

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
4

As Engrossed: H3/14/03 H3/20/03 S3/31/03

A Bill

HOUSE BILL 2720

5 By: Representatives Napper, P. Bookout
6 By: Senator Bryles
7

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.
13

Subtitle

14 AN ACT TO AMEND THE UNFAIR PRACTICES ACT
15 AND THE SUBCHAPTER ON MONOPOLIES
16 GENERALLY.
17
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 one thousand dollars
3 (\$1,000) 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 §§ 4-75-212, 4-75-213, 4-75-214, 4-75-215, or 4-75-216 should be deemed to
9 expand the rights or remedies available to persons proceeding under any
10 action instituted by one (1) or more persons or an entity other than the
11 Attorney General, for 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 4-75-217. Statute of limitations.

36 (a) Any action brought by the Attorney General pursuant to this

1 subchapter is barred if it is not commenced within five (5) years after the
2 cause of action accrues.

3 (b) The statute of limitations described in subsection (a) of this
4 section shall be tolled during any period when the defendant in any action
5 fraudulently concealed the events upon which the cause of action is based.

6 (c) This section is not intended to allow for the commencement of any
7 action by the Attorney General under the provisions of this subchapter for
8 events occurring prior to the enactment of this section, of which the
9 Attorney General had actual knowledge.

10
11 4-75-322. Statute of limitations.

12 (1) Any action brought by the Attorney General pursuant to this
13 subchapter is barred if it is not commenced within five (5) years after the
14 cause of action accrues.

15 (2) The foregoing statute of limitations shall be tolled during any
16 period when the defendant in any action fraudulently concealed the events
17 upon which the cause of action is based.

18 (3) This section is not intended to allow for the commencement of any
19 action by the Attorney General under the provisions of this subchapter for
20 events occurring prior to the enactment of this section, of which the
21 Attorney General had actual knowledge.

22
23 SECTION 2. Arkansas Code Title 4, Chapter 75, Subchapter 3 is amended
24 to add additional sections to read as follows:

25 4-75-315. Civil actions and settlements by the Attorney General.

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

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

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

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

3 (4) To recover civil penalties of up to one thousand dollars
4 (\$1,000) per violation of this subchapter, or any injunction, judgment or
5 consent order issued or entered into under the provisions of this subchapter
6 and reasonable expenses, investigative costs, and attorney's fees.

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

12 (1) The court in which the action is commenced shall award the
13 Attorney General as monetary relief the actual damages sustained or
14 restitution for loss incurred as a result of the violations of this
15 subchapter, and the cost of suit, including a reasonable attorney's fee. The
16 court shall exclude from the amount of monetary relief awarded in the action
17 any amount which duplicates amounts that have been awarded for the same
18 injury already or which are allocable to persons who have excluded their
19 claims under subsection (b)(3)(A) of this section.

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

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

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

34 (B) Any person failing to give the notice shall be barred
35 during the pendency of the action from commencing an action in his or her own
36 name for the injury alleged in the action and the final judgment in the

1 action shall be res judicata as to any claim which could be brought by the
2 person under this subchapter based on the facts alleged, or proven in the
3 action.

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

6 (ii) Nothing in the provisions set forth in §§ 4-75-
7 315 through 4-75-321 shall be deemed to expand or create additional rights or
8 remedies available to persons proceeding under any action instituted by one
9 or more persons or an entity other than the Attorney General for violations
10 of the provisions of this subchapter.

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

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

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

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

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

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

36 (d) In addition to actions under state law, the Attorney General may

1 proceed under any antitrust laws in the federal courts on behalf of this
2 state or any of its agencies, or as parens patriae on behalf of natural
3 persons in this state.

4
5 4-75-318. Person defined.

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

9
10 4-75-319. Awards to the Attorney General - Use of moneys.

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

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

18
19 4-75-320. Action not barred because it affects interstate or foreign
20 commerce.

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

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

27
28 4-75-321. Venue.

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

34
35 SECTION 3. Arkansas Code §§ 4-75-304 through 4-75-307 are repealed.

36 ~~4-75-304. Monetary penalties—Actions to recover—Disposition of~~

1 funds.

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

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

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

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

15

16 ~~4-75-305. Forfeiture of corporate rights for violations—Proceedings.~~

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

23 ~~(2)(A) Any corporation created or organized by or under the laws~~
24 ~~of any other state or country, which violates any provisions of this~~
25 ~~subchapter, shall thereby forfeit its right and privilege to do any business~~
26 ~~in this state, and, upon proper proof being made in any court of competent~~
27 ~~jurisdiction in this state, its right and privilege to do business in this~~
28 ~~state shall be declared forfeited.~~

29 ~~(B) In all proceedings to have such forfeiture declared,~~
30 ~~proof that any person who has been acting as the agent of the foreign~~
31 ~~corporation in transacting business in this state, has been, while acting as~~
32 ~~the agent, and in the name, behalf, or interest of the foreign corporation,~~
33 ~~violating any provisions of this subchapter, shall be received as prima facie~~
34 ~~proof of the act of the corporation itself.~~

35 ~~(b) It shall be the duty of the clerk of the court to certify the~~
36 ~~decree thereof to the Secretary of State, and, if it is an insurance company,~~

1 also to the Insurance Commissioner, who shall take notice and be governed
2 thereby as to the corporate powers and rights of the corporation.

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

9
10 ~~4-75-306. Overt act necessary to incur penalty.~~

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

15
16 ~~4-75-307. Enforcement by Attorney General—Compensation.~~

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

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

23
24 SECTION 4. Arkansas Code §§ 4-75-313 and 4-75-314 are repealed.

25 ~~4-75-313. Proceedings to dissolve or restrain monopolies or to recover~~
26 ~~penalties—Depositions and production of documents.~~

27 (a) ~~Whenever any proceedings are commenced in any court of competent~~
28 ~~jurisdiction in this state by the Attorney General against any corporation,~~
29 ~~individual, or association of individuals, or joint stock association or~~
30 ~~copartnership under the law against the formation and maintenance of pools,~~
31 ~~trusts of any kind, monopolies or confederations, combinations or~~
32 ~~organizations in restraint of trade, to dissolve them or to restrain their~~
33 ~~formation or maintenance in this state, or to recover the penalties provided~~
34 ~~for in this subchapter; and if the Attorney General desires to take the~~
35 ~~testimony of any officer, director, agent, or employee of any corporation, or~~
36 ~~joint stock association proceeded against, or in case of a copartnership, any~~

1 of the members of the partnership, or any employee thereof, in any court in
2 which the action may be pending; and if the individual or individuals whose
3 testimony is desired are outside the jurisdiction of this state or reside
4 without the State of Arkansas, the Attorney General may file in the court in
5 term time, or with the judge thereof in vacation, a statement, in writing,
6 setting forth the names of the persons or individuals whose testimony he or
7 she desires to take, and the time when and the place where he or she desires
8 the persons to appear.

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

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

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

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

33
34 4-75-314. Proceedings to dissolve or restrain monopolies or to recover
35 penalties—Judgment by default upon failure to testify.

36 Whenever the persons mentioned in § 4-75-313 are notified, as provided

~~in § 4-75-313, to request any officer, agent, director, or employee to attend before any court, or before any person authorized to take the testimony in the proceedings, and the person whose testimony is required, as provided in § 4-75-313 fails to appear and testify and produce any books, papers, and documents he or she has been ordered to procure by the court or the other officer authorized to take such evidence, then it will be the duty of the court, upon motion of the Attorney General, to strike out the answer, motion, reply, demurrer, or other pleading then or thereafter filed in the action or proceeding by the corporation, joint stock association, or copartnership whose officer, agent, director, or employee has neglected or failed to attend and testify and produce all books, papers, and documents he or she or they shall have been ordered to produce in the action by the court or person authorized to take said testimony, and the court shall proceed to render judgment by default against the corporation, joint stock association, or copartnership. In case any officer, agent, employee, director, or representative of any corporation, joint stock association, or copartnership in such proceedings as hereinbefore mentioned, who resides or is found within this state shall be subpoenaed to appear and testify or to produce books, papers, and documents and shall fail, neglect, or refuse to do so, then the answer, motion, demurrer, or other pleading then and thereafter filed by the corporation, joint stock association, or copartnership in any proceeding shall, on motion of the Attorney General, be stricken and judgment in the cause rendered against the corporation, joint stock association, or copartnership.~~

SECTION 5. EMERGENCY CLAUSE. It is found and determined by the Eighty-fourth General Assembly that without the amendments herein, the Attorney General is unable to adequately protect the interests of the consumers of the State of Arkansas under the provisions of the Unfair Trade Practices Act and the chapter on Monopolies Generally for harm they have suffered as indirect purchasers. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on:

(1) The date of its approval by the Governor;

(2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the

1 bill; or

2 (3) If the bill is vetoed by the Governor and the veto is
3 overridden, the date the last house overrides the veto.

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5 /s/ Napper

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