

COMMITTEE BILL ANALYSIS

Bill: Senate Bill 848

Printer's No.: 901

Sponsor: Senator Greenleaf

Prepared by: Gregg Warner

Synopsis: This bill names Title 12 of the Pennsylvania Consolidated Statutes the Commerce and Trade Code and adds a chapter to the Commerce and Trade Code providing for a comprehensive antitrust law.

Summary: Chapter 9 of the Commerce and Trade Code (12 Pa.C.S. Ch. 9) provides for the protection of free enterprise in Pennsylvania.

Prohibited acts

The following acts are prohibited:

- (1) To contract, combine or conspire in restraint of trade or commerce.
- (2) To contract, combine or conspire to establish a minimum price below which a retailer, wholesaler or distributor may not sell a commodity or service.
- (3) To monopolize, attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce.
- (4) To acquire, directly or indirectly, the whole or any part of the stock or other share, capital or the assets of any other person where the effect of the acquisition may be to lessen competition substantially or to tend to create a monopoly in any line of trade or commerce.

Civil action

The Attorney General may file a civil action for an antitrust violation based on one or more of the prohibited acts. The Attorney General may bring the action on behalf of the Commonwealth, on behalf of an agency, political subdivision, municipal authority or natural person residing in Pennsylvania. The Attorney General may recover threefold the actual damages and the costs of the suit, including a reasonable attorney fee.

The civil action must be commenced within four years after the accrual of the cause of action except that no statute of limitations shall bar any civil action for the recovery of damages sustained by the Commonwealth.

The Attorney General may also seek injunctive relief.

The fact that the persons on whose behalf the action is brought has not dealt directly with the defendant shall not bar or otherwise limit recovery except to avoid duplicate liability for the same injury.

Proof of damages

The Attorney General may recover the aggregate damages sustained by the persons on whose behalf the civil action has been brought without separately proving the individual claim of each person. Proof of damages must be based on:

- (1) Statistical or sampling methods.
- (2) The pro rata allocation of illegal overcharges of sales occurring within Pennsylvania.
- (3) Such other reasonable system of estimating aggregate damages as the Commonwealth Court may permit.

Distribution of amounts recovered

The Attorney General shall distribute the amounts recovered in accordance with law or, in the absence of any applicable law, as the Commonwealth Court directs. Where it is impossible or economically impractical to identify the persons on whose behalf a suit was brought, the amounts recovered shall be paid to any charitable organization whose interests reasonably approximate the interests of the persons on whose behalf the suit was brought.

Subpoenas

Whenever the Attorney General believes that a person may be in control of information relevant to any antitrust civil investigation, the Attorney General may issue and serve subpoenas, administer oaths and examine witnesses and receive evidence. Each subpoena shall state the subject matter of the civil investigation, describe the conduct constituting the alleged violation and list the provisions of this law applicable to the alleged violation.

Any testimony, documentary material or other tangible evidence produced or answer made shall be kept confidential by the Attorney General prior to the institution of a civil action brought for the alleged violation. There are exceptions for when confidentiality is waived by the person subpoenaed, disclosure is authorized by the Commonwealth Court, or disclosure is made in cooperation with the federal government or other states.

If a witness served with a subpoena refuses to cooperate, the Attorney General may petition the Commonwealth Court for an order requiring the witness to answer, testify or produce the documentary material demanded.

Any person who obstructs compliance with a subpoena of the Attorney General or knowingly removes or falsifies any documentary material that is the subject of a subpoena commits a misdemeanor of the second degree.

Federal government and other states

The Attorney general may cooperate with and coordinate enforcement of the provisions of this law with the federal government and other states, including sharing information and evidence obtained under this law.

If any provision of this law is identical to or similar to that of a federal antitrust statute, it shall be interpreted in a manner consistent with comparable federal antitrust law.

Commonwealth Court

The Commonwealth Court shall have original jurisdiction over all actions for violations of this law.

Effective date

This act takes effect in 60 days.

Background: The purpose of this legislation is to allow for a full and fair recovery to satisfy claims arising from an antitrust injury sustained by the Commonwealth and its residents and to provide the investigative tools to satisfactorily achieve this objective. The language is derived from other states' statutes and federal law.

Office of Attorney General

This legislation was drafted in consultation with the Office of Attorney General. During the 2011-2012 session, working with Attorney General Linda Kelly, this legislation was drafted and introduced as Senate Bill 1565. During the current session, working with Attorney General Kathleen Kane, minor changes were made in Senate Bill 1565 and the legislation was reintroduced as Senate Bill 848.

Current law

Pennsylvania is the only state that does not have an antitrust statute. The Attorney General has authority to bring federal actions to recover damages for Pennsylvania consumers and State agencies but the lack of a State antitrust law causes three main problems. Without an antitrust statute, the Attorney General:

(1) Does not have the ability to subpoena documents. Since one of the key violations of antitrust laws, a conspiracy to restrain trade, involves secretive conduct, the Attorney General is often unable to fully investigate issues involving collusion because there is no way to compel production of documents and testimony. The Attorney General can only investigate a case by getting witnesses and targets to voluntarily provide information which rarely happens.

(2) May lose control over litigation. If the Attorney General has to bring an action in federal court, as opposed to State court, the office can be dragged into federal multi-district litigation in a distant court where the litigation is controlled by a committee of lawyers appointed by the court. These lawyers may not have the interests of Pennsylvania consumers or State agencies as a priority.

(3) May not be able to recover damages. Where the unlawful conduct, especially price fixing, occurs upstream in the chain of distribution from the parties the Commonwealth and consumers deal with directly, Pennsylvania may not recover damages. This is because federal law prohibits collecting damages by indirect purchasers. This means that where there is an agreement to fix prices of a product among manufacturers, and that product is sold to wholesalers, then to retailers, before being purchased by the Commonwealth or consumers, the Attorney General cannot collect damages.