



SPONSOR: Sen. Gay & Rep. Bush
Sen. Walsh; Reps. Baumbach, Osienski

DELAWARE STATE SENATE
152nd GENERAL ASSEMBLY

SENATE BILL NO. 296

AN ACT TO AMEND TITLE 6 OF THE DELAWARE CODE RELATING TO ANTITRUST.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend § 2102, Title 6 of the Delaware Code by making deletions as shown by strike through and
2 insertions as shown by underline as follows:

3 § 2102. Definitions.

4 (1) "Court" means the Court of Chancery except where another court is specifically designated or a federal court
5 exercises supplemental jurisdiction.

6 Section 2. Amend § 2103, Title 6 of the Delaware Code by making deletions as shown by strike through and
7 insertions as shown by underline as follows:

8 § 2103. ~~Restraint of trade unlawful~~ Unlawful Conduct.

9 (a) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce
10 of this State shall be unlawful.

11 (b) It is unlawful for a person to monopolize, attempt to monopolize, or combine or conspire with any other
12 persons, to monopolize trade or commerce of this State.

13 Section 3. Amend § 2106, Title 6 of the Delaware Code by making deletions as shown by strike through and
14 insertions as shown by underline as follows:

15 § 2106. Investigative demand by Attorney General.

16 (a) Whenever the Attorney General has reason to believe that any person may have knowledge, or be in
17 possession, custody or control of any documentary material, pertinent to a possible violation of this chapter, the Attorney
18 General may issue in writing and cause to be served upon the person an investigative demand that may:

19 (1) Compel the attendance of such person and require that person to submit to examination and give
20 testimony under oath;

21 (2) Require the production of documentary material pertinent to the investigation; and

22 (3) Require answers to written interrogatories to be furnished under oath.

23 (b) Service of any demand under this section may be made by mailing such demand to the last known place of
24 business, residence or abode within or without this State of the person to whom such demand is directed; service may also
25 be made upon any person other than a natural person, in the manner provided in § 321 or §§ 371-385 of Title 8 and in the
26 manner provided in the Rules of the Court of Chancery.

27 (c) Each demand under this section shall be in writing and shall:

28 (1) State the nature of the conduct constituting the alleged violation of this chapter or federal antitrust law
29 which is under investigation and the provision of law applicable thereto;

30 (2) Describe the class or classes of documentary material to be produced thereunder with such
31 definiteness and certainty as to permit such material to be fairly identified;

32 (3) Prescribe a return date which will provide a reasonable time within which the material so demanded
33 may be assembled and made available for inspection and copying or reproduction; and

34 (4) Identify the custodian to whom such material shall be made available or the official before whom such
35 examination shall take place or to whom such answers shall be furnished.

36 (d) Any person required to submit to examination under this section shall be entitled to be represented by counsel.
37 Any person so required shall be entitled to procure a transcript of the testimony, provided that the Court, for good cause
38 shown by the Attorney General, may order that such person be limited to inspection of such transcript.

39 (e) No demand under this section shall contain any requirement which would be held to be unreasonable if
40 contained in a subpoena issued by a court of this State in aid of a grand jury investigation, or require the production of any
41 evidence which would be privileged from disclosure if demanded by a subpoena issued by a court of this State in aid of a
42 grand jury investigation.

43 (f) Within 20 days after the service of any demand under this section, or at any time before the return date
44 specified in the demand, whichever period is shorter, the person served may file with the Court a motion for an order
45 modifying or setting aside such demand. The motion shall specify each ground upon which the person relies in seeking
46 such relief, and may be based upon any failure of the demand to comply with this section, or upon any constitutional right
47 or privilege of the person.

48 (g) If any person fails to comply with a demand under this section, the Attorney General may file with the Court a
49 motion for an order, and the Court may enter an order:

50 (1) Requiring the person to respond to the demand;

51 (2) Granting such other relief as may be required to obtain compliance with the demand.

52 (h) If any person shall refuse to give testimony or to produce documentary material or to answer a written

53 interrogatory in obedience to an investigative demand on the ground that the person may thereby be incriminated, the
54 Court, upon motion by the Attorney General, may order such person to give testimony or to produce documentary material
55 or to answer the written interrogatory, or to do an applicable combination of these, after notice to the witness and a hearing.
56 Such person so ordered by the Court shall comply with the Court order. After complying, the testimony of such person or
57 the matters produced, which are obtained by virtue of said order, shall not be used against the person in any criminal
58 prosecution nor shall any evidence obtained derivatively from said testimony be so used, provided that, but for this section,
59 such person would have been privileged to withhold the answer or the evidence produced by the person. In no event,
60 however, shall such person, acting pursuant to such order, be exempt from prosecution or penalty or forfeiture for any
61 perjury, false statement or contempt committed in answering or failing to answer, or in producing or failing to produce
62 evidence in accordance with the order, and any testimony or evidence so given or produced shall not, by virtue of this
63 section, be rendered inadmissible in evidence upon any criminal action, investigation or proceeding concerning such
64 perjury, false statement or contempt.

65 (i) Any transcripts of oral testimony, documentary material or answers to written interrogatories provided pursuant
66 to a demand under this section shall be exempt from disclosure under the Delaware Freedom of Information Act. The
67 custodian described in paragraph (c) (4) of this section shall take physical possession of such transcripts, material and
68 answers. Such transcripts, material or answers, or copies thereof, shall not be disclosed by the custodian to any person other
69 than the Attorney General, ~~or~~ authorized employees, consultants, experts, accountants, economists, analysts, and other
70 agents of the Department of Justice, and ~~the Attorney General and authorized employees~~ such persons shall not make
71 further disclosure of such transcripts, material or answers, or copies, or of internal memoranda or work papers relating
72 thereto. Nothing in this section shall prevent the Attorney General from introducing said testimony, material or answers in
73 any action initially filed in a any federal court ~~sitting in this State~~, or before any court or grand jury of this State.

74 (j) The Attorney General may disclose oral testimony, documentary material, or answers to written interrogatories
75 provided pursuant to a demand under this section to any officer or employee of any federal or state law enforcement agency
76 upon the prior certification of an officer of any such federal or state law enforcement agency that information will be
77 maintained in confidence and will be used only for official law enforcement purpose.

78 (k) All oral testimony, documentary material, or answers to written interrogatories provided to the Attorney
79 General pursuant to an investigative demand or similar process issued by another state or federal law enforcement agency
80 under similar authority shall be treated as if obtained pursuant to an investigative demand issued by the Attorney General
81 under this section.

82 Section 4. Amend § 2107, Title 6 of the Delaware Code by making deletions as shown by strike through and

83 insertions as shown by underline as follows:

84 § 2107. Actions by Attorney General for violations; civil penalty; equitable relief

85 (a) The Attorney General may bring an action for any violation or threatened violation of this chapter. In any such
86 action, the Court may assess against each defendant a civil penalty for the benefit of the State of not less than \$1,000 nor
87 more than \$100,000 for each violation, or may award appropriate equitable relief, or may order a combination of civil
88 penalty and equitable relief. The Court may also award taxable costs, investigative costs, and reasonable fees for expert
89 witnesses and attorneys, including the Attorney General.

90 (b) If the defendant derives a pecuniary gain from the violation, or if the violation results in a pecuniary loss to a
91 person or persons or public body or bodies, then as an alternative to the civil penalty assessment in subsection (a) of this
92 section and in addition to other relief awarded, the Court may assess against each defendant a civil penalty for the benefit of
93 the State not more than the greater of twice the gross gain or twice the gross loss.

94 (c) To the extent the violation occurred entirely outside the State but affected trade or commerce of this State, any
95 pecuniary gain to the defendant or loss to persons or public bodies for purposes of assessing a civil penalty pursuant to
96 subsection (b) of this section shall only take into account the gain or loss which can be reasonably estimated to derive
97 from the economic activity affected by the violation in this State.

98 Section 5. Amend § 2108, Title 6 of the Delaware Code by making deletions as shown by strike through and
99 insertions as shown by underline as follows:

100 § 2108. Actions for equitable relief and damages; suits parens patriae.

101 (a) If the State or any public body thereof is threatened with injury or injured in its business or property by a
102 violation of this chapter, the Attorney General may bring an action for appropriate equitable relief, damages sustained and,
103 as determined by the Court, taxable costs, and reasonable fees for expert witnesses and attorneys, including the Attorney
104 General.

105 (b) The Attorney General may bring suit as parens patriae on behalf of natural persons residing in this State to
106 secure monetary relief for such persons who are injured in their business or property by a violation of this chapter. The
107 Court may also award taxable costs and reasonable fees for expert witnesses and attorneys, including the Attorney General.

108 (c) In actions under this section, the Court may, in its discretion, award as monetary relief up to threefold the total
109 damage sustained, in addition to costs and fees, provided that the Court finds the acts complained of to have been wilful.

110 (d) Monetary relief awarded under subsection (b) of this section may be payable to the State or may be distributed
111 in such manner as the Court in its discretion may authorize.

112 (e) In any action brought under subsection (b) of this section, the Attorney General shall, at such times, in such

113 manner, and with such content as the Court may direct, cause notice thereof to be given by publication. If the Court finds
114 that notice given solely by publication would deny due process of law to any person or persons, the Court may direct
115 further notice to such person or persons according to the circumstances of the case.

116 (f) Any person on whose behalf an action is brought under subsection (b) of this section may elect to exclude from
117 adjudication the portion of the state claim for monetary relief attributable to the person by filing notice of such election with
118 the Court in the manner specified in the notice given pursuant to subsection (e) of this section. The final judgment in any
119 action under subsection (b) of this section shall be res judicata as to any claim under this chapter by any person on behalf of
120 whom such action was brought and who fails to give notice of exclusion in the manner specified in this subsection.

121 (g) In any action brought under subsection (b) of this section, the Court shall exclude from the amount of any
122 monetary relief awarded any amount which duplicates an award made by any court for the same injury, or which is
123 allocable to persons excluded under subsection (f) of this section.

124 (h) Any person who is threatened with injury or injured in that person's business or property by a violation of this
125 chapter may bring an action for appropriate equitable relief, damages sustained and, as determined by the Court, taxable
126 costs, and reasonable fees for expert witnesses and attorneys.

127 (i) In any action under § 2107 or § 2108, the fact that the State, a public body, or any person has not dealt directly
128 with the violator does not bar or otherwise limit the award of any damages or equitable remedies. There is a presumption
129 that all changes in price due to an antitrust violation were passed to every subsequent level in the distribution chain in an
130 amount equal to the amount of the change directly caused by the antitrust violation and charged to the first purchaser of the
131 product or service in question. This presumption also applies to any change in price due to a change in the costs of an
132 ingredient or component product or service that was caused by a violation of this Chapter. The amount of the change in
133 price will be presumed to be equal to the change in the cost, in dollars and cents, of the ingredient or component product or
134 service to its first purchaser.

135 (j) The Attorney General, in an action under § 2107(a) or (b), or any person in an action under § 2108(h), may
136 elect to recover 25% of the consideration paid for any goods or services, including labor, for which the transaction was
137 affected by a violation of § 2103(a) in lieu of damages sustained or other monetary relief.

138 Section 6. Amend § 2110, Title 6 of the Delaware Code by making deletions as shown by strike through and
139 insertions as shown by underline as follows:

140 § 2110. Jurisdiction.

141 The Court of Chancery shall have exclusive jurisdiction of all state court actions or proceedings authorized by this
142 chapter or relating to its enforcement; provided, however, that in an action in which any party would otherwise have a right

143 to trial by jury of any issue of fact, and such party shall demand such trial, the Court shall order such issue to trial and
144 binding determination of such issue in the Superior Court, the action or proceeding being retained in the Court of Chancery
145 in all other respects, including entry of judgment.

SYNOPSIS

This Act amends the Delaware Antitrust Act (“DAA”) (Chapter 21, Title 6 of the Code) to provide indirect purchasers who have been harmed by violations of the Delaware Antitrust Act the ability to sue for damages. Indirect purchasers of a product or service in the chain of distribution are often the ones who bear the burden of any overcharges from antitrust violations such as price-fixing. Direct purchasers and others in the chain of distribution of the affected product or service often have the ability to pass the overcharge through the chain of distribution to end users. This will align Delaware with at least 36 other states which currently allow for a cause of action for damages for indirect purchasers. Often, end users who make purchases in Delaware, primarily Delaware residents and businesses, are excluded from making claims against multimillion dollar settlement funds set up to compensate indirect purchasers for transactions made in other states that do authorize lawsuits for damages for indirect purchasers.

To avoid complicated proof issues related to the pass through of any overcharge through the chain of distribution of a product or service, the Act creates a presumption that any overcharge paid by the first purchaser as a result of a violation of the DAA is passed through to the end user. Also, to simplify issues of proof, the Act provides a plaintiff may elect 25% of the consideration paid for the goods or services in connection with the transaction affected by an illegal restraint of trade as an alternative liquidated damage amount to actual harm.

To allow Delaware consumers and businesses to fully take advantage of the remedies provided by this Act, the Act creates a private right of action. Delaware is one of only 2 states that do not provide for a private right of action under their state antitrust law of general applicability. Currently, only the Attorney General has a right to bring actions under the DAA and the Attorney General does not have the resources to review or participate in every national antitrust action. This will ensure Delaware indirect purchasers receive the benefits of private enforcement of the DAA.

Section 2 of the Act creates a Delaware state law equivalent to Section 2 of the Sherman Antitrust Act, the federal antitrust statute, which establishes three offenses commonly termed “monopolization,” “attempted monopolization,” and “conspiracy to monopolize.” Delaware is only 1 of 9 states that does not have a state law equivalent to Section 2 of the Sherman Act and its addition to the DAA is needed to ensure the remedies under the DAA including a right of recovery for indirect purchasers are available to the Attorney General and to Delaware consumers and businesses.

Section 3 of the Act modifies the confidentiality restrictions of materials produced to the Attorney General pursuant to an investigative demand. It would allow for the materials to be shared with the Attorney General’s agents such as consultants, experts, electronic discovery platform vendors and economists which would be necessary for the Attorney General to decide on whether the law has been violated and how best to remedy the violation. The Act would also allow the Attorney General to share materials produced pursuant to an investigative demand with federal or state law enforcement officers that agree to keep the information confidential and use it only for official law enforcement purposes. Likewise, the Act requires the Attorney General to keep materials provided by other law enforcement officers received under similar process confidential. These provisions will make it easier for the Attorney General to work together with other federal and state law enforcers in enforcing state and federal antitrust laws.

Section 4 of the Act provides an alternative calculation for civil penalties for violations of the Delaware Antitrust Act. Under certain facts and circumstances, the current maximum penalty for a violation of the DAA may be lower than the amount of the gain a violator may obtain by violating the DAA making any penalty a cost of doing business and an insufficient deterrent to violate the law. The alternative calculation provides for an assessment of a civil penalty of up to twice the gross gain or loss associated with the violation. This is like the alternative method for calculating federal criminal fines for the same conduct. Section 4 also authorizes a Court to award investigative costs, expert witness fees, and attorneys’ fees to the Attorney General when the Attorney General successfully brings a law enforcement action to enforce the DAA. Currently, a Court may only award attorney’s fees and expert costs to the Attorney General when the Attorney General brings an action on behalf of a public body or natural persons.

Section 5 of the Act creates a right for indirect purchasers who have been harmed by violations of the DAA to sue for damages. It creates a presumption that overcharges paid by the first purchaser as a result of such violations are passed to the end user, and allows a plaintiff to seek liquidated damages in the amount of 25% of the consideration paid, as an alternative to seeking damages for actual harm incurred.

Section 6 of the Act clarifies that the Court of Chancery has exclusive jurisdiction of all state court actions or proceedings under the DAA.

The Act also makes several clarifications throughout the DAA to recognize it is often federal courts exercising supplemental jurisdiction deciding claims arising under the DAA.

Author: Senator Gay