

WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1978



ENROLLED

Committee Substitute for
HOUSE BILL No. 1506

(By Mr. Tompkins)



PASSED March 9, 1978

In Effect ninety days from Passage

ENROLLED

COMMITTEE SUBSTITUTE

FOR

H. B. 1506

(By MR. TOMPKINS)

[Passed March 9, 1978; in effect ninety days from passage.]

AN ACT to amend chapter forty-seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article eighteen, relating to enacting an antitrust act; declaring contracts and combinations in restraint of trade unlawful; defining specific acts in restraint of trade to be unlawful; declaring the establishment, maintenance or use of monopolies to be unlawful; the powers and duties of the attorney general with respect thereto; exemptions to unlawful acts of monopolization; investigations to be conducted by the attorney general; injunctions and other relief and jurisdiction relating to violations; punishment for violations; providing for treble damage suits in certain cases; final judgments in civil proceedings as prima facie evidence in other proceedings; limitation of actions, and suspension of limitation period; authorizing cumulative remedies; cooperation with federal government and other states with respect to antitrust matters; venue; judicial construction; parens patriae; the establishment of an antitrust enforcement fund and its uses; rules and regulations; assistance by public agencies, officials and employees; assurances of voluntary compliance; and providing for the severability of the provisions of this article.

Be it enacted by the Legislature of West Virginia:

That chapter forty-seven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article eighteen, to read as follows:

ARTICLE 18. ANTITRUST ACT; RESTRAINT OF TRADE.

§47-18-1. Short title.

1 This article shall be known and may be cited as the "West
2 Virginia Antitrust Act."

§47-18-2. Definitions.

1 As used in this article, unless the context otherwise requires:

2 (a) "Person" shall mean any natural person or persons, or
3 any corporation, partnership, company, trust or association of
4 persons.

5 (b) "Trade or commerce" shall include all economic
6 activity involving or relating to any commodity or service.

7 (c) "Commodity" shall mean any kind of real or personal
8 property.

9 (d) "Service" shall mean any activity which is performed
10 in whole or in part for the purpose of financial gain, including
11 but not limited to sale, rental, leasing or licensing for use.

§47-18-3. Contracts and combinations in restraint of trade.

1 (a) Every contract, combination in the form of trust or
2 otherwise, or conspiracy in restraint of trade or commerce in
3 this state shall be unlawful.

4 (b) Without limiting the effect of subsection (a) of this
5 section, the following shall be deemed to restrain trade or
6 commerce unreasonably and are unlawful:

7 (1) A contract, combination, or conspiracy between two
8 or more persons:

9 (A) for the purpose or with the effect of fixing, controlling,
10 or maintaining the market price, rate, or fee of any com-
11 modity or service;

12 (B) fixing, controlling, maintaining, limiting, or discon-
13 tinuing the production, manufacture, mining, sale, or supply
14 of any commodity, or the sale or supply of any service, for the
15 purpose or with the effect of fixing, controlling, or maintaining
16 the market price, rate, or fee of the commodity or service; or

17 (C) allocating or dividing customers or markets, functional
18 or geographic, for any commodity or service.

19 (2) A contract, combination, or conspiracy between two or
20 more persons whereby, in the letting of any public or private
21 contract:

22 (A) the price quotation of any bid is fixed or controlled; or

23 (B) one or more persons submits a bid intending it to be
24 higher than another bid and thus complementary thereto,
25 submits a bid intending it to be substantially identical to
26 another bid, or refrains from the submission of a bid.

27 (3) A contract, combination, or conspiracy between two or
28 more persons refusing to deal with any other person or persons
29 for the purpose of effecting any of the acts described in sub-
30 divisions (1) and (2) of this subsection.

§47-18-4. Establishment, maintenance or use of monopoly.

1 The establishment, maintenance or use of a monopoly or an
2 attempt to establish a monopoly of trade or commerce, any part
3 of which is within this state, by any persons for the purpose of
4 excluding competition or controlling, fixing or maintaining
5 prices is unlawful.

§47-18-5. Exemptions.

1 (a) Labor of a human being is not a commodity or an
2 article of commerce.

3 (b) Nothing in this article shall be construed to forbid the
4 existence and operation of any labor, agricultural, or horti-
5 cultural organization instituted for the purpose of mutual help,
6 while lawfully carrying out its legitimate objects; or the
7 existence or operation of any person whose activities or
8 operations are regulated, to the extent of such regulation,
9 pursuant to the laws of this state or of the United States,

10 by a regulatory agency of this state or of the United States;
11 or the bona fide religious and charitable activities of any
12 nonprofit corporation, trust or organization established ex-
13 clusively for religious or charitable purposes or both.

§47-18-6. Powers and duties of attorney general.

1 The attorney general shall investigate suspected violations
2 of, and institute such proceedings as are hereinafter provided
3 for violation of the provisions of this article. The attorney
4 general may direct the county prosecutor of any county in
5 which such proceedings may be brought to aid and assist him
6 in the conduct of such investigation and proceedings.

§47-18-7. Investigations; powers.

1 (a) If the attorney general has probable cause to believe
2 that a person has engaged in an act which is subject to action
3 by the attorney general under any of the provisions of this
4 article, he may make an investigation to determine if the act
5 has been committed and, to the extent necessary for this
6 purpose, may administer oaths or affirmations, and may sub-
7 poena witnesses, compel their attendance, adduce evidence,
8 and require the production of any matter which is relevant to
9 the investigation, including the existence, description, nature,
10 custody, condition, and location of any books, records, docu-
11 ments or other tangible things and the identity and location of
12 persons having knowledge of relevant facts, or any other
13 matter reasonably calculated to lead to the discovery of ad-
14 missible evidence.

15 (b) If the person's records are located outside this state,
16 the person at his option shall either make them available to
17 the attorney general at a convenient location within this state
18 or pay the reasonable and necessary expenses for the attorney
19 general or his representative to examine them at the place
20 where they are maintained. The attorney general may designate
21 representatives, including comparable officials of the state in
22 which the records are located, to inspect them on his behalf.

23 (c) Upon failure of a person without lawful excuse to obey
24 a subpoena or to give testimony and upon reasonable notice to
25 all persons affected thereby, the attorney general may apply

26 to the circuit court of the county in which the hearing is to
27 be held for an order compelling compliance.

28 (d) The attorney general shall not make public the name
29 or identity of a person whose acts or conduct he investigates
30 pursuant to this section or the facts disclosed in the in-
31 vestigation, but this subsection does not apply to disclosures
32 in actions or enforcement proceedings pursuant to this article.

§47-18-8. Injunctions and other relief; violations; jurisdiction.

1 The attorney general may institute proceedings to prevent
2 and restrain violations of the provisions of this article. In
3 addition to granting such temporary, interlocutory, or per-
4 manent relief as is necessary to prevent and restrain a violation,
5 the courts of this state may grant injunctions reasonably
6 necessary to restore and preserve competition in the trade or
7 commerce affected by a violation of this article.

8 If a permanent injunction is issued in such proceedings,
9 reasonable costs of the action may be awarded the state,
10 including but not limited to expenses of discovery and docu-
11 ment reproduction.

12 In addition to injunctive relief authorized, any person who
13 violates the provisions of this article shall be liable to a
14 penalty of not more than the greater of a total of one hundred
15 thousand dollars or five hundred dollars per day for each
16 and every day of said violation.

§47-18-9. Damages; treble damage suits.

1 Any person who shall be injured in his business or property
2 by reason of a violation of the provisions of this article may
3 bring an action therefor and shall recover threefold the
4 damages sustained by him, together with reasonable attor-
5 neys' fees, filing fees and reasonable cost of the action.
6 Reasonable costs of the action may include, but shall not be
7 limited to the expenses of discovery and document repro-
8 duction.

9 The state and any of its political subdivisions and public
10 agencies shall be deemed a person within the meaning of this
11 section. The attorney general may bring an action on behalf of

12 this state, or any of its public agencies, counties, municipalities
13 or other political subdivisions to recover the damages provided
14 for by this section or provision of federal law: *Provided*, That
15 this shall not impair the authority of any such county, muni-
16 cipality or other political subdivision to bring such action on
17 its own behalf.

§47-18-10. Final judgment in civil proceeding as prima facie evidence.

1 A final judgment rendered in any civil proceeding brought
2 by the state for violation of this article to the effect that a
3 defendant has violated said article shall be prima facie evidence
4 against such defendant in any proceeding brought by any other
5 party against such defendant pursuant to section eight of this
6 article, as to all matters with respect to which said judgment or
7 decree would be an estoppel as between the parties thereto:
8 *Provided*, That this section shall not apply to consent judg-
9 ments or decrees entered before any testimony has been
10 taken.

§47-18-11. Limitation of actions.

1 Any action brought to enforce the provisions of this article
2 shall be barred unless commenced within four years after the
3 cause of action arose, or if the cause of action is based upon a
4 conspiracy in violation of this article, within four years after
5 the plaintiff discovered, or by the exercise of reasonable dili-
6 gence should have discovered the facts relied upon for proof of
7 the conspiracy. For the purpose of this section, a cause of
8 action for a continuing violation is deemed to arise at any time
9 during the period of such violation.

§47-18-12. Suspension of limitation period.

1 Whenever any civil proceeding shall be commenced by the
2 state to prevent, restrain or punish a violation of this article,
3 the running of the statute of limitations in respect of every
4 private right of action arising under this article and based in
5 whole or in part on any matter complained of in said proceed-
6 ing shall be suspended during the pendency thereof and for
7 one year thereafter: *Provided*, That whenever the running of
8 the statute of limitations in respect of a cause of action

9 arising under section eight shall be suspended hereunder,
10 any action to enforce such cause of action shall be forever
11 barred unless commenced either within the period of suspen-
12 sion or within four years after the cause of action accrued,
13 whichever is later.

§47-18-13. Cumulative remedies.

1 The remedies provided in this article shall be cumulative.

§47-18-14. Cooperation with federal government and other states.

1 The attorney general may cooperate with officials of the
2 federal government and the several states in the enforcement of
3 this article.

§47-18-15. Venue.

1 Actions or proceedings under this article may be brought in
2 the circuit court of any county in which an act on which the
3 action or proceeding is based occurred, or in any county in
4 which the respondent or defendant resides or transacts busi-
5 ness.

§47-18-16. Judicial construction.

1 This article shall be construed liberally and in harmony
2 with ruling judicial interpretations of comparable federal
3 antitrust statutes.

§47-18-17. Parens patriae.

1 (a) The attorney general shall be permitted to bring an
2 action as parens patriae of natural persons who are citizens and
3 residents of this state, under this article, and in proper federal
4 court for violations of the federal antitrust laws or of both this
5 article and the federal antitrust laws, to secure relief as pro-
6 vided under this article and other lawful relief as appropriate.

7 (b) In any action brought under this section, the attorney
8 general shall, at such times, in such manner, and with such
9 content as the court may direct, cause notice to be given by
10 publication. If the court finds that notice given solely by pub-
11 lication would deny due process of law to any person or per-
12 sons, the court may direct further notice to such person or
13 persons according to the circumstances of the case.

14 (c) Any person on whose behalf an action is brought under
15 this section may elect to exclude from adjudication the portion
16 of the state claim for monetary relief attributable to him by
17 filing notice of such election with the court within such time as
18 specified in the notice given pursuant to this subsection.

19 (d) The final judgment in an action under this section shall
20 be res judicata as to any claim under this article by any person
21 on behalf of whom such action was brought and who fails to
22 give such notice within the period specified in the notice given
23 pursuant to subsection (c).

24 (e) An action under subsection (a) shall not be dismissed
25 or compromised without approval of the court, and notice of
26 any proposed dismissal or compromise shall be given in such
27 manner as the court directs.

28 (f) In any action brought under this section, damages may
29 be proved and assessed in the aggregate by statistical or
30 sampling methods, by the computation of illegal overcharges,
31 or by such other reasonable system of estimating aggregate
32 damages as the court in its discretion may permit without the
33 necessity of separately proving the individual claim of, or
34 amount of damage to, persons on whose behalf the suit was
35 brought. The court shall exclude from the amount of monetary
36 relief awarded in such action any amount of monetary relief
37 which:

38 (1) duplicate amounts which have been awarded for the
39 same injury; or

40 (2) are properly allocable to natural persons who have
41 excluded their claims pursuant to subsection (c).

42 (g) In any action brought under this section, the court
43 shall award to the state for payment into the state treasury
44 for the use of the antitrust enforcement fund:

45 (1) an amount attributable to the recovery of the state
46 and its public agencies; and

47 (2) the greater of:

48 (A) any amount assessed as reasonable attorney fees,
49 filing fees, and reasonable costs of the action; or

50 (B) an amount equal to the expenses and costs of investiga-
51 tion, litigation and fund administration attributable to the case.

52 (h) The court shall afford the citizens and residents and
53 the public bodies of this state other than the state and its
54 public agencies a reasonable opportunity individually to secure
55 appropriate portions of the remainder of the monetary relief
56 assessed under this section and thereafter shall award the
57 undistributed portion of said remainder to the state for
58 payment into the general fund of the state treasury for the
59 overall benefit of the citizens, residents and public bodies
60 of this state.

§47-18-18. Disposition of funds.

1 All civil penalties exacted pursuant to this article, unless
2 otherwise specifically provided for, shall be paid into the state
3 treasury for the use of the antitrust enforcement fund.

§47-18-19. Antitrust enforcement fund.

1 All money received by the state from July first, one thou-
2 sand nine hundred seventy-eight, as a result of actions by the
3 attorney general pursuant to this article or to the federal anti-
4 trust laws shall be placed in a separate fund by the state
5 treasurer, to be known as the antitrust enforcement fund,
6 and shall be used solely for the payment of fees, costs,
7 expenses and other matters incurred by the attorney general
8 in connection with antitrust enforcement activities, and the
9 first two hundred fifty thousand dollars in such funds shall
10 not expire at the end of each fiscal year but shall, by
11 operation of law, be automatically reappropriated from year
12 to year and all sums in excess of two hundred fifty thousand
13 dollars remaining in such fund shall expire at the end of each
14 fiscal year and shall revert to the general revenue fund.

§47-18-20. Rules and regulations.

1 The attorney general may make and adopt such rules and
2 regulations as may be necessary for the enforcement and
3 administration of this article.

§47-18-21. Cooperation by public agencies, officials and employees.

1 It shall be the duty of all public officers, their deputies,

2 assistants, clerks, subordinates and employees, to render and
3 furnish to the attorney general, his deputy or other designated
4 representative, when so requested, all information and assis-
5 tance in their possession and within their power for the en-
6 forcement of the provisions of this article.

§47-18-22. Assurances of voluntary compliance.

1 In the administration of this article, the attorney general
2 may accept an assurance of voluntary compliance with
3 respect to any method, act or practice deemed to be a viola-
4 tion of this article from any person who has engaged or was
5 about to engage in such method, act or practice. Such
6 assurance may include a stipulation for voluntary payment
7 by the alleged violator of damages sustained by any person or
8 public body. Any such assurance shall be in writing and be
9 filed with the circuit court in which the alleged violator resides,
10 has his principal place of business, or is doing business. Such
11 assurance of voluntary compliance shall not be considered
12 an admission of violation for any purpose. Matters thus
13 closed may at any time be reopened by the attorney general
14 for further proceedings in the public interest.

§47-18-23. Severability.

1 If, for any reason, any section, sentence, clause, phrase or
2 provision of this article or the application thereof to any
3 person or circumstance is held unconstitutional or invalid, such
4 unconstitutionality or invalidity shall not affect other sections,
5 sentences, clauses, phrases or provisions or their application
6 to any other person or circumstance, and to this end, each
7 and every section, sentence, clause, phrase or provision of
8 this article is hereby declared to be severable.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

James L. Davis
Chairman Senate Committee

Lawrence C. Christian
Chairman House Committee

Originated in the House.

Takes effect ninety days from passage.

J. P. Sillanpaa
Clerk of the Senate

V. A. Blankenship
Clerk of the House of Delegates

J. M. Brotherton
President of the Senate

Donald L. Zopp
Speaker House of Delegates

The within *is approved* this the *30*
day of *March*, 1978.

John D. Rhyne
Governor

RECEIVED

MAR 13 2 13 PM '78

OFFICE OF THE GOVERNOR

APPROVED AND SIGNED BY THE GOVERNOR

Date Mar. 30, 1978

Time 2:15 p.m.

RECEIVED

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OFFICE
SECY. OF STATE