Va. \_\_\_, 266 S.E.2d 905 (1980), where the Court said,

"We are impressed that the word 'any' represents a fundamental and irreducible concept. It is a statue wrought from the letters A, N and Y; a monument to an idea; an artistic rendering designed to signify a meaningful unit of the English language. The Court is led to the unavoidable conclusion that the word 'any', when used in a statute, should be construed to mean, in a word, any . . . ." 266 S.E.2d at 909.

Given this clear judicial mandate, plaintiffs will assert that the statute permits indirect purchaser recovery. Loop-hole-conscious defendants, however, will argue that the provisions of Code 47-18-9 must be construed in a manner consistent with controlling federal antitrust decisional law, thereby precluding recovery for indirect injury. See, W.Va. Code § 47-18-16; Illinois Brick Co. v. Illinois, 431 U.S. 720 (1976). The proposed legislative rule would resolve this uncertainty in favor of the obvious wording of the Act, allowing indirect purchaser recovery without imposing additional liability upon the antitrust wrongdoer. In this context, it should be noted that the Illinois Brick decision pre-dated the passage of the Act by two years, and therefore, the West Virginia Legislature was on notice of the option of incorporating an indirect purchaser limitation into the Act, an option which the Legislature chose not to take.

The proposed rule does not raise any issue of first impression. Other states have statutes which permit persons who have been indirectly affected by unlawful antitrust activities to maintain damage actions under state antitrust law. See, Alabama Code Section 6-5-50(a) (1975); Section 16750(a) of the California Business & Professions Code Annotated (West Supp. 1989); Minnesota Statutes Section 325D.57 (1988); Colorado Revised Statutes Section 6-4-106 (Supp. 1988); District of Columbia Code Section 28-4509(a) (1981); Hawaii Revised Statutes Section 480-14(c) (1985); Illinois Revised Statutes, Chapter 38, Paragraph 60-7(2) (1988); Maryland Commercial Law Code Annotated Section 11-209 (1983); Michigan Competition Laws Annotated Section 445.778 (West Supp. 1988); Mississippi Code Annotated Section 75-21-9 (1972); New Mexico Statutes Annotated Section 57-1-3(A) (1987); Rhode Island General Laws Section 6-36-12(g) (1985); South Dakota Codified Laws

Brown Letter/Comments on  
Proposed Legislative Rule  
July 18, 1989  
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Section 37-1-33 (1986); Wisconsin Statutes Section 133. (1987-1988). Further it is anticipated that states which current do not authorize compensation for indirect injury will soon modify their statutes to allow such recovery. See, Briggs, "Waiting For Godot: Antitrust 1988-89," Antitrust, Summer 1989, Vol. 3, No. p. 26, 29.

As the United States Supreme Court recently held, federal antitrust law concerning indirect purchaser recovery will not preempt the proposed legislative rule since the federal law does not occupy the field, and the proposed legislative rule allowing persons who are indirectly injured by unlawful antitrust activity is not inconsistent with and does not stand as an obstacle to effectuating the purpose of the federal antitrust law. See, California v. ARC America Corp., 490 U.S. \_\_\_\_\_, 104 L. Ed.2d \_\_\_\_\_ (1989). Indeed, Congress itself has been considering amending Section 4 of the Clayton Act to permit indirect purchaser recovery under federal antitrust law. Moreover, actions for injunctive relief under the Robinson-Patman Act and Section 16 of the Clayton Act by indirect purchasers have never been precluded by Illinois Brick. See, e.g., Mid-West Paper Products Co. v. Continental Group, Inc. 596 F.2d 573, 589-94 (3d Cir. 1979); In Re Bee Industry Antitrust Litigation, 600 F.2d 1148, 1167 (5th Cir. 1979) cert. denied, 449 U.S. 905; National Constructors Association v. National Electrical Contractors Association, Inc., 498 F. Supp. 510 (D.Md. 1980).

This rule is essential to the proper administration and enforcement of the West Virginia Antitrust Act in order to allow all persons who are aggrieved by violations of the antitrust laws to recover damages. Therefore, I submit these comments in favor of the proposed legislative rule allowing persons indirectly affected by conduct violative of the West Virginia Antitrust Act to recover for their injuries. Please feel free to contact me if you have any questions.

Sincerely,

DANIEL N. HUCK  
DEPUTY ATTORNEY GENERAL  
ANTITRUST DIVISION

DNH/amh

SIGN IN SHEET

August 8, 1989

Title: Comments on the Proposed Legislative Rule Pertaining to  
Allowing Persons Who Have Been Indirectly Injured by  
Reason of Unlawful Antitrust Activities to Recover  
Damages Pursuant to Section 9 of the West Virginia  
Antitrust Act, W.Va. Code 47-18-9

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Organization: \_\_\_\_\_

Name: \_\_\_\_\_

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Organization: \_\_\_\_\_

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Name: \_\_\_\_\_

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Organization: \_\_\_\_\_

Rulemaking  
Exhibit 2  
8-8-89 dkm

SIGN IN SHEET

August 8, 1989

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SIGN IN SHEET

August 8, 1989

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          Allowing Persons Who Have Been Indirectly Injured by  
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          Damages Pursuant to Section 9 of the West Virginia  
          Antitrust Act, W.Va. Code 47-18-9

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Name: \_\_\_\_\_

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Organization: \_\_\_\_\_

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Name: \_\_\_\_\_

Address: \_\_\_\_\_

Organization: \_\_\_\_\_

**NATIONAL ASSOCIATION OF ATTORNEYS GENERAL**

**Adopted**

**Summer Meeting**

**July 9-12, 1989**

**Lake of the Ozarks, Missouri**

**I**

**RESOLUTION**

**TO OPPOSE FEDERAL PREEMPTION OF STATE INDIRECT PURCHASER STATUTES**

**WHEREAS**, erosion of state sovereignty and federalism concepts constitutes a threat to our constitutional form of government, as strict adherence to the constitutional principles of federalism is essential to the maintenance of the Constitution; and

**WHEREAS**, the federal antitrust laws were enacted by Congress with the intent that they coexist with rather than supplant state antitrust law; and

**WHEREAS**, Congressional intent, as recognized by the Supreme Court of the United States, was reaffirmed most recently in *California v. ARC America Corp.*; and

**WHEREAS**, state statutes providing for recovery for antitrust injury by indirect purchasers have been in existence since 1899; and

**WHEREAS**, approximately 16 states plus the District of Columbia have such indirect purchasers statutes in place; and

**WHEREAS**, approximately 75% of all purchases by local governments and state agencies are made through indirect distribution channels; and

**WHEREAS**, in 1977 the Supreme Court of the United States in *Illinois Brick Co. v. Illinois* limited recovery for antitrust injuries pursued under federal antitrust law to direct purchasers only; and

**WHEREAS**, in *California v. ARC America Corp.* the Supreme Court of the United States rejected the claim that state statutes providing for recovery by indirect purchasers in antitrust cases were preempted by federal law; and

**WHEREAS**, the Attorneys General by resolutions in 1977, 1978, 1979, 1982, 1983, 1984 and 1986 have consistently supported the enactment of a federal statute overruling the effects of the Supreme Court decision in *Illinois Brick Co. v. Illinois*;

**NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:**

- 1) Supports the reversal of the *Illinois Brick* decision and supports the enactment of federal legislation which would permit the recovery of antitrust damages by indirect purchasers;
- 2) Opposes any federal preemption of state indirect purchaser statutes;
- 3) Authorizes the NAAG Antitrust Committee Chair to work with members of Congress to develop an appropriate federal *Illinois Brick* repeal;
- 4) Authorizes the Executive Director and General Counsel to transmit the views to Congress, the Administration, and to other interested parties.



STATE OF WEST VIRGINIA  
OFFICE OF THE ATTORNEY GENERAL  
CHARLESTON 25305

CHARLES G. BROWN  
ATTORNEY GENERAL

(304) 348-2021

CONSUMER HOT LINE  
(800) 368-2808

July 18, 1989

The Honorable Charles G. Brown  
Attorney General of the  
State of West Virginia  
Room E-26, State Capitol  
Charleston, West Virginia 25305

Re: Comments on the Proposed Legislative Rule  
Pertaining to Allowing Persons Who Have Been  
Indirectly Injured by Reason of Unlawful  
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Dear Attorney General Brown:

Please accept these comments for filing in support of the proposed legislative rule which would allow persons who have been injured indirectly by reason of violations of the West Virginia Antitrust Act ("the Act") to recover damages ("the Rule"). These comments, however, should not be construed as a limitation of the proposed rule.

W.Va. Code § 47-18-22 authorizes the Attorney General to engage in rule making to aid in the enforcement or administration of the West Virginia Antitrust Act. However, such rules must be promulgated in accordance with the Administrative Procedures Act. See, W.Va. Code § 29A-31-1. Rules passed through a rule making procedure done in accordance with the Administrative Procedures Act have the force of law. See, W.Va. Code § 29A-1-2(d)(1).

W.Va. Code § 47-18-9 permits "any person" (whether a natural person, public entity or business) who is injured by reason of a violation of the West Virginia Antitrust Act to bring an action for recovery of treble damages, costs, and a reasonable attorney's fee. This section of the Act would appear on its face to allow relief for indirect as well as direct injuries. As the West Virginia

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Supreme Court of Appeals has previously declared, the word "any", when used in a statute, means any. See, Thomas v. Firestone Tire and Rubber Co., \_\_\_ W.Va. \_\_\_, 266 S.E.2d 905 (1980), where the Court said,

"We are impressed that the word 'any' represents a fundamental and irreducible concept. It is a statue wrought from the letters A, N and Y; a monument to an idea; an artistic rendering designed to signify a meaningful unit of the English language. The Court is led to the unavoidable conclusion that the word 'any', when used in a statute, should be construed to mean, in a word, any . . . ." 266 S.E.2d at 909.

Given this clear judicial mandate, plaintiffs will assert that the statute permits indirect purchaser recovery. Loop-hole-conscious defendants, however, will argue that the provisions of Code 47-18-9 must be construed in a manner consistent with controlling federal antitrust decisional law, thereby precluding recovery for indirect injury. See, W.Va. Code § 47-18-16; Illinois Brick Co. v. Illinois, 431 U.S. 720 (1976). The proposed legislative rule would resolve this uncertainty in favor of the obvious wording of the Act, allowing indirect purchaser recovery without imposing additional liability upon the antitrust wrongdoer. In this context, it should be noted that the Illinois Brick decision pre-dated the passage of the Act by two years, and therefore, the West Virginia Legislature was on notice of the option of incorporating an indirect purchaser limitation into the Act, an option which the Legislature chose not to take.

The proposed rule does not raise any issue of first impression. Other states have statutes which permit persons who have been indirectly affected by unlawful antitrust activities to maintain damage actions under state antitrust law. See, Alabama Code Section 6-5-50(a) (1975); Section 16750(a) of the California Business & Professions Code Annotated (West Supp. 1989); Minnesota Statutes Section 325D.57 (1988); Colorado Revised Statutes Section 6-4-106 (Supp. 1988); District of Columbia Code Section 28-4509(a) (1981); Hawaii Revised Statutes Section 480-14(c) (1985); Illinois Revised Statutes, Chapter 38, Paragraph 60-7(2) (1988); Maryland Commercial Law Code Annotated Section 11-209 (1983); Michigan Competition Laws Annotated Section 445.778 (West Supp. 1988); Mississippi Code Annotated Section 75-21-9 (1972); New Mexico Statutes Annotated Section 57-1-3(A) (1987); Rhode Island General Laws Section 6-36-12(g) (1985); South Dakota Codified Laws

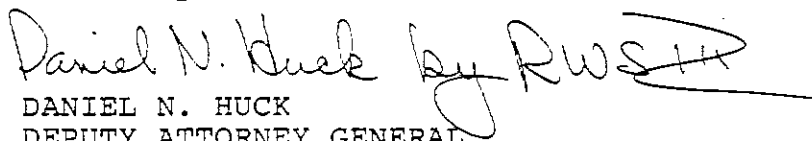
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Section 37-1-33 (1986); Wisconsin Statutes Section 133.18 (1987-1988). Further it is anticipated that states which currently do not authorize compensation for indirect injury will soon modify their statutes to allow such recovery. See, Briggs, "Waiting For Godot: Antitrust 1988-89," Antitrust, Summer 1989, Vol. 3, No. 3, p. 26, 29.

As the United States Supreme Court recently held, federal antitrust law concerning indirect purchaser recovery will not preempt the proposed legislative rule since the federal law does not occupy the field, and the proposed legislative rule allowing persons who are indirectly injured by unlawful antitrust activity is not inconsistent with and does not stand as an obstacle to effectuating the purpose of the federal antitrust laws. See, California v. ARC America Corp., 490 U.S. \_\_\_\_\_, 104 L. Ed.2d 86 (1989). Indeed, Congress itself has been considering amending Section 4 of the Clayton Act to permit indirect purchaser recovery under federal antitrust law. Moreover, actions for injunctive relief under the Robinson-Patman Act and Section 16 of the Clayton Act by indirect purchasers have never been precluded by Illinois Brick. See, e.g., Mid-West Paper Products Co. v. Continentally Group, Inc. 596 F.2d 573, 589-94 (3d Cir. 1979); In Re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1167 (5th Cir.1979), cert. denied, 449 U.S. 905; National Constructors Association v. National Electrical Contractors Association, Inc., 498 F. Supp. 510 (D.Md. 1980).

This rule is essential to the proper administration and enforcement of the West Virginia Antitrust Act in order to allow all persons who are aggrieved by violations of the antitrust laws to recover damages. Therefore, I submit these comments in favor of the proposed legislative rule allowing persons indirectly affected by conduct violative of the West Virginia Antitrust Act to recover for their injuries. Please feel free to contact me if you have any questions.

Sincerely,

  
DANIEL N. HUCK  
DEPUTY ATTORNEY GENERAL  
ANTITRUST DIVISION

DNH/amh



STATE OF WEST VIRGINIA  
OFFICE OF THE ATTORNEY GENERAL  
CHARLESTON 25305

FILED

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OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

CHARLES G. BROWN  
ATTORNEY GENERAL

(304) 348-2021

CONSUMER HOT LINE  
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August 11, 1989

The Honorable Ken Hechler  
Secretary of State of the  
State of West Virginia  
Building 1, Suite 157-K  
Charleston, West Virginia 25305

Re: Filing of the Agency Approved Proposed Legislative  
Rule Pertaining to Allowing Persons Indirectly  
Injured by Violations of the West Virginia Antitrust  
Act to Recover Damages, 142 C.S.R. 9

Dear Mr. Hechler:

By this letter I am informing you that I have filed the above proposed legislative rule with the Legislative Rule-Making Review Committee as an agency approved rule. I am also informing you that I am filing:

- (1) a copy of the agency approved rule;
- (2) a copy of the fiscal note for the agency approved rule because of some changes relating to the effects on the State, its public bodies, its political subdivisions, its businesses, and citizens. However, such effects have been determined to be positive, rather than negative;
- (3) a copy of the notice of agency approval (and the submission) to the Legislative Rule-Making Committee; and

The Honorable Ken Hechler  
August 8, 1989  
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(4) a copy of all items received at the public hearing.

Please feel free to contact Rob Schulenberg of my staff at 348-0246 if you have any questions.

Sincerely yours,

  
CHARLES G. BROWN  
ATTORNEY GENERAL

CGB/RS/amh

Enclosures