

HOUSE BILL 2711

By Garrett

AN ACT to amend Tennessee Code Annotated, Title 8,
Chapter 6, Part 4 and Title 47, relative to
commerce.

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

SECTION 1. Tennessee Code Annotated, Section 47-25-101, is amended by deleting the section in its entirety and substituting the following:

47-25-101. Agreements in restraint of trade.

All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in trade or commerce affecting this state, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed or which tend to advance, reduce, or control the price or the cost to the producer or the consumer of any product or service in trade or commerce affecting this state, are declared to be against public policy, unlawful, and void.

SECTION 2. Tennessee Code Annotated, Section 47-25-102, is amended by deleting the section in its entirety and substituting the following:

47-25-102. Monopolization.

It is unlawful for any corporation or person to monopolize, attempt to monopolize, conspire to monopolize, or maintain a monopoly over any part of trade or commerce affecting this state.

SECTION 3. Tennessee Code Annotated, Section 47-25-104, is amended by deleting the section in its entirety and substituting the following:

47-25-104. Statute of limitations.

(a) Section 28-1-113 applies to all actions brought by the attorney general and reporter under this part.

(b) Section 28-3-105 applies to all actions brought by any other person under this part.

SECTION 4. Tennessee Code Annotated, Section 47-25-105, is amended by deleting the section in its entirety and substituting the following:

47-25-105. Construction.

Where necessary to consider the competitive effects of conduct or an agreement challenged under this part, a court shall consider exclusively the actual or reasonably likely effects of the challenged conduct or agreement on full and free competition. A full and free competitive process advances consumer welfare, which is served by competition on dimensions of price, quality, innovation, output, and consumer choice. This section does not confer standing on, or serve as proof of damages as to, any party.

SECTION 5. Tennessee Code Annotated, Section 47-25-106, is amended by designating the existing language as subsection (a) and adding the following new subsections:

(b) The attorney general and reporter may bring an action in any court of competent jurisdiction in the name of this state, any of this state's political subdivisions or agencies, or as *parens patriae* on behalf of natural persons residing in this state for appropriate injunctive or other equitable relief, including, but not limited to, disgorgement, and to secure monetary damages for any injuries directly or indirectly sustained by reason of any violation of this part. The court shall award this state a reasonable attorney's fee, costs, and expenses, and, in actions *parens patriae*, to secure monetary damages or treble damages sustained.

(c) A class action lawsuit must not be brought to obtain injunctive relief and recover damages for conduct declared to be unlawful by this part.

(d) In any action brought by the attorney general and reporter under subsection (b), the attorney general and reporter is the sole party for discovery purposes and is deemed to lack possession, custody, or control over documents possessed by the general assembly, other state officers, or any state agencies or institutions. If such an action is asserted on behalf of a political subdivision or agency, then the attorney general and reporter may facilitate nonparty discovery from that political subdivision or agency as an instrumentality with an interest in the litigation consistent with § 8-6-109.

(e) In any action brought by the attorney general and reporter under subsection (b), where the attorney general and reporter does not seek to recover for an injury suffered by a state governmental branch or office, official, agency, political subdivision, or other instrumentality, nonparty discovery of that entity is presumptively unreasonable and unduly burdensome.

(f) Actions *parens patriae* under subsection (b) are subject to the following procedures:

(1)

(A) The attorney general and reporter shall, at such times, in such manner, and with such content as the court may direct, cause notice of such actions to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to such person or persons according to the circumstances of the case;

(B) Any person on whose behalf an action is brought under subsection (b) may elect to exclude from adjudication the portion of this state's claim for monetary relief attributable to the person by filing notice of such election with the court within such time as specified in the notice

given pursuant to subdivision (f)(1)(A); and

(C) The doctrine of *res judicata* applies to a final judgment in an action under subsection (b) as to any claim under this part by any person on behalf of whom such action was brought and who fails to give such notice within the period specified in the notice given pursuant to subdivision (f)(1)(A);

(2) An action under subsection (b) must not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise must be given in such manner as the court directs; and

(3) Monetary relief recovered in an action under subsection (b) must be distributed in such a manner as the court in its discretion may authorize, subject to the requirements that any distribution procedure adopted afford each person a reasonable opportunity to secure the person's appropriate portion of the net monetary relief, and that such monetary recovery must not be distributed to any uninjured person by *cy pres* distribution.

(g) In any action brought by the attorney general and reporter under subsection (b), the court may, as a remedial measure, order payment to this state of a civil penalty of not more than one thousand dollars (\$1,000) for each violation.

SECTION 6. Tennessee Code Annotated, Section 47-25-106(a), is amended by inserting "directly or indirectly" between the language "Any person who is" and "injured or damaged".

SECTION 7. Tennessee Code Annotated, Section 47-25-106(a), is amended by deleting "such arrangement, contract, agreement, trust, or combination described in this part" and substituting "violation of this part".

SECTION 8. Tennessee Code Annotated, Section 47-25-106(a), is amended by

deleting all language following "court of competent jurisdiction," and substituting "equitable relief and actual damages; provided, that such an action by a natural person must not be filed or proceed once the attorney general and reporter has commenced an action *parens patriae* pursuant to subsection (b)".

SECTION 9. Tennessee Code Annotated, Section 47-25-108, is amended by deleting the section in its entirety and substituting the following:

47-25-108. Nonexclusivity.

Conduct may be actionable as a violation of § 47-25-101 or § 47-25-102 and also constitute unfair or deceptive acts or practices actionable under the Tennessee Consumer Protection Act of 1977, compiled in chapter 18, part 1 of this title; provided, that the court shall exclude from an award of monetary relief under this part amounts that duplicate relief obtained for the same injuries.

SECTION 10. Tennessee Code Annotated, Section 47-18-106(a)(1), is amended by deleting "the person" and substituting "any person with information relevant to the subject matter of the investigation".

SECTION 11. Tennessee Code Annotated, Section 47-18-106(a)(2), is amended by deleting "connected to the alleged violation" and substituting "with information relevant to the subject matter of the investigation".

SECTION 12. Tennessee Code Annotated, Section 47-18-106, is amended by deleting subsection (g) and substituting the following:

(g)

(1) Documentary material, merchandise, or other information, including trade secrets, obtained pursuant to a request under this section, unless otherwise ordered by the court for good cause shown, must not be produced for inspection, copied by, or its contents disclosed to, any person other than an

authorized representative of the attorney general and reporter or other proper law enforcement official for the purpose of prosecution without the consent of the person who produced the material or information.

(2) The attorney general and reporter may use copies of the documentary material produced in accordance with this section and merchandise impounded under a court order as it determines necessary in the enforcement of this part, including the presentation before any court; provided, that the powers conferred upon the attorney general and reporter by this part must not be used for the purpose of compelling any natural person to furnish testimony or evidence which may be protected by such person's right against self-incrimination.

(3) All other documentary material, answers to written interrogatories, and transcripts of oral testimony that are voluntarily provided to the attorney general and reporter as part of an investigation under this section must be treated as if obtained pursuant to a request issued under this section if such materials were obtained pursuant to an investigative demand or similar process issued by another state or federal attorney general or law enforcement agency, obtained from a state or federal attorney general or law enforcement agency pursuant to a statutory obligation to produce, or provided by a person with information relevant to the subject matter of the investigation.

SECTION 13. Tennessee Code Annotated, Section 47-18-108(b)(3), is amended by deleting the subdivision and substituting:

(3) The court may also order payment to this state of a civil penalty of not more than one thousand dollars (\$1,000) for each violation. In determining the amount of a civil penalty, the court may consider the defendant's participation in the complaint resolution process described in § 47-18-5002(2), and the defendant's restitution efforts

prior to the initiation of an action pursuant to subdivision (a)(1), in addition to any other factors, including, but not limited to:

(A) The good or bad faith of the violator as it relates to the violations;

(B) The injury to the public;

(C) The violator's ability to pay;

(D) The public's interest in eliminating the benefits derived by the violator from the violations; and

(E) This state's interest in vindicating the authority of this state and deterring future violations.

SECTION 14. Tennessee Code Annotated, Section 47-18-125, is amended by deleting the section in its entirety and substituting the following:

47-18-125. Additional penalties concerning specially targeted consumers.

(a) As used in this section, unless the context otherwise requires:

(1) "Elderly person" means any person who is sixty (60) years of age or older; and

(2) "Specially targeted consumers" means elderly persons, persons under eighteen (18) years of age, and current and former military service members.

(b) Any person who knowingly uses, or has knowingly used, a method, act, or practice that targets specially targeted consumers and is in violation of this part is liable to this state for a civil penalty of not more than ten thousand dollars (\$10,000) for each violation. Each violation may include, but is not limited to, each specially targeted consumer solicited, each advertisement that was distributed, each misrepresentation or deceptive statement that appeared on a solicitation, each time that an advertisement appeared on television or on radio, and each contact, including by telephone call, a

direct mail solicitation, or in person solicitation, with a specially targeted consumer to promote or solicit using unfair, misleading, or deceptive acts or practices.

(c) The specially targeted consumer does not need to be a citizen of this state if the company or individual is operating from this state or the court otherwise has jurisdiction over the company or individual for engaging in an unfair, misleading, or deceptive act or practice arising in this state.

(d) The civil penalties recoverable by this state under this part are supplemental and cumulative to any other available civil penalties and relief available under other laws, regulations, and rules, including, but not limited to, those available pursuant to § 47-18-108.

SECTION 15. Tennessee Code Annotated, Section 8-6-403, is amended by deleting the section in its entirety and substituting the following:

8-6-403. Civil demands – Service of process.

Service of a civil investigative demand as described in § 8-6-402 must be made by a designated representative of the attorney general and reporter by any means permitted by the Rules of Civil Procedure. Such process must run throughout the United States but does not require any witness to testify in any county other than the witnesses' county of residence or the county where records or tangible objects demanded are found under the witnesses' control.

SECTION 16. Tennessee Code Annotated, Section 8-6-404, is amended by deleting the section in its entirety and substituting the following:

8-6-404. Civil demands – Failure to comply.

If a witness fails to comply with a civil investigative demand issued under this part by its return date and has not secured a protective order from the court, then the attorney general and reporter, upon notice to the witness, may apply to a court of

competent jurisdiction for an order compelling compliance.

SECTION 17. Tennessee Code Annotated, Section 8-6-407, is amended by designating the existing language as subsection (a) and adding the following new subsection (b):

(b) All other documentary material, answers to written interrogatories, and transcripts of oral testimony that are voluntarily provided to the attorney general and reporter as part of an investigation under this part must be treated as if obtained pursuant to a demand issued under this part if said materials were obtained pursuant to an investigative demand or similar process issued by another state or federal attorney general or law enforcement agency, obtained from a state or federal attorney general or law enforcement agency pursuant to a statutory obligation to produce, or provided by a person with information relevant to the subject matter of the investigation.

SECTION 18. The headings to sections and chapters in this act are for reference purposes only and do not constitute a part of the law enacted by this act. However, the Tennessee Code Commission is requested to include the headings in any compilation or publication containing this act.

SECTION 19. This act takes effect upon becoming a law, the public welfare requiring it.