

STATE OF OKLAHOMA

2nd Session of the 46th Legislature (1998)

CONFERENCE COMMITTEE SUBSTITUTE

FOR ENGROSSED

SENATE BILL NO. 1357

By: Hendrick and Brown of the
Senate

and

Toure of the House

CONFERENCE COMMITTEE SUBSTITUTE

An Act relating to trusts and pools; creating the Oklahoma Antitrust Reform Act and providing short title; defining terms; prohibiting certain acts which restrain or monopolize trade or commerce; prohibiting certain refusal of access to certain facilities; prohibiting certain discrimination in prices; providing for certain civil action by certain persons and the Attorney General; authorizing injunctive and other relief; requiring certain notice; allowing certain damages; providing criminal penalties; providing for service of subpoenas; prohibiting certain persons from owning certain stock; declaring act to be cumulative; providing procedure for civil investigative demands and stating contents; prohibiting issuance of certain demand upon Oklahoma Tax Commission; requiring service of certain notice upon Attorney General; allowing Attorney General to make certain appearance in certain proceedings; construing language; repealing 17 O.S. 1991, Sections 141, 142, 143, 144 and 145, which relate to antitrust actions prosecuted before the Corporation Commission; repealing 79 O.S. 1991, Sections 1, 2, 3, 4, 5, 6, 7, 21, 22, 23, 24, 25, 26, 27, as amended by Section 591, Chapter 133, O.S.L. 1997, 28, 29, 30, 31, 32, 33, 34, 35, 36, 81, 82, 83, 84, 85, 86 and 87 (79 O.S. Supp. 1997, Section 27), which relate to combinations in restraint of trade and unfair discrimination or competition; providing for codification; providing an effective date; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 201 of Title 79, unless there is created a duplication in numbering, reads as follows:

Sections 1 through 12 of this act may be cited as the "Oklahoma Antitrust Reform Act".

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 202 of Title 79, unless there is created a duplication in numbering, reads as follows:

As used in this act:

1. "Attorney General" means the Attorney General of Oklahoma;
2. "Commodity" means any tangible personal property, article, or good;
3. "Person" means a natural person, corporation, partnership, limited liability company, proprietorship, association, municipal corporation, including any public trust which has a municipal corporation as its beneficiary, or other political subdivision of this state, including any public trust which has a political subdivision as its beneficiary, or any other legal entity, but does not include the State of Oklahoma, its departments, and its administrative agencies, except the Grand River Dam Authority and the Oklahoma Municipal Power Authority to the extent that their goods or services are not regulated by the Oklahoma Corporation Commission; and
4. "Services" means any work or labor, including, but not limited to, work or labor furnished in connection with the sale, lease, or repair of commodities.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 203 of Title 79, unless there is created a duplication in numbering, reads as follows:

A. Every act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce within this state is hereby declared to be against public policy and illegal.

B. It is unlawful for any person to monopolize, attempt to monopolize, or conspire to monopolize any part of trade or commerce in a relevant market within this state.

C. Without limiting any other section of Title 79 of the Oklahoma Statutes or applicable sections of Title 17 of the Oklahoma Statutes, it is unlawful for any person in control of an

essential facility to unreasonably refuse to give a competitor or customer of an entity controlling an essential facility access to it upon reasonable terms if the effect of such denial is to injure competition. An injured competitor or customer may bring an action under Section 5 of this act to enforce the provisions of this section only when such injured competitor or customer does not have a remedy before the Corporation Commission.

D. As used in this section:

1. "Monopolize" means:

- a. the possession of monopoly power in the relevant market, and
- b. the willful acquisition or maintenance of that power by exclusionary conduct as distinguished from growth or development as a consequence of a superior product and/or service, business acumen, or historic accident;

2. "Monopoly power" means the power to control market prices or exclude competition; and

3. "Essential facility" means a facility:

- a. which is controlled by an entity that possesses monopoly power,
- b. that a competitor would be unable to practically or reasonably duplicate,
- c. the use of which has been unreasonably denied to a competitor or a customer of the entity that possesses monopoly power, and
- d. that it would be feasible to allow the competitor or customer to use or have access to without causing harm to or unreasonably interfering with the entity that possesses monopoly power.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 204 of Title 79, unless there is created a duplication in numbering, reads as follows:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities

of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within this state, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; provided, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered; provided further, that nothing herein contained shall prevent persons engaged in selling commodities, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade; provided further, that nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the commodities concerned, including, but not limited to, actual or imminent deterioration of perishable commodities, obsolescence of seasonal commodities, distress sales under court process, or sales in good faith in discontinuance of business in the commodities concerned. Nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his or her lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 205 of Title 79, unless there is created a duplication in numbering, reads as follows:

A. 1. Any person who is injured in his or her business or property by a violation of this act, may obtain appropriate injunctive or other equitable relief and monetary damages and shall recover threefold the damages sustained, and the cost of suit, including a reasonable attorney fee. The Attorney General

may bring an action in the name of the state, as *parens patriae* on behalf of natural persons residing in the state for appropriate injunctive or other equitable relief and to secure monetary damages for injury sustained by such natural persons to their business or property by reason of any violation of this act. The court shall exclude from the amount of the monetary damages awarded in such action any amount of monetary damages:

- a. which duplicates amounts which have been awarded for the same injury, or
- b. which is properly allocable to:
 - (1) natural persons who have excluded their claims, and
 - (2) any other persons.

The court shall award the state as *parens patriae* threefold the total damages sustained and the cost of suit, including a reasonable attorney fee. Whenever the state is hereafter injured in its business or property by anything forbidden in this act, it may obtain appropriate injunctive or other equitable relief and monetary damages therefor and shall recover actual damages by it sustained and the cost of suit including a reasonable attorney fee. The court may award under this section, pursuant to a motion by such person or the state, simple interest on actual damages for the period beginning on the date of service of such person's or the state's pleading setting forth a claim under this act and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. The Attorney General may bring an action on behalf of either the state or a political subdivision of the state when either is injured in its business or property by anything forbidden by the provisions of this act.

2. In any civil action brought by the Attorney General as *parens patriae*, the Attorney General shall, at such times, in such manner, and with such content as the court may direct, cause notice thereof to be given by publication. Any person on whose behalf an action is brought may elect to exclude from adjudication the portion of the claim for monetary damages attributable to him

or her by filing notice of this election with the court within the time specified in the notice given pursuant to this paragraph.

3. In a civil action brought by the Attorney General as *parens patriae*, the final judgment shall be *res judicata* as to any claim under this section by any person on behalf of whom the action was brought and who fails to give notice within the period specified in the notice given pursuant to paragraph 2 of this subsection.

B. Any person or governmental entity who or which obtains a judgment for damages under 15 U.S.C., Section 15 or any other provision of federal law comparable to this section may not recover damages in a suit under this section based on substantially the same conduct that was the subject of the federal suit.

C. Any action to recover damages under this section is barred unless commenced within four (4) years after the claim accrued or was discovered, whichever is later.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 206 of Title 79, unless there is created a duplication in numbering, reads as follows:

A. Any person, other than a municipal corporation, who violates Section 3, 4, or 8 of this act is guilty of a felony pursuant to the state sentencing matrix. A violator shall, upon conviction, be subject to a fine not to exceed Ten Thousand Dollars (\$10,000.00) per violation.

B. The Attorney General or any district attorney may file a criminal information or seek a criminal indictment to enforce the provisions of subsection A of this section.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 207 of Title 79, unless there is created a duplication in numbering, reads as follows:

It shall be the duty of the court before whom any proceeding under this act, may be brought, upon the application of the Attorney General, to cause to be issued by the clerk of the court subpoenas for witnesses as may be named in the application, and cause the same to be served by the sheriff of the county where the

Req. No. 3101Page 6

subpoena is issued; and the witnesses shall be compelled to appear before the court or judge, at the time and place set forth in the subpoena, and shall be compelled to testify as to any knowledge they may have of the violations of any of the provisions of this act; and any witness who fails or refuses to attend and testify shall be punished as for contempt, as provided by law. The evidence of all the witnesses shall, at the option of the Attorney General, be taken down and shall be transcribed and placed in the hands of the Attorney General, and the Attorney General shall be authorized to prosecute a violator or violators of this act. Witnesses subpoenaed as provided in this section shall be compelled to attend proceedings from any county in the state.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 208 of Title 79, unless there is created a duplication in numbering, reads as follows:

No person engaged in trade or commerce in this state shall acquire, in any manner whatever, the stock or the whole or any part of the assets of any competing person engaged in the same or similar line of trade or commerce, in or out of this state, where, in any relevant market in this state or in any line of trade or commerce in this state, the effect of the acquisition is to substantially lessen competition or to tend to create a monopoly; provided, however, that this section shall have no application to corporations owning or holding the stock of subsidiary corporations when the ownership of stock in subsidiary corporations does not violate Section 3 of this act.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 209 of Title 79, unless there is created a duplication in numbering, reads as follows:

The remedies provided by this act shall be cumulative to all other remedies at law or in equity.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 210 of Title 79, unless there is created a duplication in numbering, reads as follows:

A. As used in this section:

1. "Antitrust investigation" and "investigation" mean any inquiry conducted by the Attorney General for the purpose of ascertaining whether any person is or has been engaged in or is actively preparing to engage in activities which may constitute an antitrust violation;

2. "Antitrust violation" means any act or omission in violation of any of the prohibitions contained in this act or in violation of any of the antitrust laws set forth in 15 U.S.C., Section 12(a);

3. "Civil investigative demand" and "demand" mean any demand issued by the Attorney General under subsection B of this section and consistent with the discovery methods set forth in subsection A of Section 3226 of Title 12 of the Oklahoma Statutes; and

4. "Person" means a natural person, proprietorship, partnership, corporation, limited liability company, municipal corporation, public trust, association, or any other public or private entity, however organized, and includes any person acting under color or authority of state law.

B. Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any information, documentary material, or physical evidence relevant to a civil antitrust investigation, the Attorney General may, prior to the institution of a civil proceeding, obtain discovery by issuing in writing and serving upon the person a civil investigative demand requiring the person to produce the information, documentary material, or physical evidence for inspection and copying, to permit entry upon land or other property, to answer in writing written interrogatories, to give oral testimony, or to provide any combination of the above.

1. Each demand shall describe the nature of the activities that are the subject of the investigation and shall set forth each statute and section of that statute that may have been or may be violated as a result of the activities. Each demand shall advise the person upon whom the demand is to be served that the person has the right to object to the demand as provided for in this section;

2. Each demand for production of documentary material and for answers to written interrogatories shall prescribe a reasonable return date or dates by which the material shall be produced and the answers to interrogatories shall be submitted;

3. Each demand for the giving of oral testimony shall prescribe a reasonable date, time, and place at which the testimony shall begin.

C. 1. A demand issued under subsection B of this section may require compliance only if the material or information sought would be discoverable under the Oklahoma Discovery Code, and only in the manner prescribed in the applicable provisions therein.

2. A demand under subsection B of this section may not be issued upon the Oklahoma Tax Commission for records or files which are considered confidential and privileged under Section 205 of Title 68 of the Oklahoma Statutes.

D. At any time before the return date specified in a demand or within twenty (20) days after the demand has been served, whichever period is shorter, the person who has been served and, in the case of a demand for a product of discovery, the person from whom the discovery is sought, may file a petition for an order modifying or setting aside the demand in the district court in the county of the person's residence or principal office or place of business. Any such petition shall specify each ground upon which the petitioner relies in seeking the relief sought. The petition may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of the petitioner. The petitioner shall serve a copy of the petition upon the Attorney General. The Attorney General may submit an answer to the petition. In ruling on the petition, the court shall presume absent evidence to the contrary that the Attorney General issued the demand in good faith and within the scope of his or her authority. The time for compliance with the demand in whole or in part shall not run during the pendency of any petition filed under this subsection; provided, however, that the

petitioner shall comply, with any portions of the demand not sought to be modified or set aside.

E. A person on whom a demand is served shall comply with the terms of the demand unless otherwise provided by court order.

F. 1. Whenever any person fails to comply with any demand duly served on that person under this section, the Attorney General may file in the district court in the county in which the person resides, is found, or transacts business and serve on the person a petition for an order of the court for enforcement of this section. If the person transacts business in more than one county, the petition shall be filed in the county of the person's principal office or place of business in the state or in any other county as may be agreed upon by the person and the Attorney General.

2. Any person, who, with intent to avoid, evade, or prevent compliance in whole or part with a demand issued under this section, removes from any place, conceals, withholds, destroys, mutilates, alters, or by any other means falsifies any documentary material or otherwise provides inaccurate information is guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than Five Thousand Dollars (\$5,000.00) or by confinement in the county jail for not more than one (1) year or by both such fine and imprisonment.

G. 1. Not later than fifteen (15) days prior to disclosing under this subsection any documentary material or answers to written interrogatories designated as containing trade secrets or confidential information, the Attorney General shall notify the person who produced the material of the Attorney General's intent to make the disclosure. After providing such notification, the Attorney General may petition a district court in any county of this state in which the person resides, does business, or maintains its principal office for an order authorizing disclosure of the trade secrets or confidential information. After notice and hearing, if so ordered, the Attorney General may disclose the trade secrets or confidential information.

2. Upon written request, the Attorney General shall return documentary material produced under this section in connection with an antitrust investigation to the person who produced it whenever:

- a. any case or proceeding before any court arising out of the investigation has been completed, or
- b. the Attorney General has decided after completing an examination and analysis of the material not to institute any case or proceeding before a court in connection with the investigation.

H. Whenever any petition is filed in the district court as provided for in this section, the court shall have jurisdiction to hear and determine the matter presented and to enter any order or orders required to implement the provisions of this section. Any final order shall be subject to appeal. Failure to comply with any final order entered by a court under this section is punishable by the court as contempt.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 211 of Title 79, unless there is created a duplication in numbering, reads as follows:

A person filing a petition, counterclaim, or answer in any Oklahoma court, agency, or commission for any violation of the provisions of this act shall simultaneously with the filing of the pleading serve a copy of the petition, counterclaim, or answer on the Attorney General. The Attorney General may appear as amicus curiae in any civil action or proceeding pending before any Oklahoma court, agency, or commission in which matters related to this act appear to be in issue. Service of any notice required under this section does not limit or otherwise affect the right of the Attorney General to maintain an action under this act or intervene in a pending action, nor does it authorize the person to name this state or the Attorney General as a party to the action.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 212 of Title 79,

unless there is created a duplication in numbering, reads as follows:

The provisions of this act shall be interpreted in a manner consistent with Federal Antitrust Law 15 U.S.C., Section 1 et seq. and the case law applicable thereto.

SECTION 13. REPEALER 17 O.S. 1991, Sections 141, 142, 143, 144 and 145 are hereby repealed.

SECTION 14. REPEALER 79 O.S. 1991, Sections 1, 2, 3, 4, 5, 6, 7, 21, 22, 23, 24, 25, 26, 27, as amended by Section 591, Chapter 133, O.S.L. 1997, 28, 29, 30, 31, 32, 33, 34, 35, 36, 81, 82, 83, 84, 85, 86 and 87 (79 O.S. Supp. 1997, Section 27), are hereby repealed.

SECTION 15. This act shall become effective July 1, 1998.

SECTION 16. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

46-2-3101 KSM (<time=system>)