
THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

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HERRIN, DALEY, HOWARD, KINKEAD AND ISAACSON, JUNE 24, 2022

REFERRED TO COMMITTEE ON CONSUMER AFFAIRS, JUNE 24, 2022

AN ACT

1 Providing for cause of action for antitrust conduct, for
2 indirect purchaser recovery under State antitrust laws and
3 for premerger notice of health care mergers and transactions;
4 and imposing criminal penalties.

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6 The General Assembly of the Commonwealth of Pennsylvania
7 hereby enacts as follows:

8 Section 1. Short title.

9 This act shall be known and may be cited as the Pennsylvania
10 Open Markets Act.

11 Section 2. Declaration of purpose.

12 The purpose of this act is to promote free enterprise and
13 free trade in the marketplaces of this Commonwealth by
14 prohibiting restraints of trade that are secured through
15 monopolistic or collusive practices and that act or tend to act
16 to decrease competition between and among persons engaged in
17 commerce and trade.

18 Section 3. Definitions.

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

22 "Monopoly." The power to control prices and exclude
23 competition as a buyer or seller.

24 "Monopsony." A market structure in which a firm is the sole
25 purchaser of a good or service.

26 "Person." A natural person, corporation, trust, partnership,
27 an incorporated or unincorporated association, the Commonwealth,
28 a State agency, municipal authority, political subdivision and
29 any other legal entity.

30 "Trade or commerce." Economic activity directly or

1 indirectly affecting the people of this Commonwealth.

2 Section 4. Prohibited acts.

3 (a) Restraints of trade.--A contract, a combination in the
4 form of trust or otherwise or a conspiracy in restraint of trade
5 or commerce shall be unlawful.

6 (b) Monopolize or monopsonize.--It shall be unlawful for a
7 person to monopolize or monopsonize, to attempt to monopolize or
8 monopsonize or to combine or conspire with another person to
9 monopolize or monopsonize in any part of trade or commerce.

10 (c) Acquisitions.--It shall be unlawful for a person to
11 acquire, directly or indirectly, the whole or any part of the
12 stock, share capital or other equity interest of another person
13 or the whole or any part of the assets of another person if any
14 of the following apply:

15 (1) The effect of the acquisition may be substantially
16 to lessen competition.

17 (2) The effect of the acquisition tends to create a
18 monopoly or monopsony of any part of trade or commerce.

19 (d) Market power.--It shall be unlawful for any person or
20 persons with market power in the conduct of any business, trade
21 or commerce, in any labor market, or in the furnishing of any
22 service in this Commonwealth to abuse that market power.

23 Section 5. Enforcement by Attorney General.

24 (a) Action on behalf of Commonwealth.--If the Attorney
25 General has reason to believe that a person, foreign or
26 domestic, has engaged in, is engaging in or is about to engage
27 in an act or practice that is unlawful under this act, the
28 Attorney General may bring a civil action in the name of the
29 Commonwealth against the person to:

30 (1) Obtain a declaratory judgment that the action or

1 practice violates this act.

2 (2) Enjoin an act or practice that violates this act by
3 issuing a temporary restraining order, an ex parte temporary
4 restraining order or a preliminary or permanent injunction,
5 without bond.

6 (3) Recover a civil penalty, not less than \$100,000, for
7 each violation of this act or of an injunction, judgment or
8 consent agreement issued or entered into under this act.

9 (4) Obtain an order requiring divestiture of assets:

10 (i) acquired in violation of this act and after the
11 court determines that divestiture is necessary to avoid
12 the creation or continuation of a monopoly or to avoid a
13 likely substantial lessening of competition that results
14 from a transaction found to be in violation of this act;
15 or

16 (ii) to restore competition to a line of commerce
17 that has been eliminated by a violation of this act.

18 (5) Recover actual damages or restitution, and
19 disgorgement, on behalf of the Commonwealth and its agencies
20 that are injured either directly or indirectly through a
21 violation of this act.

22 (b) Action on behalf of resident.--The Attorney General may
23 bring a civil action in the name of the Commonwealth on behalf
24 of a person residing within this Commonwealth to secure damages
25 or restitution, and disgorgement, for losses incurred directly
26 or indirectly through any violation of this act.

27 (c) Recovery authorized.--The Attorney General shall recover
28 the costs of an investigation, expert costs and reasonable
29 attorney fees and costs if successful in an action initiated
30 under this section.

1 (d) Jurisdiction.--A civil action under this section may be
2 brought in Commonwealth Court and in the court of common pleas
3 of the county in which any party resides or has a principal
4 place of business or in the Court of Common Pleas of Dauphin
5 County.

6 Section 6. Measurement of damages.

7 If a court has found a violation of this act, damages may be
8 proved and assessed in the aggregate by statistical or sampling
9 methods, by the computation of illegal overcharges or by other
10 reasonable systems of estimating aggregate damages, as the court
11 in its discretion may permit, without the necessity of
12 separately proving the individual claim of, or amount of damage
13 to, persons on whose behalf the suit was brought.

14 Section 7. Premerger notification regarding health care.

15 (a) Legislative intent.--

16 (1) It is the intent of the General Assembly to ensure
17 that competition beneficial to consumers in health care
18 markets across this Commonwealth remains vigorous and robust.

19 (2) The General Assembly supports that intent through
20 this section, which provides the Office of Attorney General
21 with notice of all material health care transactions in this
22 Commonwealth so that the Office of Attorney General has the
23 information necessary to determine whether an investigation
24 under this act is warranted for potential anticompetitive
25 conduct and consumer harm.

26 (3) This section is intended to supplement the Hart-
27 Scott-Rodino Act by requiring notice of transactions not
28 reportable under the Hart-Scott-Rodino Act's reporting
29 thresholds and by providing the Office of Attorney General
30 with a copy of any filings made pursuant to the Hart-Scott-

1 Rodino Act.

2 (b) Notice of material change.--

3 (1) Not less than 120 days prior to the effective date
4 of a transaction that results in a material change, the
5 parties to the transaction shall submit written notice to the
6 Office of Attorney General of the material change.

7 (2) For the purposes of this section, a material change
8 includes a merger, acquisition or contracting affiliation
9 between two or more entities of the following types:

- 10 (i) health care facilities;
- 11 (ii) health care facility systems; or
- 12 (iii) provider organizations.

13 (3) A material change includes proposed changes
14 identified in paragraph (2) between a Pennsylvania entity and
15 an out-of-state entity where the out-of-state entity
16 generates at least \$10,000,000 in health care services
17 revenue from patients residing in this Commonwealth and the
18 entities are of the types identified in paragraph (2). A
19 party to a material change that is licensed or operating in
20 this Commonwealth shall submit a notice as required under
21 this section.

22 (4) For purposes of paragraph (2), a merger, acquisition
23 or contracting affiliation between two or more health care
24 facilities, health care facility systems or provider
25 organizations only qualifies as a material change if the
26 health care facilities, health care facility systems or
27 provider organizations did not previously have common
28 ownership or a contracting affiliation.

29 (c) Notice requirements.--

30 (1) The written notice provided by the parties, as

1 required by subsection (b), shall include:

2 (i) The names of the parties and their current
3 business addresses.

4 (ii) Identification of all locations where health
5 care services are currently provided by each party.

6 (iii) Identification of all health care
7 practitioners who currently provide health care services
8 for each party.

9 (iv) A brief description of the nature and purpose
10 of the proposed material change.

11 (v) The anticipated effective date of the proposed
12 material change.

13 (2) Nothing in this section shall be construed to
14 prohibit the parties to a material change from voluntarily
15 providing additional information to the Office of Attorney
16 General.

17 (d) Requests for additional information.--

18 (1) The Office of Attorney General must make a request
19 for additional information from the parties under this act
20 within 30 days of the date notice is received under
21 subsections (b) and (c).

22 (2) Nothing in this subsection shall be construed to
23 preclude the Office of Attorney General from conducting an
24 investigation or enforcing Federal or State antitrust laws at
25 a later date.

26 (e) Premerger notification.--A health care practitioner or
27 provider organization conducting business in this Commonwealth
28 that files a premerger notification with the Federal Trade
29 Commission or the United States Department of Justice, in
30 compliance with the Hart-Scott-Rodino Act, shall provide a copy

1 of the filing to the Office of Attorney General. Providing a
2 copy of the Hart-Scott-Rodino Act filing to the Office of
3 Attorney General satisfies the notice requirement under
4 subsection (c).

5 (f) Materials submitted to the Office of Attorney General.--

6 (1) Information submitted to the Office of Attorney
7 General pursuant to this section shall be maintained and used
8 by the Office of Attorney General in the same manner and
9 under the same protections as provided under this act.

10 (2) Nothing in this section shall be construed to limit
11 the Office of Attorney General's authority under this act.

12 (3) Failure to comply with this section does not provide
13 a private cause of action.

14 (g) Penalty for noncompliance.--A person that fails to
15 comply with this section is liable to the Commonwealth for a
16 civil penalty of not more than \$200 per day for each day of
17 noncompliance.

18 (h) Definitions.--As used in this section, the following
19 words and phrases shall have the meanings given to them in this
20 subsection unless the context clearly indicates otherwise:

21 "Acquisition." An agreement, arrangement or activity, the
22 consummation of which results in a person acquiring, directly or
23 indirectly, the control of another person or the ability to
24 influence the competitive conduct of the target firm, and
25 includes the acquisition of voting securities and noncorporate
26 interests, such as assets, capital stock, membership interests,
27 or equity interests.

28 "Contracting affiliation." The formation of a relationship
29 between two or more entities that permits the entities to
30 negotiate jointly with insurers or third-party administrators

1 over rates for professional medical services or for one entity
2 to negotiate on behalf of the other entity with insurers or
3 third-party administrators over rates for professional medical
4 services.

5 "Hart-Scott-Rodino Act." Title II of the Clayton Antitrust
6 Act (Public Law 63-212, 15 U.S.C. § 18a).

7 "Health care facility." As defined in section 103 of the act
8 of July 19, 1979 (P.L.130, No.48), known as the Health Care
9 Facilities Act.

10 "Health care facility system." Either of the following:

11 (1) a parent corporation of one or more health care
12 facilities and an entity affiliated with the parent
13 corporation through ownership or control; or

14 (2) a health care facility and an entity affiliated with
15 the health care facility through ownership.

16 "Health care practitioner." As defined in section 103 of the
17 Health Care Facilities Act.

18 "Health care services." Medical, surgical, chiropractic,
19 hospital, optometric, podiatric, pharmaceutical, ambulance,
20 mental health, substance use disorder, therapeutic,
21 preventative, diagnostic, curative, rehabilitative, palliative,
22 custodial and other services relating to the prevention, cure or
23 treatment of illness, injury or disease.

24 "Health care services revenue." The total revenue received
25 for health care services in the previous 12 months.

26 "Insurer." As defined in 40 Pa.C.S. § 9103 (relating to
27 definitions).

28 "Merger." A consolidation of two or more organizations,
29 including two or more organizations joining through a common
30 parent organization or two or more organizations forming a new

1 organization. The term does not include a corporate
2 reorganization.

3 "Person." Where applicable, a natural person, corporation,
4 trust and partnership.

5 "Provider organization." A corporation, partnership,
6 business trust, association or organized group of persons,
7 whether incorporated or not, that is in the business of health
8 care delivery or management and that represents seven or more
9 health care practitioners in contracting with insurers or third-
10 party administrators for the payments of health care services.
11 The term includes a physician organization, physician-hospital
12 organization, independent practice association, provider network
13 and accountable care organization.

14 "Third-party administrator." An entity that administers
15 payments for health care services on behalf of a client in
16 exchange for an administrative fee.

17 Section 8. Civil investigation.

18 (a) Power of Attorney General to conduct.--

19 (1) If the Attorney General has reason to believe that a
20 person, whether foreign or domestic, has engaged in or is
21 engaging in a violation of this act or of a Federal antitrust
22 law that may be enforced by the Attorney General, the
23 Attorney General may initiate an investigation.

24 (2) As part of an investigation under this section, the
25 Attorney General may administer oaths and affirmations,
26 subpoena witnesses and documentary material, propound
27 interrogatories to be answered in writing under oath and
28 collect evidence.

29 (3) The Attorney General may use the information
30 obtained under this section as the Attorney General

1 determines necessary in the civil enforcement of this act or
2 Federal antitrust law that may be enforced by the Attorney
3 General, including presentation before a court.

4 (4) An interrogatory or subpoena served under this
5 subsection shall inform the party served of the right to file
6 a petition as provided in subsection (b).

7 (b) Petition authorized.--

8 (1) Not later than five business days after the service
9 of an interrogatory or subpoena, or at any time before the
10 return date specified in the interrogatory or subpoena, the
11 party served under this section may file in Commonwealth
12 Court a petition for an order modifying or setting aside the
13 interrogatory or subpoena.

14 (2) The party must serve the Attorney General with a
15 copy of the petition.

16 (3) The petitioner may raise an objection or privilege
17 that would be available under this act or upon service of a
18 subpoena in a civil action.

19 (c) Location for production of documentary material.--

20 (1) If documentary material that the Attorney General
21 seeks to obtain by subpoena is not located within this
22 Commonwealth and is not reducible to electronic reproduction
23 and transmission, the party subpoenaed may make the
24 documentary material available to the Attorney General to
25 examine the documentary material at the place where the
26 documentary material is located.

27 (2) The Attorney General may designate representatives,
28 including officials of the state in which the documentary
29 material is located, to inspect the documentary material on
30 the Attorney General's behalf.

1 (3) The Attorney General may respond to similar requests
2 from officials of other states and may inspect documentary
3 material on their behalf.

4 (d) Investigation enforcement order.--

5 (1) The Attorney General may apply to Commonwealth Court
6 for an order compelling compliance of any party who fails to
7 obey a subpoena or answer an interrogatory issued under this
8 section without lawful excuse and upon reasonable notice to
9 all persons affected by the subpoena or interrogatory.

10 (2) The Attorney General may request that an individual
11 who refuses to comply with a subpoena or answer an
12 interrogatory on the grounds that the testimony or
13 documentary material may incriminate the individual be
14 ordered by the court to provide the testimony or documentary
15 material.

16 (3) Except for a prosecution for perjury, an individual
17 who complies with a court order to provide testimony or
18 matter after asserting a privilege against self-incrimination
19 to which the individual is entitled by law shall not have the
20 testimony or documentary material provided, or evidence
21 derived therefrom, or received against the individual used in
22 a criminal investigation or proceeding.

23 (e) Duty to comply.--A person, whether foreign or domestic,
24 upon whom an interrogatory or subpoena is served pursuant to
25 this section shall comply with the terms of the interrogatory or
26 subpoena unless otherwise provided by this section or by court
27 order.

28 (f) Liability.--

29 (1) A person who:

30 (i) fails to appear with the intent to avoid, evade

1 or prevent compliance, in whole or in part, with an
2 investigation under this act or who removes from a place,
3 conceals, withholds, mutilates, alters, destroys or by
4 other means falsifies a matter or documentary material in
5 the possession, custody or control of a person subject to
6 the request or subpoena; or

7 (ii) knowingly conceals relevant information with
8 the intent to avoid, evade or prevent compliance shall be
9 liable for a civil penalty as provided in this
10 subsection.

11 (2) The Attorney General may, upon petition to
12 Commonwealth Court, recover a civil penalty not to exceed
13 \$25,000. If a civil penalty is assessed in or as the result
14 of litigation, the Attorney General is entitled to reasonable
15 attorney fees and costs.

16 (g) Access to information of other agencies and
17 confidentiality.--

18 (1) If criminal or civil intelligence, records of
19 investigations, investigative information or other
20 information held by a Federal or State agency is available to
21 the Attorney General on a confidential or restricted basis,
22 the Attorney General may obtain and use the information
23 unless otherwise prohibited by law.

24 (2) A record of an investigation or intelligence or
25 investigative information that is exempt from disclosure
26 under the act of February 14, 2008 (P.L.6, No.3), known as
27 the Right-to-Know Law, shall remain confidential and be
28 exempt from disclosure under that act.

29 (h) Records of investigation.--A written response, testimony
30 or document obtained by the Attorney General under this section,

1 or information derived directly or indirectly from a written
2 response, testimony or document obtained by the Attorney
3 General, shall be deemed a record of an investigation and shall
4 be exempt from disclosure under the Right-to-Know Law.

5 Section 9. Criminal penalties.

6 A person, including an agent or officer of the person, who
7 knowingly commits an unlawful act under section 4(a) or (b) is
8 guilty of a felony of the third degree and, upon conviction,
9 shall be sentenced to a term of imprisonment of not more than
10 four years or sentenced to pay a fine of not more than
11 \$1,000,000, or both. If the person who knowingly committed an
12 unlawful act under section 4(a) or (b) is a corporation, the
13 corporation shall be sentenced to pay a fine of not more than
14 \$1,000,000. An indictment or information based on a violation of
15 any of the provisions of this act must be found within five
16 years after the violation. No criminal proceeding barred by a
17 prior limitation shall be revived by this act.

18 Section 10. Standing.

19 An individual or entity who has suffered damages as a result
20 of prohibited acts enumerated in section 4 shall have standing
21 to commence an action in a court of competent jurisdiction.

22 Section 11. Cooperation with Federal Government and other
23 states.

24 The Attorney General may cooperate with and coordinate
25 enforcement of this act and Federal antitrust law that may be
26 enforced by the Attorney General with the Federal Government and
27 the several states, including using and sharing information and
28 evidence obtained under this act.

29 Section 12. Exceptions.

30 This act shall not make illegal an activity or conduct exempt

1 under any statute of the United States or the Commonwealth.

2 Section 13. Applicability.

3 This act shall not apply to a cooperative association or an
4 employee-owned enterprise, corporate or otherwise, of farmers,
5 gardeners or dairy producers, including livestock farmers and
6 fruit growers, nor to a contract, agreement or arrangement made
7 by the association or enterprise, nor to a bona fide labor
8 union.

9 Section 14. Action not barred as affecting or involving
10 interstate or foreign commerce.

11 No action under this act shall be barred on the grounds that
12 the activity or conduct complained of affects or involves
13 interstate or foreign commerce.

14 Section 15. Remedies cumulative.

15 The remedies afforded by this act are cumulative.

16 Section 16. Effective date.

17 This act shall take effect in 60 days.