

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas
2 84th General Assembly
3 Regular Session, 2003

A Bill

HOUSE BILL 2720

4
5 By: Representatives Napper, P. Bookout
6 By: Senator Bryles

For An Act To Be Entitled

10 AN ACT TO AMEND THE UNFAIR PRACTICES ACT AND THE
11 SUBCHAPTER ON MONOPOLIES GENERALLY; AND FOR OTHER
12 PURPOSES.

Subtitle

15 AN ACT TO AMEND THE UNFAIR PRACTICES ACT
16 AND THE SUBCHAPTER ON MONOPOLIES
17 GENERALLY.

18
19
20 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

21
22 SECTION 1. Arkansas Code Title 4, Chapter 75, Subchapter 2 is amended
23 to add additional sections to read as follows:

24 4-75-212. Civil actions and settlements by the Attorney General.

25 (a) In addition to the other remedies provided in this subchapter,
26 whenever the Attorney General has reason to believe that any person is
27 engaging, has engaged, or is about to engage in any act or practice declared
28 unlawful by this subchapter, the Attorney General may bring an action in the
29 name of the state against that person:

30 (1) To obtain a declaratory judgment that the act or practice
31 violates the provisions of this subchapter;

32 (2) To enjoin any act or practice that violates the provisions
33 of this subchapter by issuance of a temporary restraining order or
34 preliminary or permanent injunction, without bond, upon the giving of
35 appropriate notice;

36 (3) To recover on behalf of the state and its agencies actual



1 damages or restitution for loss incurred either directly or indirectly; and

2 (4) To recover civil penalties of up to ten thousand dollars
3 (\$10,000) per violation of this subchapter, or any injunction, judgment or
4 consent order issued or entered into under the provisions of this subchapter
5 and reasonable expenses, investigative costs and attorney’s fees;

6 (b) The Attorney General may also bring a civil action in the name of
7 the state, as parens patriae on behalf of natural persons residing in this
8 state, to secure monetary relief as provided under this section for injury,
9 directly or indirectly sustained by those persons because of any violation of
10 this subchapter, in accordance with the following provisions:

11 (1)(A) The circuit court shall award the Attorney General as
12 monetary relief actual damages sustained or restitution for loss incurred as
13 a result of the violations of this subchapter, and the cost of suit,
14 including a reasonable attorney’s fee.

15 (B) The court shall exclude from the amount of monetary
16 relief awarded in the action any amount which duplicates amounts that have
17 been awarded for the same injury already or which are allocable to persons
18 who have excluded their claims under subsection (b)(3)(A) of this section.

19 (C) The treble damages recoverable under § 4-75-211(b)(3)
20 are not recoverable under a parens patriae action brought under this section.

21 (2)(A) In any action brought under this section, the Attorney
22 General shall, at the time, in the manner, and with the content as the court
23 may direct, cause notice of the parens patriae action to be given by
24 publication.

25 (B) If the court finds that notice given solely by
26 publication would deny due process of law to any person, the court shall
27 direct the Attorney General to give the notice as may be required by due
28 process of law.

29 (3)(A) Any person on whose behalf an action is brought under
30 this section may elect to exclude from the adjudication the portion of the
31 Attorney General’s claim for monetary relief attributable to him or her by
32 filing notice of the election with the court, within the time period
33 specified in the notice of the action given to the persons to be benefited by
34 the action.

35 (B) Any person failing to give the notice shall be barred
36 during the pendency of the action from commencing an action in his or her own

1 name for the injury alleged in the action and the final judgment in the
 2 action shall be res judicata as to any claim which could be brought by the
 3 person under this act based on the facts alleged or proven in the action.

4 (C)(i) The provisions of §§ 4-75-212, 4-75-213, 4-75-214,
 5 4-75-215, or 4-75-216 of this subchapter shall apply only to actions
 6 instituted by the Attorney General.

7 (ii) Nothing contained in the provisions set forth
 8 in this subdivision (b)(3)(c) should be deemed to expand the rights or
 9 remedies available to persons proceeding under any action instituted by one
 10 (1) or more persons or an entity other than the Attorney General, for
 11 violations of the provisions of this subchapter.

12 (4) All damages shall be distributed in a manner that will
 13 afford each person a reasonable opportunity to secure his or her appropriate
 14 portion of the net monetary relief, including a distribution under the theory
 15 of cy pres, subject to approval by the court.

16 (c)(1) In lieu of instigating or continuing an action or proceeding,
 17 or to conclude an investigation commenced or contemplated under this
 18 subchapter, the Attorney General may accept a consent decree with respect to
 19 any act or practice alleged to be a violation of this subchapter.

20 (2) The consent decree may include a stipulation for the payment
 21 of civil penalties, the Attorney General's reasonable expenses, investigative
 22 costs and attorney's fees, an agreement to pay damages or to allow for
 23 restitution of money, property, or other things received in connection with a
 24 violation of this act, and agreed to injunctive provisions.

25 (3) Before any consent decree entered into under this section is
 26 effective, it must be approved by the circuit court, the federal district
 27 court, or if an action has already been commenced, the court in which the
 28 action is pending and an entry made in that court in the manner required for
 29 making an entry of judgment.

30 (4)(A) If the consent decree submitted to the court is to settle
 31 an action brought under subsection (b) of this section, notice of the
 32 proposed settlement shall be given in the manner as the court directs.

33 (B) Once court approval is received, any breach of the
 34 conditions of the consent decree shall be treated as a violation of a court
 35 order, and shall be subject to all penalties provided by law for violation of
 36 court orders.

1 (d) In addition to actions under state law, the Attorney General may
 2 proceed under any antitrust laws in the federal courts on behalf of this
 3 state or any of its agencies, or as parens patriae on behalf of natural
 4 persons in this state.

5
 6 4-75-213. Person defined.

7 Unless otherwise defined, for purposes of this subchapter, "person"
 8 means any natural person, corporation, firm, partnership, limited
 9 partnership, trust, association, or any other legal or commercial entity.

10
 11 4-75-214. Awards to the Attorney General - Use of moneys.

12 (a) There shall be established within the Office of the Attorney
 13 General an Antitrust Enforcement Account into which all costs and fees
 14 recovered by the Attorney General under the terms of this subchapter or the
 15 federal antitrust laws, shall be remitted.

16 (b) The costs and fees deposited into the Antitrust Enforcement
 17 Account of the Attorney General's Office shall be used for the furtherance of
 18 the attorney general's duties and activities under this subchapter.

19
 20 4-75-215. Action not barred because it affects interstate or foreign
 21 commerce.

22 (a) This subchapter is to apply to any economic activity occurring
 23 wholly or partly within the state of Arkansas, or which affects economic
 24 activity within the state of Arkansas.

25 (b) No action instituted by the Attorney General under this subchapter
 26 shall be barred on the ground that the activity or conduct complained of in
 27 any way affects or involves interstate or foreign commerce.

28
 29 4-75-216. Venue.

30 Any action, application, or motion brought by the Attorney General
 31 against a person under this subchapter shall be filed in the circuit court of
 32 Pulaski County unless the action, application, or motion is brought as part
 33 of an action containing claims of federal law violations, in which event the
 34 action shall be brought in the appropriate federal court.

35
 36 SECTION 2. Arkansas Code Title 4, Chapter 75, Subchapter 3 is amended

1 to add additional sections to read as follows:

2 4-75-315. Civil actions and settlements by the Attorney General.

3 (a) In addition to the other remedies provided in this subchapter,
4 whenever the Attorney General has reason to believe that any person is
5 engaging, has engaged, or is about to engage in any act or practice declared
6 unlawful by this subchapter, the Attorney General may bring an action in the
7 name of the state against that person:

8 (1) To obtain a declaratory judgment that the act or practice
9 violates the provisions of this subchapter;

10 (2) To enjoin any act or practice that violates the provisions
11 of this subchapter by issuance of a temporary restraining order or
12 preliminary or permanent injunction, without bond, upon the giving of
13 appropriate notice;

14 (3) To recover on behalf of the state and its agencies actual
15 damages or restitution for loss incurred either directly or indirectly; and

16 (4) To recover civil penalties of up to ten thousand dollars
17 (\$10,000) per violation of this subchapter, or any injunction, judgment or
18 consent order issued or entered into under the provisions of this subchapter
19 and reasonable expenses, investigative costs, and attorney’s fees.

20 (b) The Attorney General also may bring a civil action in the name of
21 the state, as parens patriae on behalf of natural persons residing in this
22 state, to secure monetary relief as provided under this section for injury,
23 directly or indirectly sustained by those persons because of any violation of
24 this subchapter, in accordance with the following provisions:

25 (1) The court in which the action is commenced shall award the
26 Attorney General as monetary relief the actual damages sustained or
27 restitution for loss incurred as a result of the violations of this
28 subchapter, and the cost of suit, including a reasonable attorney’s fee. The
29 court shall exclude from the amount of monetary relief awarded in the action
30 any amount which duplicates amounts that have been awarded for the same
31 injury already or which are allocable to persons who have excluded their
32 claims under subsection (b)(3)(A) of this section.

33 (2)(A) In any action brought under this section, the Attorney
34 General shall, at the time, in the manner, and with the content as the
35 circuit court may direct, cause notice of the parens patriae action to be
36 given by publication.

1 (B) If the court finds that notice given solely by
2 publication would deny due process of law to any person, the court shall
3 direct the Attorney General to give the notice as may be required by due
4 process of law.

5 (3)(A) Any person on whose behalf an action is brought under
6 this section may elect to exclude from the adjudication the portion of the
7 Attorney General's claim for monetary relief attributable to him or her by
8 filing notice of the election with the court, within the time period
9 specified, in the notice of the action given to the persons to be benefited
10 by the action.

11 (B) Any person failing to give the notice shall be barred
12 during the pendency of the action from commencing an action in his or her own
13 name for the injury alleged in the action and the final judgment in the
14 action shall be res judicata as to any claim which could be brought by the
15 person under this subchapter based on the facts alleged, or proven in the
16 action.

17 (C)(i) The provisions of §§ 4-75-315 through 4-75-321
18 shall apply only to actions instituted by the Attorney General.

19 (ii) Nothing in the provisions set forth in this
20 subdivision (b)(3)(C) shall be deemed to expand or create additional rights
21 or remedies available to persons proceeding under any action instituted by
22 one or more persons or an entity other than the Attorney General for
23 violations of the provisions of this subchapter.

24 (4) All damages shall be distributed in a manner that will
25 afford each person a reasonable opportunity to secure his or her appropriate
26 portion of the net monetary relief, including a distribution under the theory
27 of cy pres, subject to approval by the court.

28 (c)(1) In lieu of instigating or continuing an action or proceeding,
29 or to conclude an investigation commenced or contemplated by this subchapter,
30 the Attorney General may accept a consent decree with respect to any act or
31 practice alleged to be a violation of this subchapter.

32 (2) The consent decree may include a stipulation for the payment
33 of civil penalties, the Attorney General's reasonable expenses, investigative
34 costs and attorney's fees, an agreement to pay damages or to allow for
35 restitution of money, property, or other things received in connection with a
36 violation of this act, and agreed to injunctive provisions.

1 (3) Before any consent decree entered into under this section is
 2 effective, it must be approved by the circuit court, the federal district
 3 court, or if an action has already been commenced, the court in which the
 4 action is pending and an entry made in that court in the manner required for
 5 making an entry of judgment.

6 (4) If the consent decree submitted to the court is to settle an
 7 action brought under subsection (b) of this section, notice of the proposed
 8 settlement shall be given in the manner as the court directs.

9 (5) Once court approval is received, any breach of the
 10 conditions of the consent decree shall be treated as a violation of a court
 11 order, and shall be subject to all penalties provided by law for violation of
 12 court orders.

13 (d) In addition to actions under state law, the Attorney General may
 14 proceed under any antitrust laws in the federal courts on behalf of this
 15 state or any of its agencies, or as parens patriae on behalf of natural
 16 persons in this state.

17
 18 4-75-318. Person defined.

19 Unless otherwise defined, for purposes of this subchapter, "person"
 20 means any natural person, corporation, firm, partnership, limited
 21 partnership, trust, association, or any other legal or commercial entity.

22
 23 4-75-319. Awards to the Attorney General - Use of moneys.

24 (a) There shall be established within the Office of the Attorney
 25 General an Antitrust Enforcement Account into which all costs and fees
 26 recovered by the Attorney General under the terms of this subchapter or the
 27 federal antitrust laws, shall be remitted.

28 (b) The costs and fees deposited into the Antitrust Enforcement
 29 Account of the Attorney General's Office shall be used for the furtherance of
 30 the Attorney General's duties and activities under this subchapter.

31
 32 4-75-320. Action not barred because it affects interstate or foreign
 33 commerce.

34 (a) This subchapter is to apply to any economic activity occurring
 35 wholly or partly within the state of Arkansas, or which affects economic
 36 activity within the state of Arkansas.

1 (b) No action instituted by the Attorney General under this subchapter
 2 shall be barred on the ground that the activity or conduct complained of in
 3 any way affects or involves interstate or foreign commerce.

4
 5 4-75-321. Venue.

6 Any action, application, or motion brought by the Attorney General
 7 against a person under this subchapter shall be filed in the circuit court of
 8 Pulaski County unless the action, application, or motion is brought as part
 9 of an action containing claims of federal law violations, in which event the
 10 action shall be brought in the appropriate federal court.

11
 12 SECTION 3. Arkansas Code §§ 4-75-304 through 4-75-307 are repealed.

13 ~~4-75-304. Monetary penalties—Actions to recover—Disposition of~~
 14 ~~funds.~~

15 ~~(a)(1) Any person, partnership, firm, or association, or any~~
 16 ~~representative or agent thereof, or any corporation or company, or any~~
 17 ~~officer, representative, or agent thereof, violating any of the provisions of~~
 18 ~~this subchapter shall forfeit not less than two hundred dollars (\$200) nor~~
 19 ~~more than five thousand dollars (\$5,000) for every such offense.~~

20 ~~(2) Each day the person, corporation, partnership, or~~
 21 ~~association shall continue to violate the provisions of this subchapter shall~~
 22 ~~be a separate offense.~~

23 ~~(b) The penalty provided for in this subchapter is to be recovered by~~
 24 ~~an action in the name of the state at the relation of the Attorney General.~~

25 ~~(c) The moneys thus collected are to go into the State Treasury for~~
 26 ~~the benefit of the Public School Fund of this state, except as otherwise~~
 27 ~~provided in this subchapter.~~

28
 29 ~~4-75-305. Forfeiture of corporate rights for violations—Proceedings.~~

30 ~~(a)(1) Any corporation created or organized by or under the laws of~~
 31 ~~this state which violates any of the provisions of this subchapter shall~~
 32 ~~forfeit its corporate rights and franchises, and its corporate existence~~
 33 ~~shall, upon proper proof being made in any court of competent jurisdiction in~~
 34 ~~this state, be by the court declared forfeited, void, and of no effect, and~~
 35 ~~shall thereupon cease and determine.~~

36 ~~(2)(A) Any corporation created or organized by or under the laws~~

1 of any other state or country, which violates any provisions of this
 2 subchapter, shall thereby forfeit its right and privilege to do any business
 3 in this state, and, upon proper proof being made in any court of competent
 4 jurisdiction in this state, its right and privilege to do business in this
 5 state shall be declared forfeited.

6 (B) In all proceedings to have such forfeiture declared,
 7 proof that any person who has been acting as the agent of the foreign
 8 corporation in transacting business in this state, has been, while acting as
 9 the agent, and in the name, behalf, or interest of the foreign corporation,
 10 violating any provisions of this subchapter, shall be received as prima facie
 11 proof of the act of the corporation itself.

12 (b) It shall be the duty of the clerk of the court to certify the
 13 decree thereof to the Secretary of State, and, if it is an insurance company,
 14 also to the Insurance Commissioner, who shall take notice and be governed
 15 thereby as to the corporate powers and rights of the corporation.

16 (c) In all suits instituted under this subchapter to forfeit the
 17 charter of corporations, or to forfeit the right of a corporation to do
 18 business in this state, where a judgment of forfeiture is obtained and the
 19 cause is not appealed to the Supreme Court, the circuit court rendering the
 20 judgment shall allow the Attorney General his or her actual expenses, to be
 21 paid out of the assets of the corporation.

22
 23 ~~4-75-306. Overt act necessary to incur penalty.~~

24 ~~No individual, company, or corporation shall be subject to any of the~~
 25 ~~penalties of this subchapter unless the individual, company, or corporation~~
 26 ~~shall do within this state some act directly tending to carry into effect a~~
 27 ~~conspiracy prohibited by this subchapter.~~

28
 29 ~~4-75-307. Enforcement by Attorney General—Compensation.~~

30 (a) ~~It is the duty of the Attorney General to enforce the provisions~~
 31 ~~of this subchapter.~~

32 (b) ~~As compensation for his or her services in this behalf, the~~
 33 ~~Attorney General shall be entitled to his or her actual expenses incurred in~~
 34 ~~the prosecution of suits, to be paid by the defendant when judgment is~~
 35 ~~rendered for the state, to be taxed as costs by the court hearing the cause.~~

SECTION 4. Arkansas Code §§ 4-75-313 and 4-75-314 are repealed.

~~4-75-313. Proceedings to dissolve or restrain monopolies or to recover penalties—Depositions and production of documents.~~

~~(a) Whenever any proceedings are commenced in any court of competent jurisdiction in this state by the Attorney General against any corporation, individual, or association of individuals, or joint stock association or copartnership under the law against the formation and maintenance of pools, trusts of any kind, monopolies or confederations, combinations or organizations in restraint of trade, to dissolve them or to restrain their formation or maintenance in this state, or to recover the penalties provided for in this subchapter; and if the Attorney General desires to take the testimony of any officer, director, agent, or employee of any corporation, or joint stock association proceeded against, or in case of a copartnership, any of the members of the partnership, or any employee thereof, in any court in which the action may be pending; and if the individual or individuals whose testimony is desired are outside the jurisdiction of this state or reside without the State of Arkansas, the Attorney General may file in the court in term time, or with the judge thereof in vacation, a statement, in writing, setting forth the names of the persons or individuals whose testimony he or she desires to take, and the time when and the place where he or she desires the persons to appear.~~

~~(b) Thereupon, the court or judge thereof shall make an order for the taking of the testimony of such person or persons and for the production of any books, papers, and documents in his or her possession or under his or her control relating to the merits of any suit, or to any evidence therein; and the court shall appoint a commissioner for that purpose, who shall be an officer authorized by law to take depositions in this state.~~

~~(c) The commissioner shall issue immediately a notice, in writing, directed to the attorney or attorneys of record in the cause, or agent, or officer, or other employee, that the testimony of the person named in the application of the Attorney General is desired, and requesting the attorney of record, or the officer, agent, or employee to whom the notice is delivered, and upon whom the notice is served, to have the officer, agent, employee, representative of the copartnership, or agent thereof, whose evidence is desired to be taken, together with such books, papers, and documents, at the place named in the application, shall then and there~~

1 testify.

2 ~~(d) However, the application shall always allow in fixing the time the~~
 3 ~~same number of days' travel to reach the designated place in Arkansas that~~
 4 ~~would be allowed by law in case of taking depositions. In addition to the~~
 5 ~~above named time, six (6) days shall be allowed for the attorney of record,~~
 6 ~~or the agent, officer, or employee on whom notice is served, to notify the~~
 7 ~~persons whose testimony is to be taken.~~

8 ~~(e) Service of the notice as returned in writing may be made by anyone~~
 9 ~~authorized by law to serve a subpoena.~~

10

11 ~~4-75-314. Proceedings to dissolve or restrain monopolies or to recover~~
 12 ~~penalties— Judgment by default upon failure to testify.~~

13 ~~Whenever the persons mentioned in § 4-75-313 are notified, as provided~~
 14 ~~in § 4-75-313, to request any officer, agent, director, or employee to attend~~
 15 ~~before any court, or before any person authorized to take the testimony in~~
 16 ~~the proceedings, and the person whose testimony is required, as provided in §~~
 17 ~~4-75-313 fails to appear and testify and produce any books, papers, and~~
 18 ~~documents he or she has been ordered to procure by the court or the other~~
 19 ~~officer authorized to take such evidence, then it will be the duty of the~~
 20 ~~court, upon motion of the Attorney General, to strike out the answer, motion,~~
 21 ~~reply, demurrer, or other pleading then or thereafter filed in the action or~~
 22 ~~proceeding by the corporation, joint stock association, or copartnership~~
 23 ~~whose officer, agent, director, or employee has neglected or failed to attend~~
 24 ~~and testify and produce all books, papers, and documents he or she or they~~
 25 ~~shall have been ordered to produce in the action by the court or person~~
 26 ~~authorized to take said testimony, and the court shall proceed to render~~
 27 ~~judgment by default against the corporation, joint stock association, or~~
 28 ~~copartnership. In case any officer, agent, employee, director, or~~
 29 ~~representative of any corporation, joint stock association, or copartnership~~
 30 ~~in such proceedings as hereinbefore mentioned, who resides or is found within~~
 31 ~~this state shall be subpoenaed to appear and testify or to produce books,~~
 32 ~~papers, and documents and shall fail, neglect, or refuse to do so, then the~~
 33 ~~answer, motion, demurrer, or other pleading then and thereafter filed by the~~
 34 ~~corporation, joint stock association, or copartnership in any proceeding~~
 35 ~~shall, on motion of the Attorney General, be stricken and judgment in the~~
 36 ~~cause rendered against the corporation, joint stock association, or~~

1 ~~copartnership.~~
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