

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 730 Session of
2011

INTRODUCED BY D. COSTA, DeLUCA, CALTAGIRONE, GEORGE, HARKINS,
HORNAMAN, JOSEPHS, KULA, MATZIE, STABACK, STURLA, WHITE AND
DALEY, FEBRUARY 16, 2011

REFERRED TO COMMITTEE ON CONSUMER AFFAIRS, FEBRUARY 16, 2011

AN ACT

1 Prohibiting unreasonable restraints of trade; imposing
2 penalties; and providing for enforcement.

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15 The General Assembly of the Commonwealth of Pennsylvania
16 hereby enacts as follows:

17 Section 1. Short title.

1 This act shall be known and may be cited as the Pennsylvania
2 Antitrust Act.

3 Section 2. Declaration of policy.

4 The General Assembly finds and declares that the purpose of
5 this act is to promote the public benefits of a competitive
6 economic environment and to protect the economic welfare of
7 consumers, businesses and the Commonwealth.

8 Section 3. Definitions.

9 The following words and phrases when used in this act shall
10 have the meanings given to them in this section unless the
11 context clearly indicates otherwise:

12 "Attorney General." Includes a designated deputy Attorney
13 General. The term does not include a private attorney or law
14 firm.

15 "Business of insurance." That business of insurance
16 conducted by an insurance company, association or reciprocal,
17 nonprofit hospital plan corporation, nonprofit professional
18 health service plan, health maintenance organization, fraternal
19 benefits society or any risk-assuming preferred provider
20 organization or nonrisk-assuming preferred provider organization
21 not governed and regulated under the Employee Retirement Income
22 Security Act of 1974 (Public Law 93-406, 88 Stat. 829).

23 "Person." An individual, partnership, corporation,
24 association or other entity individually or as a part of an
25 alleged class, or through its officers, agents, employees or
26 attorneys or those acting in concert with the person. The term
27 includes a political subdivision.

28 "Political subdivision." Includes an agency, a board, a
29 commission or an authority of a political subdivision.

30 "Reasonable cause to believe." The totality of facts and

1 circumstances sufficient to warrant belief by a person of
2 reasonable caution that further investigation is necessary. The
3 term does not require the Attorney General to establish probable
4 cause or a prima facie case.

5 "Trade secret." Anything which constitutes, represents,
6 evidences or records secret or confidential scientific,
7 technical, merchandising, production, management or commercial
8 information.

9 Section 4. Unreasonable restraints of trade.

10 A contract, combination or conspiracy in restraint of trade
11 or commerce in this Commonwealth is unlawful.

12 Section 5. Penalties.

13 (a) Criminal penalty.--

14 (1) A partnership, corporation, association or other
15 entity which violates section 4 commits a felony of the third
16 degree and shall, upon conviction, be sentenced to pay a fine
17 of not more than \$1,000,000.

18 (2) An individual who violates section 4 commits a
19 felony of the third degree and shall, upon conviction, be
20 sentenced to pay a fine of not more than \$100,000 or to
21 imprisonment for not more than three years, or both.

22 (b) Enforcement.--The Attorney General shall have standing
23 and authority to prosecute an action for a criminal penalty.

24 (c) Alternative civil penalty.--In lieu of criminal
25 prosecution under subsection (b), the Attorney General may elect
26 to bring an action for a civil penalty. In an action under this
27 subsection:

28 (1) An individual who violates section 4 shall be liable
29 for a penalty of not more than \$100,000 for each violation
30 and for the cost of suit, including reasonable attorney fees.

1 (2) A partnership, corporation, association or other
2 entity which violates section 4 shall be liable for a penalty
3 of not more than \$1,000,000 for each violation and for the
4 cost of the suit, including reasonable attorney fees.

5 (d) Factors to be considered.--In determining the
6 appropriate sanctions to be imposed under this section, the
7 court shall consider at least the following factors:

8 (1) The prior criminal record of the violator.

9 (2) The size and amount of the contract involved, if
10 any.

11 (e) Disposition of fines and penalties.--Criminal fines and
12 civil penalties collected under this section shall be paid into
13 the State Treasury.

14 (f) Limitation of action.--An action under this section must
15 be commenced within four years after the violation of this act
16 is committed.

17 (g) Double jeopardy.--A criminal prosecution or an action
18 solely for a civil penalty under this section may not be brought
19 against a person previously charged by information or indictment
20 with a criminal violation of 62 Pa.C.S. Ch. 45 (relating to
21 antibid-rigging), or of a Federal antitrust statute, if the
22 prosecution is based upon substantially the same conduct upon
23 which a prosecution under this section could be based and
24 jeopardy has attached under the prosecution.

25 (h) Other actions.--An action under this section does not
26 bar administrative sanctions, a civil action for injunctive
27 relief under section 6 or a civil action for damages or
28 injunctive relief under section 7.

29 Section 6. Injunctive relief.

30 (a) Action by Attorney General.--The Attorney General may

bring a civil action against any person to restrain the conduct prohibited by this act.

(b) Commencement of action.--An action under this section must be commenced within four years after the violation of this act is committed.

Section 7. Private cause of action.

(a) Cause of action.--

(1) A person directly injured in business or property as a result of an act prohibited by this act shall have a right to bring a civil action for damages or injunctive relief.

(2) The Commonwealth, whether a direct or indirect purchaser, when injured in its business or property as a result of an act prohibited by this act, shall have the right to bring a civil action for damages or injunctive relief. In an action by the Commonwealth as an indirect purchaser, the court shall take necessary steps, including transfer and consolidation, to avoid duplicate liability for the same injury.

(3) Neither the Commonwealth nor any person may maintain or continue to maintain a civil action under this act based on any transactions or occurrences if a final judgment as to which all appeals have been exhausted has been entered in an action by or on behalf of the Commonwealth or of the person, under the antitrust laws of the United States or another state for injury arising from the same transactions, occurrences or circumstances.

(b) Limitation of action.--A cause of action arises under this section at the time the conduct in violation of this act is discovered or should have been discovered or, for a continuing violation, at the time the latest violation of this act is

1 discovered or should have been discovered. An action under this
2 section must be brought within four years of the date when the
3 cause of action arises. During the pendency of an action under
4 section 5 and for one year after the action is completed, the
5 limitation under this subsection is tolled if the action under
6 this section is based in whole or in part on any matter
7 complained of in the action under section 5. If the running of
8 the statute of limitations in respect of a cause of action
9 arising under this section is tolled under this subsection, any
10 action to enforce that cause of action shall be barred unless
11 commenced either within the period of suspension or within four
12 years after the cause of action accrued.

13 (c) Damages.--Damages recoverable under this act by the
14 Commonwealth and by any person shall be actual damages sustained
15 plus the cost of suit, including reasonable attorney fees. If
16 the circumstances warrant, damages recoverable under this act by
17 any person may be three times the actual damages sustained plus
18 taxable costs and reasonable attorney fees. Damages are subject
19 to the following:

20 (1) Neither the Commonwealth nor any person shall be
21 awarded any damages, including treble damages, if a court of
22 another jurisdiction has already entered judgment on a claim
23 by the Commonwealth or the person arising out of the same
24 transaction or occurrence.

25 (2) If the conduct which gives rise to a violation of
26 this act also gives rise to a violation of 62 Pa.C.S. Ch. 45
27 (relating to antibid-rigging), the amount awarded as civil
28 damages or compensation under this act shall not duplicate
29 the amount awarded under 62 Pa.C.S. Ch. 45.

30 (d) Costs in injunction actions.--In an injunction action in

1 which the plaintiff substantially prevails, the court shall
2 award the cost of suit, including reasonable attorney fees.

3 (e) Liability.--Liability under this section shall be joint
4 and several. Persons subject to liability under this act shall
5 be entitled to contribution in accordance with 42 Pa.C.S. Ch. 83
6 Subch. B (relating to contribution among tort-feasors).

7 (f) Notice to Attorney General.--Within ten days of filing a
8 complaint under this section, the plaintiff shall serve a copy
9 of the complaint upon the Attorney General by registered mail. A
10 copy of the certificate of service shall be filed with the
11 court.

12 (g) Collateral estoppel.--A criminal conviction for a
13 violation of section 4 shall be prima facie evidence as to
14 liability of the convicted participants in a civil action under
15 this section. This subsection does not apply to pleas of no
16 contest or to consent decrees. Nothing contained in this
17 subsection shall be construed to impose a limitation on the
18 application of collateral estoppel.

19 (h) Authority of Attorney General.--The Attorney General has
20 authority under this section:

21 (1) To bring all actions on behalf of the Commonwealth.

22 (2) To bring an action as parens patriae on behalf of
23 individuals who:

24 (i) have suffered an injury to their property by
25 reason of a violation of this act; and

26 (ii) resided in this Commonwealth when the violation
27 occurred.

28 (3) To bring an action on behalf of a political
29 subdivision, if requested to do so by the political
30 subdivision.

1 Section 8. Exemptions.

2 (a) Sovereign immunity.--The Commonwealth shall not be
3 liable in actions under this act. Commonwealth officials and
4 employees acting in their official capacities shall not be
5 liable for penalties under section 5 or for damages, costs and
6 attorney fees under section 7.

7 (b) Governmental and official immunity.--Political
8 subdivisions shall not be liable in actions under this act.
9 Officials and employees of political subdivisions acting in
10 their official capacities shall not be liable for penalties
11 under section 5 or for damages, costs and attorney fees under
12 section 7.

13 (c) State action.--Conduct which results from a clearly
14 articulated and affirmatively expressed State policy and which
15 is actively supervised by the Commonwealth shall not constitute
16 a violation of this act.

17 (d) Labor organizations.--The existence and operation of a
18 labor organization and the exercise of lawful activities of a
19 labor organization shall not constitute a violation of this act.

20 (e) Cooperative associations.--The collective activities of
21 an agricultural or a horticultural cooperative association to
22 process, prepare for market, handle and market members'
23 products, whether or not the activities restrain competition
24 among the members of the association, shall not constitute a
25 violation of this act.

26 (f) Business of insurance.--This act does not apply to the
27 business of insurance to the extent that the business:

28 (1) is regulated by the Insurance Commissioner; and

29 (2) does not constitute a boycott, coercion or
30 intimidation or an agreement to boycott, coerce or

1 intimidate.

2 (g) Public utilities.-- This act does not apply to
3 activities of, or to the rates charged by, an electric
4 cooperative corporation, as defined in 15 Pa.C.S. Ch. 73
5 (relating to electric cooperative corporations), or a public
6 utility, as defined in 66 Pa.C.S. § 102 (relating to
7 definitions), to the extent that those activities or rates are
8 subject to the review of the Pennsylvania Public Utility
9 Commission or a comparable Federal agency. Upon the filing of a
10 complaint against a public utility under this act, the public
11 utility may request from Commonwealth Court a declaratory order
12 outlining the extent to which the activity or rates subject to
13 the complaint are subject to the review of the commission; or,
14 if the public utility's conduct or activities are subject
15 primarily to the jurisdiction of a comparable Federal agency,
16 the public utility may request from that agency a declaratory
17 order outlining the extent to which the activity or rates
18 subject to the complaint are subject to the review of the
19 comparable Federal agency. This public utility exemption is in
20 addition to other exemptions granted to public utilities in this
21 act.

22 (h) Regulated financial institutions.--This act does not
23 apply to any institution subject to the Bank Holding Company Act
24 of 1956 (70 Stat. 133, 12 U.S.C. § 1841 et seq.); section 10 of
25 the Home Owners' Loan Act (48 Stat. 128, 12 U.S.C. § 1467a); the
26 Bank Merger Act (Public Law 86-463, 74 Stat. 129); the Federal
27 Deposit Insurance Act (64 Stat. 873, 12 U.S.C. § 1811 et seq.);
28 18 U.S.C. §§ 215 (relating to receipt of commissions or gifts
29 for procuring loans) and 709 (relating to false advertising or
30 misuse of names to indicate Federal agency); the act of November

30, 1965 (P.L.847, No.356), known as the Banking Code of 1965;
or the act of December 14, 1967 (P.L.746, No.345), known as the
Savings Association Code of 1967.

(i) Federal or State exempt activities.--Activity or conduct
authorized by or exempt from Pennsylvania statutory or common
law, or exempt from the provisions of the antitrust laws of the
United States, shall be exempt from the provisions of this act.
This section shall specifically apply to any activity or conduct
authorized by the board of the Ben Franklin Partnership Fund, as
authorized by the act of July 2, 1993 (P.L.439, No.64), known as
the Ben Franklin/IRC Partnership Act. Any activity or conduct
subject to any other Federal statute which limits, modifies or
otherwise affects the applicability of one or more provisions of
the Federal antitrust statutes, or Federal judicial opinions
interpreting those statutes, shall, to that extent, be exempt
from this act.

(j) Not-for-profit health care facilities.--Any agreement or
conduct by a not-for-profit health care facility, which reduces
health care costs and passes the reductions on to consumers,
shall not constitute a violation of this act.

Section 9. Investigation.

(a) General power.--If the Attorney General has reasonable
cause to believe that a violation of this act has occurred, the
Attorney General has authority to investigate on behalf of the
Commonwealth, its citizens or a political subdivision.

(b) Attendance and production of documents.--Prior to the
institution of a civil action, the Attorney General is
authorized to require the attendance and testimony of witnesses
and the production of documents. Prior to the issuance of a
subpoena under this section, the Attorney General must make a

1 request for information. A request for information must state
2 the subject matter of the investigation, the conduct
3 constituting the alleged violation which is under investigation
4 and the provisions of this act applicable to the alleged
5 violation. A request for documentary material must describe the
6 material to be produced with reasonable particularity so as to
7 fairly identify the documents demanded, provide a return date
8 within which the material is to be produced and identify the
9 member of the Attorney General's staff to whom the material
10 shall be given. For this purpose, the Attorney General may issue
11 subpoenas, examine witnesses and receive evidence. If a person
12 objects to or otherwise fails to comply with a subpoena or
13 request for testimony, the Attorney General may file in
14 Commonwealth Court an action to enforce the subpoena or request.
15 Notice of hearing the action and a copy of all pleadings must be
16 served upon the person, who may appear in opposition.

17 (c) Confidentiality.--

18 (1) Any testimony taken or material produced shall be
19 kept confidential by the Attorney General except that the
20 Attorney General may use that information:

- 21 (i) in a judicial proceeding;
22 (ii) if the disclosure is authorized by the court
23 for good cause shown; or
24 (iii) if confidentiality is waived by the person
25 being investigated and by the person who has testified,
26 answered interrogatories or produced materials.

27 (2) At the Attorney General's discretion, the Attorney
28 General may disclose information discovered under this
29 section to the United States Department of Justice, the
30 Federal Trade Commission, another state or territory of the

1 United States or another agency of the Commonwealth, upon the
2 prior certification of an appropriate official of the
3 recipient that the information will be maintained in
4 confidence other than use for official purposes and that the
5 recipient will abide by the provisions of paragraph (1).

6 Trade secrets may not be disclosed by the Attorney General
7 without the approval of Commonwealth Court, after notice to
8 the person who produced the information.

9 (3) The Attorney General may use information, including
10 documents, obtained under this section in an action brought
11 under this act or Federal antitrust statutes; however,
12 information relating to trade secrets may not be made public
13 in an action without the approval of the court in which the
14 action is pending, after notice to the person who produced
15 the information.

16 (d) Limitation on use.--No criminal prosecution under this
17 act may be brought by the Attorney General based principally
18 upon information or documents obtained in a civil investigation
19 under this section.

20 (e) Wrongful disclosure of information.--A person who
21 publishes or communicates any procedure, testimony or material
22 produced, which is required to be kept confidential under this
23 section, commits a misdemeanor of the third degree.

24 Section 10. Consistency with Federal law.

25 The provisions of this act which parallel provisions of
26 Federal antitrust statutes shall be construed consistently with
27 pertinent Federal statutes and Federal judicial opinions
28 interpreting those Federal statutes.

29 Section 11. Effective date.

30 This act shall take effect July 1, 2011.