

1 **State of Arkansas**
2 **78th General Assembly**
3 **Regular Session, 1991**
4 **By: Senate Judiciary Committee**

A Bill

SENATE BILL

For An Act To Be Entitled

"THE ARKANSAS FREE AND FAIR COMPETITION ACT."

10 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

12 SECTION 1. Definitions as used in this act:

13 (a) "Person" means an individual, corporation, business trust,
14 partnership, association, or any other legal entity.

15 (b) "Relevant market" means the geographical area of actual or
16 potential competition in a line of commerce, all or any part of which is
17 within this state.

19 SECTION 2. CONTRACT, COMBINATION, OR CONSPIRACY TO RESTRAIN OR
20 MONOPOLIZE TRADE. A contract, combination, or conspiracy between two (2) or
21 more persons in restraint of, or to monopolize, trade or commerce in a
22 relevant market is unlawful.

24 SECTION 3. ESTABLISHMENT, MAINTENANCE, OR USE OF A MONOPOLY. The
25 establishment, maintenance, or use of a monopoly, or an attempt to establish a
26 monopoly, of trade or commerce in a relevant market by any person, for the
27 purpose of excluding competition or controlling, fixing, or maintaining
28 prices, is unlawful.

30 SECTION 4. EXCLUSIONS.

31 (a) Labor of a human being is not a commodity or an article of
32 commerce.

33 (b) Nothing in this act shall be construed to forbid the existence and
34 operation of any labor, agricultural, or horticultural organization instituted
35 for the purpose of mutual help, while lawfully carrying out its legitimate

1 objects.

2 SECTION 5. JUDICIAL JURISDICTION. An action for violation of this act
3 shall be brought in the circuit court of Pulaski County.

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5 SECTION 6. OFFICIAL INVESTIGATION.

6 (a) If the Attorney General has reasonable cause to believe that a
7 person has information or is in possession, custody, or control of any
8 document or other tangible object relevant to an investigation for violation
9 of this act, he may serve upon the person, before bringing any action in the
10 circuit court, a written demand to appear and be examined under oath, to
11 answer written interrogatories under oath, and to produce the document or
12 object for inspection and copying. The demand shall:

13 (1) be served upon the person in the manner required for service
14 of process in this state;

15 (2) describe the nature of the conduct constituting the violation
16 under investigation;

17 (3) describe the document or object with sufficient definiteness
18 to permit it to be fairly identified;

19 (4) contain a copy of the written interrogatories;

20 (5) prescribe a reasonable time at which the person must appear
21 to testify, within which to answer the written interrogatories, and within
22 which the document or object must be produced, and advise the person that a
23 reasonable opportunity will be afforded for examination and notation of
24 corrections upon any transcript of an oral examination, that a copy of one's
25 own transcript can be obtained upon payment of reasonable charges, and that
26 objections to or reasons for not complying with the demand may be filed with
27 the Attorney General at or before the designated time;

28 (6) specify a place for the taking of testimony or for production
29 and designate a person who shall be custodian of the document or object; and

30 (7) contain a copy of subsection (b).

31 (b) If a person objects to or otherwise fails to comply with the
32 written demand served upon him under subsection (a) the Attorney General may
33 file in the [district] court of the county in which the person resides or in
34 which he maintains a principal place of business within this state a petition
35 for an order to enforce the demand. Notice of hearing the petition and a copy

1 of the petition shall be served upon the person, who may appear in opposition
2 to the petition. If the court finds that the demand is proper, there is
3 reasonable cause to believe that there may have been a violation of this act,
4 and the information sought or document or object demanded is relevant to the
5 violation, it shall order the person to comply with the demand, subject to
6 modification the court may prescribe. Upon by the person and for good cause
7 shown, the court may make any further order in the proceedings that justice
8 requires to protect the person from unreasonable annoyance, embarrassment,
9 oppression, burden, or expense.

10 (c) Any procedure, testimony taken, or material produced under this
11 section shall be kept confidential by the Attorney General before bringing an
12 action against a person under this act for the violation under investigation
13 unless confidentiality is waived by the person being investigated and the
14 person who has testified, answered interrogatories, or produced material, or
15 disclosure is authorized by the court.

16 (d) Nothing in this section shall limit the authority of the Attorney
17 General to subpoena or require production of documents as permitted under any
18 other provision of law.

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20 SECTION 7. CIVIL PENALTY AND INJUNCTIVE ENFORCEMENT BY STATE. The
21 Attorney General, may bring an action for appropriate injunctive relief and
22 civil penalties in the name of the state for a violation of this act. A civil
23 penalty of not more than two hundred thousand dollars (\$200,000) for each
24 violation of this act may be assessed by the trier of fact for the benefit of
25 the state.

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27 SECTION 8. DAMAGES AND INJUNCTIVE RELIEF.

28 (a) The Attorney General, on behalf of the state, a political
29 subdivision, or any public agency threatened with injury or injured, directly
30 or indirectly, in its business or property by a violation of this act may
31 bring an action for appropriate injunctive or other equitable relief, three
32 (3) times the damages sustained and, as determined by the court, taxable costs
33 and reasonable attorney's fees.

34 (b)(1) The Attorney General may bring a civil action in the name of the
35 State of Arkansas, as parens patriae on behalf of natural persons residing in

1 the state, in any court in which venue is proper under Section 5 of this act,
2 to secure equitable and monetary relief as provided in this section for injury
3 directly or indirectly sustained by such natural persons to their property by
4 reason of violation of Section 2 or Section 3 of this act.

5 (2) The court shall exclude from the amount of monetary relief
6 awarded in an action pursuant to paragraph (1) of this subsection any amount
7 of monetary relief:

8 (A) which duplicates amounts which have been awarded for
9 the same injury; or

10 (B) which is properly allocable to:

11 (i) natural persons who have excluded their claims
12 pursuant to paragraph (2) of subsection (a) of this section; and

13 (ii) any business entity.

14 (3) The court shall award the state as monetary relief three (3)
15 times the damages sustained, as described in paragraph (2) of this subsection,
16 and the costs of suit, and a reasonable attorney's fees. If the trier of fact
17 finds that the violation is flagrant, it may increase recovery to an amount
18 not in excess of three (3) times the damages sustained.

19 (c)(1) In any action pursuant to paragraph (a) of subsection (a) of
20 this section, the Attorney General shall, at such times, in such manner, and
21 with such content as the court may direct, cause notice thereof to be given by
22 publication. If the court finds that notice given solely by publication would
23 deny due process of law to any person or persons, the court may direct further
24 notice to such person or persons according to the circumstances of the case.

25 (2) Any person on whose behalf an action is brought pursuant to
26 paragraph (1) of subsection (a) of this section may elect to exclude from
27 adjudication the portion of the claim for monetary relief attributable to the
28 person by filing notice of such election with the court within such time as
29 specified in the notice given pursuant to paragraph (1) of this subsection.

30 (3) The final judgment in an action pursuant to paragraph (1) of
31 subsection (a) of this section shall be res judicata as to any claim under
32 this section by any person on behalf of whom such action was brought and who
33 fails to give the notice specified in paragraph (2) of this subsection within
34 the period specified in the notice given pursuant to paragraph (1) of this
35 subsection.

1 (d) An action pursuant to paragraph (1) of subsection (a) of this
2 section shall not be dismissed or compromised without the approval of the
3 court, and the notice of any proposed dismissal or compromise shall be given
4 in such manner as the court directs.

5 (e) In any action pursuant to paragraph (1) of subsection (a) of this
6 section in which there has been a determination that a defendant agreed to fix
7 prices in violation of Section 2 of this act, damages may be proved and
8 assessed in the aggregate by statistical or sampling methods, by the
9 computation and pro rata allocation of illegal overcharges, or by such other
10 reasonable system of estimating aggregate damages as the court in its
11 discretion may permit without the necessity of separately proving the
12 individual claim of, or amount of damage to, persons on whose behalf the suit
13 was brought.

14 (f) (1) Monetary relief recovered in an action pursuant to paragraph (1)
15 of subsection (a) of this section shall be distributed in such manner as the
16 court in its discretion may authorize, subject to the requirement that any
17 distribution procedure adopted afford each person on whose behalf the suit was
18 brought a reasonable opportunity to secure their appropriate portion of the
19 net monetary relief.

20 (2) The Attorney General shall deposit that portion of the
21 monetary relief awarded by the court as costs of suit and attorney's fee in
22 the Fair Competition Enforcement Fund established pursuant to Section 14 of
23 this act.

24 (3) To the extent that the monetary relief awarded by the court
25 is not exhausted by distribution pursuant to paragraphs (1) and (2) of this
26 subsection, the remaining funds shall be deemed a civil penalty by the court
27 and revert to the General Fund of the State of Arkansas.

28 (g) The powers granted in this section are in addition to and not in
29 derogation of the common law powers of the Attorney General to act as parens
30 patriae, at law or in equity.

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32 SECTION 9. LIMITATIONS OF ACTIONS.

33 (a) An action under Section 7 to recover a civil penalty is barred if
34 it is not commenced within four (4) years after the cause of action accrues.

35 (b) An action under Section 8 to recover damages is barred if it is not

1 commenced within four (4) years after the cause of action accrues.

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3 SECTION 10. REMEDIES CUMULATIVE. The remedies provided in this act are
4 cumulative.

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6 SECTION 11. FAIR COMPETITION ENFORCEMENT FUND. All money received by
7 the state as a result of actions brought by the Attorney General pursuant to
8 Section 8(a) or Section 8(b)(e)(2) of this act or pursuant to the federal
9 antitrust laws shall be credited by the state treasurer to a fund to be known
10 as the "Fair Competition Enforcement Fund". Money in the Fair Competition
11 Enforcement Fund, subject to appropriation pursuant to law not to exceed two
12 hundred fifty thousand dollars (\$250,000) in any fiscal year, shall be used
13 solely for the payment of expenses incurred by the Attorney General in
14 connection with its activities under this act or the federal antitrust laws.
15 At the end of any fiscal year if the balance in the Fair Competition
16 Enforcement Fund exceeds five hundred thousand dollars (\$500,000), the excess
17 shall be withdrawn from it and deposited in the State Central Services Fund as
18 direct revenues.

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20 SECTION 12. ORDER COMPELLING TESTIMONY OR PRODUCTION OF EVIDENCE,
21 IMMUNITY, CONTEMPT.

22 (a) In any proceeding or investigation under this article, if a person
23 refuses to answer a question or produce evidence of any kind on the ground
24 that he may be incriminated and if the Attorney General requests the court in
25 writing to order the person to answer the question or produce the evidence,
26 the court may make this order and the person shall comply with the order. If
27 the court denies the request, the court shall state its reasons for denial in
28 writing. After complying, the testimony or evidence, or any information
29 directly or indirectly derived from the testimony or evidence, shall not be
30 used against the person in any proceeding or prosecution for a crime or
31 offense concerning which he gave an answer or produced evidence under the
32 court order, except that immunity obtained pursuant to this section does not
33 prevent or in any way affect the bringing of an action under Section 8 of this
34 act. Immunity obtained pursuant to this section does not exempt any person
35 from prosecution, penalty or forfeiture for any perjury, false swearing or

1 contempt committed in answering, or failing to answer, or in producing, or
2 failing to produce, evidence in accordance with the order.

3 (b) If a person refuses to testify after being granted immunity and
4 after being ordered to testify as prescribed in subsection (a) of this
5 section, he may be adjudged in contempt.

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7 SECTION 13. All provisions of this act of a general and permanent
8 nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas
9 Code Revision Commission shall incorporate the same in the Code.

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11 SECTION 14. If any provision of this act or the application thereof to
12 any person or circumstance is held invalid, such invalidity shall not affect
13 other provisions or applications of the act which can be given effect without
14 the invalid provision or application, and to this end the provisions of this
15 act are declared to be severable.

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17 SECTION 15. All laws and parts of laws in conflict with this act are
18 hereby repealed.

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20 SECTION 16. EMERGENCY. It is hereby found and determined by the
21 Seventy-Eighth General Assembly that our free enterprise system of government
22 requires us to be vigilant against all forms of insidious efforts to exclude
23 competition and fix prices in the marketplace, and the Attorney General of the
24 State of Arkansas should be given adequate tools to combat all efforts to
25 exclude competition and fix prices. Therefore, an emergency is hereby
26 declared to exist and this act being necessary for the immediate preservation
27 of the public peace, health, and safety, shall be in full force and effect
28 from and after its passage and approval.

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