

LEGISLATIVE BILL 1028

Approved by the Governor April 15, 1974

Introduced by Agriculture and Environment Committee, Schmit, 23, Chmn.; Rasmussen, 41; Dickinson, 31; C. Carsten, 2; Kime, 43; Kennedy, 21; R. Maresh, 32

AN ACT relating to monopolies and unlawful combinations; to provide for the institution of actions and the recovery of damages; to provide for construction; to provide for an antitrust division in the Department of Justice; to amend sections 59-821, 59-828, and 84-211, Reissue Revised Statutes of Nebraska, 1943; to adopt the Consumer Protection Act; to provide severability; to repeal the original sections, and also section 59-509 and Chapter 59, articles 2, 4, 6, 9, and 10, Reissue Revised Statutes of Nebraska, 1943; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 59-821, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

59-821. Any person who shall be injured in his business or property by any other person or persons, by reason of anything forbidden or declared to be unlawful by sections 59-801 to 59-828, may sue therefor in any court of record in this state, in the county in which the defendant or defendants reside or are found, without respect to the amount in controversy, and shall recover ~~threefold the damages by him sustained~~ actual damages or liquidated damages in an amount which bears a reasonable relation to the actual damages which have been sustained and which damages are not susceptible of measurement by ordinary pecuniary standards and the costs of suit, including a reasonable attorney's fee.

Sec. 2. That section 59-828, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

59-828. [1] It is hereby made the duty of the Attorney General and the county attorney of each county under the direction of the Attorney General to institute and prosecute such proceedings as may be necessary to carry into effect all of the provisions of sections 59-801 to 59-828; Provided, no person shall be prosecuted

or be subjected to any penalty or forfeiture for, or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said sections; and provided further, no person testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

(2) It shall be lawful for any person to institute proceedings pursuant to the provisions of Chapter 59, article 8 at his own expense and by his own attorney, but in the action so brought by such person no recovery for costs and disbursements shall be had against the state.

Sec. 3. When any provision of sections 1 to 7 of this act or any provision of Chapter 59 is the same as or similar to the language of a federal antitrust law, the courts of this state in construing sections 1 to 7 of this act or any provision of Chapter 59 shall follow the construction given to the federal law by the federal courts.

Sec. 4. That section 84-211, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

84-211. It shall be the duty of the Attorney General to institute and prosecute such proceedings as may be necessary for the State of Nebraska and its political subdivisions when there are violations of the state and federal antitrust laws. Such proceedings shall be for the state and its political subdivisions as their interest may appear, and may be prosecuted in the name of the State of Nebraska. No later than June 30, 1974, the Attorney General shall establish within the Department of Justice an antitrust division to which he shall assign one or more assistants, as the work may require. It shall be the primary duty of such division to enforce the laws against monopolies, illegal trusts and other unlawful combinations in restraint of trade, and it shall investigate complaints of violations of such laws, subject to the availability of appropriations for that purpose. To assist the division, the Attorney General shall have authority to call on all agencies of this state, and the political subdivisions thereof, for such assistance as they may be in a position to provide, including but not limited to the furnishing of records and information relating to transactions entered into by them which the Attorney General believes pertain to his antitrust investigations.

Sec. 5. The Attorney General shall have and retain all his common law powers with respect to dealing with antitrust matters, and all related statutes of this state shall be deemed to be supplementary to such powers. He shall have authority to bring civil actions in the name of the state against anyone found violating either state or federal antitrust laws, and may recover treble damages in such actions. Such actions may also be brought as *parens patriae* of the citizens of this state with respect to damages personally sustained by such citizens, and he may recover the aggregate damages sustained by the citizens of this state, without separately proving the individual claims of each such citizen. Proof of such damages may be based on statistical sampling methods, the pro rata allocation of excess profits to sales occurring within this state, or such other reasonable system of estimating aggregate damages as the court in its discretion may permit. He shall distribute, allocate, or otherwise pay out of the funds so recovered to each citizen of the state a pro rata portion of the fund attributable to his respective claim for damages, less litigation and administrative costs, and any balance remaining after the payment of such individual claims and the costs of litigation and other administrative costs shall be placed in a fund to be distributed to the common schools of this state.

Sec. 6. Whenever the Attorney General undertakes any investigation contemplated by sections 1 to 7 of this act, he shall have the authority, prior to commencement of any action, to subpoena witnesses, compel their attendance, examine them under oath or require the production of any books, documents, records, writings or tangible things hereafter referred to as documentary material, which he deems relevant or material to his investigation, for inspection, reproducing or copying under such terms and conditions as are set forth in this section. Any subpoena issued by the Attorney General shall contain the following information: (1) The section of the statutes, the alleged violation of which is under investigation, and the general subject matter of the investigation, (2) the date and place at which time the person is required to appear or produce documentary material in his possession, custody or control, which date shall not be less than ten days from the date of service of the subpoena, and (3) a description of any documentary material required by class so as to clearly indicate the material demanded. He may require the production of documentary material prior to the taking of any testimony of the person subpoenaed, in which event the documentary material shall be made available for inspection and copying during normal business hours at the principal place of business of the person served or

at such other time and place as may be agreed upon by the person served and the Attorney General. When documentary material is demanded by subpoena, the subpoena shall not contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this state, or require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of this state. Service of such subpoena shall be in the same manner as subpoenas issued by a court in this state, and service on a corporation may be made on its resident agent. The examination of all witnesses under this section shall be conducted by the Attorney General or by an assistant or special assistant Attorney General designated by him in writing, and the testimony shall be taken stenographically or by a sound-recording device and shall be transcribed. All persons served with a subpoena by the Attorney General under sections 1 to 7 of this act shall be paid the same fees and mileage as paid witnesses in the courts of this state, which shall be paid the same as other claims against the state at the time such person appears in response to the subpoena. If a witness served with a subpoena under sections 1 to 7 of this act fails or refuses to obey the same or produce documentary material as required or to give testimony relevant or material to the investigation being conducted, the Attorney General may petition the district court of Lancaster County or the county wherein the witness resides for an order requiring the witness to attend and testify or produce the documentary material demanded. Any failure or refusal on the part of the witness to obey such an order of court may be punishable by the court as a contempt thereof. In any investigation brought by the Attorney General pursuant to sections 1 to 7 of this act, no individual shall be excused from attending, testifying or producing documentary material, objects or tangible things in obedience to a subpoena or under order of the court on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to any criminal penalty for or on account of any testimony given by him in any investigation brought by the Attorney General pursuant to sections 1 to 7 of this act; Provided, no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under sections 1 to 7 of this act; and provided further, that no individual so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

Sec. 7. Anything in sections 1 to 7 of this act to the contrary notwithstanding the labor of human beings shall not be construed to be an article of commerce or commodity of business and shall be exempt from the provisions of sections 1 to 7 of this act.

Sec. 8. For purposes of sections 8 to 29 of this act, unless the context otherwise requires:

(1) Person shall mean natural persons, corporations, trusts, unincorporated associations and partnerships;

(2) Trade and commerce shall mean the sale of assets or services, and any commerce directly or indirectly affecting the people of the State of Nebraska; and

(3) Assets shall mean any property, tangible or intangible, real, personal, or mixed, and wherever situated, and any other thing of value.

Sec. 9. Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful.

Sec. 10. Any contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce shall be unlawful.

Sec. 11. It shall be unlawful for any person to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce.

Sec. 12. It shall be unlawful for any person to lease or sell or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, or services, whether patented or unpatented, for use, consumption, enjoyment, or resale, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodity or services of a competitor of the lessor or seller, when the effect of such lease, sale, or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Sec. 13. (1) It shall be unlawful for any corporation to acquire, directly or indirectly, the whole or any part of the stock or assets of another corporation

when the effect of such acquisition may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

(2) This section shall not apply to corporations which purchase such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition; nor shall anything contained in this section prevent a corporation from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

(3) In addition to any other remedy provided by sections 8 to 29 of this act, the district court may order any corporation to divest itself of the stock or assets held contrary to this section, in the manner and within the time fixed by such order.

Sec. 14. The labor of a human being shall not be a commodity or article of commerce. Nothing contained in sections 8 to 29 of this act shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof.

Sec. 15. (1) The Attorney General may bring an action in the name of the state against any person to restrain and prevent the doing of any act prohibited by sections 8 to 29 of this act; and the prevailing party may, in the discretion of the court, recover the costs of such action including a reasonable attorney's fee.

(2) The court may make such additional orders or judgments as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of any act prohibited in sections 8 to 29 of this act.

Sec. 16. Any person who is injured in his business or property by a violation of sections 9 to 13 of this act, or any person so injured because he refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of sections 10 to 13 of this act, may bring a civil action in the district court to enjoin further violations, to recover the actual

damages sustained by him, or both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion increase the award of damages to an amount which bears a reasonable relation to the actual damages which have been sustained and which damages are not susceptible of measurement by ordinary pecuniary standards; Provided, that such increased award for violation of section 9 of this act shall not exceed one thousand dollars. For the purpose of this section, person shall include the counties, municipalities, and all political subdivisions of this state.

Whenever the State of Nebraska is injured by reason of a violation of sections 10 to 13 of this act, it may sue therefor in the district court to recover the actual damages sustained by it and to recover the costs of the suit including a reasonable attorney's fee.

Sec. 17. In the enforcement of sections 8 to 29 of this act, the Attorney General may accept an assurance of discontinuance of any act or practice deemed in violation of sections 8 to 29 of this act, from any person who engages in, or who has engaged in, such act or practice. Any such assurance shall be in writing and be filed with and subject to the approval of the district court of the county in which the alleged violator resides or has his principal place of business, or in Lancaster County.

Such assurance of discontinuance shall not be considered an admission of a violation for any purpose, but proof of failure to comply with the assurance of discontinuance shall be prima facie evidence of a violation of sections 8 to 29 of this act.

Sec. 18. (1) Whenever the Attorney General believes that any person may be in possession, custody, or control of any original or copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situated, which he believes to be relevant to the subject matter of an investigation of a possible violation of sections 9 to 13 of this act, he may, prior to the institution of a civil proceeding thereon, execute in writing and cause to be served upon such a person a civil investigative demand requiring such person to produce such documentary material and permit inspection and copying thereof; Provided, that this section shall not be applicable to criminal prosecutions.

(2) Each such demand shall:

(a) State the statute and section or sections thereof the alleged violation of which is under investigation, and the general subject matter of the investigation;

(b) Describe the class or classes of documentary material to be produced thereunder with reasonable specificity so as fairly to indicate the material demanded;

(c) Prescribe a return date within which the documentary material shall be produced; and

(d) Identify the members of the Attorney General's staff to whom such documentary material shall be made available for inspection and copying.

(3) No such demand shall:

(a) Contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this state; or

(b) Require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of this state.

(4) Service of any such demand may be made by:

(a) Delivering a duly executed copy thereof to the person to be served, or, if such person is not a natural person, to any officer of the person to be served;

(b) Delivering a duly executed copy thereof to the principal place of business in this state of the person to be served; or

(c) Mailing by certified mail a duly executed copy thereof addressed to the person to be served at the principal place of business in this state, or, if such person has no place of business in this state, to his principal office or place of business.

(5) Documentary material demanded pursuant to the provisions of this section shall be produced for inspection and copying during normal business hours at the principal office or place of business of the person served, or at such other times and places as may be agreed upon by the person served and the Attorney General.



(6) No documentary material produced pursuant to a demand, or copies thereof, shall, unless otherwise ordered by a district court for good cause shown, be produced for inspection or copying by, nor shall the contents thereof be disclosed to, other than an authorized employee of the Attorney General, without the consent of the person who produced such material; Provided, that under such reasonable terms and conditions as the Attorney General shall prescribe, the copies of such documentary material shall be available for inspection and copying by the person who produced such material or any duly authorized representative of such person. The Attorney General or any assistant Attorney General may use such copies of documentary material as he determines necessary in the enforcement of sections 8 to 29 of this act, including presentation before any court; Provided, that any such material which contains trade secrets shall not be presented except with the approval of the court in which action is pending, after adequate notice to the person furnishing such material.

(7) At any time before the return date specified in the demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date for or to modify or set aside a demand issued pursuant to subsection (1) of this section, stating good cause, may be filed in the district court for Lancaster County, or in such other county where the parties reside. A petition by the person or whom the demand is served, stating good cause, to require the Attorney General or any person to perform any duty imposed by the provisions of this section, and all other petitions in connection with a demand, may be filed in the district court for Lancaster County, or in the county where the parties reside.

(8) Whenever any person fails to comply with any civil investigative demand for documentary material duly served upon him under this section, or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the county in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one county such petition shall be filed in the county in which such person maintains his principal place of business, or in such other county as may be agreed upon by the parties to such petition. Whenever any petition is filed in the district court of any county under this section, such court shall have jurisdiction to hear and determine the matter so

presented and to enter such order as may be required to carry into effect the provisions of this section. Disobedience of any order entered under this section by any court shall be punished as a contempt thereof.

Sec. 19. Any action to enforce a claim for damages under section 16 of this act shall be forever barred unless commenced within four years after the cause of action accrues; Provided, that whenever any action is brought by the Attorney General for a violation of sections 9 to 13 of this act, except actions for the recovery of a civil penalty for violation of an injunction or actions under section 16 of this act, the running of such statute of limitations, with respect to every private right of action for damages under section 16 of this act which is based in whole or part on any matter complained of in the action by the Attorney General, shall be suspended during the pendency thereof.

Sec. 20. A final judgment or decree rendered in any action brought under section 15 of this act by the state to the effect that a defendant has violated sections 9 to 13 of this act shall be prima facie evidence against such defendant in any action brought by any party against such defendant under section 16 of this act as to all matters as to which such judgment or decree would be an estoppel as between the parties thereto; Provided, that this section shall not apply to consent judgments or decrees when the court makes no finding of illegality.

Sec. 21. Any person who violates section 10 or 11 of this act or the terms of any injunction issued as provided in sections 8 to 29 of this act, shall forfeit and pay a civil penalty of not more than twenty-five thousand dollars.

Any person who violates section 9 of this act shall pay a civil penalty of not more than two thousand dollars for each violation; Provided, that such penalty shall not apply to any radio or television broadcasting station which broadcasts, or to any publisher, printer or distributor of any newspaper, magazine, billboard or other advertising medium who publishes, prints or distributes advertising in good faith without knowledge of its false, deceptive or misleading character.

For the purpose of this section, the district court which issues any injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the Attorney General acting in the name of the state may petition for the recovery of civil penalties.

With respect to violations of sections 10 and 11 of this act, the Attorney General, acting in the name of the state, may seek recovery of such penalties in a civil action.

Sec. 22. Upon petition by the Attorney General, the court may, in its discretion, order the dissolution, or suspension or forfeiture of franchise, of any corporation which shall violate section 10 or 11 of this act or the terms of any injunction issued as provided in sections 8 to 29 of this act.

Sec. 23. Personal service of any process in an action under sections 8 to 29 of this act may be made upon any person outside the state if such person has engaged in conduct in violation of sections 8 to 29 of this act which has had impact in this state which sections 8 to 29 of this act prohibit.

Sec. 24. Nothing in sections 8 to 29 of this act shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the Director of Insurance, the Public Service Commission, the federal power commission or any other regulatory body or officer acting under statutory authority of this state or the United States, nor shall the provisions of sections 8 to 29 of this act extend to or apply to any actions or transactions on the part of any public power and irrigation district, public power district, electric membership association, and cooperatives or municipalities engaged in furnishing electrical service to customers at retail or wholesale if such actions or transactions are otherwise permitted by law; Provided, that actions and transactions prohibited or regulated under the laws administered by the Director of Insurance shall be subject to the provisions of section 9 of this act and all statutes which provide for the implementation and enforcement of section 9 of this act.

No penalty or remedy shall result from a violation of sections 8 to 29 of this act except as expressly provided therein.

Sec. 25. Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut growers, or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing such products in intrastate commerce. Such associations may have marketing agencies in common, and the associations and their members may make the necessary contracts and

agreements to effect such purposes. The associations shall be operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

(1) That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; or

(2) That the association does not pay dividends on stock or membership capital in excess of eight per cent per annum.

Such association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

Sec. 26. If the Attorney General shall have reason to believe that any association described in section 25 of this act monopolizes or restrains trade to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached or in which shall be contained a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade.

Sec. 27. All contracts and agreements made in restraint of trade by conspirators in violation of the provisions of section 10, 11, or 12 of this act shall be void. All contracts and agreements made between a conspirator and an innocent party in violation of the provisions of section 10, 11, or 12 of this act shall be voidable by the innocent party.

Sec. 28. Upon a finding in district court that a conspiracy in restraint of trade existed in an action brought pursuant to section 10 or 11 of this act, that finding shall constitute prima facie evidence of the existence of the conspiracy in subsequent civil actions involving the conspiracy.

Sec. 29. Every president, treasurer, general manager, agent, or other person exercising the powers of such office of any corporation, joint stock company, or other association, who has himself, in its behalf, knowingly violated, united to violate, or consented to the violation of the provisions of section 10, 11, or 12 of this act, shall thereafter be personally liable for all debts and obligations of any such corporation, joint

stock company, or other association created while such person holds such office or agency and which were incurred in the furtherance of that violation.

Sec. 30. Sections 8 to 29 of this act shall be known and designated as the Consumer Protection Act.

Sec. 31. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions thereof.

Sec. 32. That original sections 59-821, 59-828, and 84-211, Reissue Revised Statutes of Nebraska, 1943, and also section 59-509 and Chapter 59, articles 2, 4, 6, 9, and 10, Reissue Revised Statutes of Nebraska, 1943, are repealed.

Sec. 33. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.