SPONSOR: Sen. Gay & Rep. Bush
Sen. Walsh; Reps. Baumbach, Osienski

DELAWARE STATE SENATE
152nd GENERAL ASSEMBLY

SENATE BILL NO. 296
AS AMENDED BY
HOUSE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 6 OF THE DELAWARE CODE RELATING TO ANTITRUST.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 2102, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2102. Definitions.

(1) "Court" means the Court of Chancery except where another court is specifically designated or a federal court exercises supplemental jurisdiction.

Section 2. Amend § 2103, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2103. ~~Restraint of trade unlawful~~ Unlawful Conduct.

(a) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce of this State shall be unlawful.

(b) It is unlawful for a person to monopolize, attempt to monopolize, or combine or conspire with any other persons, to monopolize trade or commerce of this State.

Section 3. Amend § 2106, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2106. Investigative demand by Attorney General.

(a) Whenever the Attorney General has reason to believe that any person may have knowledge, or be in possession, custody or control of any documentary material, pertinent to a possible violation of this chapter, the Attorney General may issue in writing and cause to be served upon the person an investigative demand that may:

(1) Compel the attendance of such person and require that person to submit to examination and give testimony under oath;

(2) Require the production of documentary material pertinent to the investigation; and

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(3) Require answers to written interrogatories to be furnished under oath.

(b) Service of any demand under this section may be made by mailing such demand to the last known place of business, residence or abode within or without this State of the person to whom such demand is directed; service may also be made upon any person other than a natural person, in the manner provided in § 321 or §§ 371-385 of Title 8 and in the manner provided in the Rules of the Court of Chancery.

(c) Each demand under this section shall be in writing and shall:

(1) State the nature of the conduct constituting the alleged violation of this chapter or federal antitrust law which is under investigation and the provision of law applicable thereto;

(2) Describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) Prescribe a return date which will provide a reasonable time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) Identify the custodian to whom such material shall be made available or the official before whom such examination shall take place or to whom such answers shall be furnished.

(d) Any person required to submit to examination under this section shall be entitled to be represented by counsel. Any person so required shall be entitled to procure a transcript of the testimony, provided that the Court, for good cause shown by the Attorney General, may order that such person be limited to inspection of such transcript.

(e) No demand under this section shall contain any requirement which would be held to be unreasonable if contained in a subpoena issued by a court of this State in aid of a grand jury investigation, or require the production of any evidence which would be privileged from disclosure if demanded by a subpoena issued by a court of this State in aid of a grand jury investigation.

(f) Within 20 days after the service of any demand under this section, or at any time before the return date specified in the demand, whichever period is shorter, the person served may file with the Court a motion for an order modifying or setting aside such demand. The motion shall specify each ground upon which the person relies in seeking such relief, and may be based upon any failure of the demand to comply with this section, or upon any constitutional right or privilege of the person.

(g) If any person fails to comply with a demand under this section, the Attorney General may file with the Court a motion for an order, and the Court may enter an order:

(1) Requiring the person to respond to the demand;

(2) Granting such other relief as may be required to obtain compliance with the demand.

(h) If any person shall refuse to give testimony or to produce documentary material or to answer a written interrogatory in obedience to an investigative demand on the ground that the person may thereby be incriminated, the Court, upon motion by the Attorney General, may order such person to give testimony or to produce documentary material or to answer the written interrogatory, or to do an applicable combination of these, after notice to the witness and a hearing. Such person so ordered by the Court shall comply with the Court order. After complying, the testimony of such person or the matters produced, which are obtained by virtue of said order, shall not be used against the person in any criminal prosecution nor shall any evidence obtained derivatively from said testimony be so used, provided that, but for this section, such person would have been privileged to withhold the answer or the evidence produced by the person. In no event, however, shall such person, acting pursuant to such order, be exempt from prosecution or penalty or forfeiture for any perjury, false statement or contempt committed in answering or failing to answer, or in producing or failing to produce evidence in accordance with the order, and any testimony or evidence so given or produced shall not, by virtue of this section, be rendered inadmissible in evidence upon any criminal action, investigation or proceeding concerning such perjury, false statement or contempt.

(i) Any transcripts of oral testimony, documentary material or answers to written interrogatories provided pursuant to a demand under this section shall be exempt from disclosure under the Delaware Freedom of Information Act. The custodian described in paragraph (c) (4) of this section shall take physical possession of such transcripts, material and answers. Such transcripts, material or answers, or copies thereof, shall not be disclosed by the custodian to any person other than the Attorney General, ~~or~~ authorized employees, consultants, experts, accountants, economists, analysts, and other agents of the Department of Justice, and ~~the Attorney General and authorized employees~~ such persons shall not make further disclosure of such transcripts, material or answers, or copies, or of internal memoranda or work papers relating thereto. Nothing in this section shall prevent the Attorney General from introducing said testimony, material or answers in any action initially filed in ~~a~~ any federal court ~~sitting in this State~~, or before any court or grand jury of this State.

(j) The Attorney General may disclose oral testimony, documentary material, or answers to written interrogatories provided pursuant to a demand under this section to any officer or employee of any federal or state law enforcement agency upon the prior certification of an officer of any such federal or state law enforcement agency that information will be maintained in confidence and will be used only for official law enforcement purpose.

(k) All oral testimony, documentary material, or answers to written interrogatories provided to the Attorney General pursuant to an investigative demand or similar process issued by another state or federal law enforcement agency under similar authority shall be treated as if obtained pursuant to an investigative demand issued by the Attorney General under this section.

Section 4. Amend § 2107, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2107. Actions by Attorney General for violations; civil penalty; equitable relief

(a) The Attorney General may bring an action for any violation or threatened violation of this chapter. In any such action, the Court may assess against each defendant a civil penalty for the benefit of the State of not less than $1,000 nor more than $100,000 for each violation, or may award appropriate equitable relief, or may order a combination of civil penalty and equitable relief. The Court may also award taxable costs, investigative costs, and reasonable fees for expert witnesses and attorneys, including the Attorney General.

(b) If the defendant derives a pecuniary gain from the violation, or if the violation results in a pecuniary loss to a person or persons or public body or bodies, then as an alternative to the civil penalty assessment in subsection (a) of this section and in addition to other relief awarded, the Court may assess against each defendant a civil penalty for the benefit of the State not more than the greater of twice the gross gain or twice the gross loss.

(c) To the extent the violation occurred entirely outside the State but affected trade or commerce of this State, any pecuniary gain to the defendant or loss to persons or public bodies for purposes of accessing a civil penalty pursuant to subsection (b) of this section shall only take into account the gain or loss which can be reasonably estimated to derive from the economic activity affected by the violation in this State.

Section 5. Amend § 2108, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2108. Actions for equitable relief and damages; suits parens patriae.

(a) If the State or any public body thereof is threatened with injury or injured in its business or property by a violation of this chapter, the Attorney General may bring an action for appropriate equitable relief, damages sustained and, as determined by the Court, taxable costs, and reasonable fees for expert witnesses and attorneys, including the Attorney General.

(b) The Attorney General may bring suit as parens patriae on behalf of natural persons residing in this State to secure monetary relief for such persons who are injured in their business or property by a violation of this chapter. The Court may also award taxable costs and reasonable fees for expert witnesses and attorneys, including the Attorney General.

(c) In actions under this section, the Court may, in its discretion, award as monetary relief up to threefold the total damage sustained, in addition to costs and fees, provided that the Court finds the acts complained of to have been wilful.

(d) Monetary relief awarded under subsection (b) of this section may be payable to the State or may be distributed in such manner as the Court in its discretion may authorize.

(e) In any action brought under subsection (b) of this section, the Attorney General shall, at such times, in such manner, and with such content as the Court may direct, cause notice thereof to be given by publication. If the Court finds that notice given solely by publication would deny due process of law to any person or persons, the Court may direct further notice to such person or persons according to the circumstances of the case.

(f) Any person on whose behalf an action is brought under subsection (b) of this section may elect to exclude from adjudication the portion of the state claim for monetary relief attributable to the person by filing notice of such election with the Court in the manner specified in the notice given pursuant to subsection (e) of this section. The final judgment in any action under subsection (b) of this section shall be res judicata as to any claim under this chapter by any person on behalf of whom such action was brought and who fails to give notice of exclusion in the manner specified in this subsection.

(g) In any action brought under ~~subsection (b) of~~ this section, the Court shall exclude from the amount of any monetary relief awarded any amount which duplicates an award made by any court for the same injury, or which is allocable to persons excluded under subsection (f) of this section.

(h) Any person who is threatened with injury or injured in that person's business or property by a violation of this chapter may bring an action for appropriate equitable relief, damages sustained and, as determined by the Court, taxable costs, and reasonable fees for expert witnesses and attorneys.

(i) In any action under § 2107 or § 2108, the fact that the State, a public body, or any person has not dealt directly with the violator does not bar or otherwise limit the award of any damages or equitable remedies. There is a presumption that all changes in price due to an antitrust violation were passed to every subsequent level in the distribution chain in an amount equal to the amount of the change directly caused by the antitrust violation and charged to the first purchaser of the product or service in question. This presumption also applies to any change in price due to a change in the costs of an ingredient or component product or service that was caused by a violation of this Chapter. The amount of the change in price will be presumed to be equal to the change in the cost, in dollars and cents, of the ingredient or component product or service to its first purchaser.

(j) The Attorney General, in an action under subsection (a) or (b) of this section, or any person in an action under § 2108(h), may elect to recover 25% of the consideration paid for any goods or services, including labor, that were the subject of the violation of § 2103(a) in lieu of damages sustained or other monetary relief.

Section 6. Amend § 2110, Title 6 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 2110. Jurisdiction.

The Court of Chancery shall have exclusive jurisdiction of all state court actions or proceedings authorized by this

chapter or relating to its enforcement; provided, however, that in an action in which any party would otherwise have a right to trial by jury of any issue of fact, and such party shall demand such trial, the Court shall order such issue to trial and binding determination of such issue in the Superior Court, the action or proceeding being retained in the Court of Chancery in all other respects, including entry of judgment.