

Original sponsor: Kerttula

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1 IN THE SENATE

BY THE COMMERCE COMMITTEE

2 CS FOR SPONSOR SUBSTITUTE FOR SENATE BILL NO. 5 am

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 NINTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act prohibiting monopolies and combinations in
7 restraint of trade."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 45 is amended by adding a new chapter to read:

10 CHAPTER 52. MONOPOLIES; RESTRAINT OF TRADE.

11 ARTICLE 1. SUBSTANTIVE PROVISIONS.

12 Sec. 45.52.010. COMBINATIONS IN RESTRAINT OF TRADE UNLAWFUL.
13 Every contract, combination in the form of trust or otherwise, or
14 conspiracy, in restraint of trade or commerce is unlawful.

15 Sec. 45.52.020. MONOPOLIES AND ATTEMPTED MONOPOLIES UNLAWFUL. It
16 is unlawful for a person to monopolize, or attempt to monopolize, or
17 combine or conspire with another person to monopolize any part of trade
18 or commerce.

19 Sec. 45.52.030. TRANSACTIONS AND AGREEMENTS NOT TO USE OR DEAL IN
20 COMMODITIES OR SERVICES UNLAWFUL. It is unlawful for a person to lease
21 or make a sale or contract for sale of goods, wares, merchandise,
22 machinery, supplies, or other commodities, or services, whether patented
23 or unpatented, for use, consumption, enjoyment, or resale, or fix a
24 price charged for it, or discount from, or rebate upon, that price, on
25 the condition, agreement, or understanding that the lessee or purchaser
26 will not use or deal in the goods, wares, merchandise, machinery,
27 supplies, or other commodity or service of a competitor or competitors
28 of the lessor or seller, if the effect of the lease, sale or contract
29 for sale, or of the condition, agreement, or understanding may be sub-

1 stantially to lessen competition or tend to create a monopoly in any
2 line of commerce.

3 Sec. 45.52.040. MERGERS, ACQUISITIONS, UNLAWFUL WHEN COMPETITION
4 LESSENER. (a) It is unlawful for a person to acquire and hold, di-
5 rectly or indirectly, the whole or a part of the stock, other share
6 capital, or assets of any corporation after the effective date of this
7 Act if the effect of the acquisition and holding may be substantially to
8 lessen competition or to tend to create a monopoly in any line of com-
9 merce in the state or in a section of the state. This subsection does
10 not apply to persons purchasing such stock solely for investment if it
11 is not used by voting or otherwise to bring about, or in attempting to
12 bring about, the substantial lessening of competition. Nothing in this
13 subsection prevents a corporation from causing the formation of sub-
14 sidiary corporations for the actual carrying on of their immediate
15 lawful business, or the natural and legitimate branches or extensions of
16 it, or from owning and holding all or a part of the stock of the sub-
17 sidiary corporation, when the effect of the formation is not substan-
18 tially to lessen competition.

19 (b) When the court finds that the effect of the holding of such
20 stock, share capital, or assets is substantially to lessen competition
21 or tends to create a monopoly and no other remedy will eliminate the
22 lessening of competition or the tendency to create a monopoly, the court
23 shall order the divestiture or other disposition of the stock, share
24 capital, or assets and shall prescribe a reasonable time, manner, and
25 degree of the divestiture or other disposition of it.

26 (c) This section does not apply to mergers, acquisitions or
27 holding companies permitted by AS 06.05.235 or to a merger carried out
28 in accordance with AS 21.69.590 - 21.69.600, or to mergers, acquisitions
29 or holding companies permitted and regulated by a regulatory agency of

1 the United States having jurisdiction and control over those mergers and
2 acquisitions.

3 Sec. 45.52.050. INTERLOCKING DIRECTORATES AND RELATIONSHIPS. (a)
4 It is unlawful for a person to be at the same time a director, officer,
5 partner, or trustee in any two or more firms, partnerships, trusts,
6 associations, or corporations or any combination of them engaged in
7 commerce, if these firms, partnerships, trusts, associations, or corpo-
8 rations or a combination of them, are by virtue of their business and
9 location or operation, competitors and if the effect may be substan-
10 tially to lessen competition or tend to create a monopoly.

11 (b) No person may by the use of a representative accomplish the
12 result prohibited in (a) of this section.

13 (c) The validity or invalidity of an act of a director, officer,
14 or trustee done by him while occupying such a position in violation of
15 this section shall be determined by the statutory and common law of the
16 state relating to corporations, trusts, or associations.

17 (d) The attorney general may bring an action at any time to cause
18 a director, officer, or trustee who may be occupying such a position in
19 violation of this section, to vacate the office or offices to effect the
20 termination of the prohibited interlocking relationship.

21 (e) A person affected by an act of a director, officer, or trustee
22 may bring an action at any time to cause the director, officer, or
23 trustee who may be occupying such a position in violation of this
24 section to terminate the prohibited interlocking relationship.

25 (f) The court, upon finding that a director, officer, or trustee
26 is holding office in violation of this section, shall order the person
27 to terminate the interlocking relationship, and, in the case of a
28 trustee, the court may, when it considers it appropriate, order the
29 trustee to vacate his office. A remedy provided in this section does

1 not limit and is in addition to any other remedy available under another
2 section of this chapter or another law.

3 Sec. 45.52.060. EXEMPTIONS. (a) This chapter does not forbid
4 the existence or operation of labor, agricultural or horticultural
5 organizations created for the purpose of mutual help, and not conducted
6 for profit, or forbid or restrain members of those organizations from
7 lawfully carrying out the legitimate objectives of them; nor are these
8 organizations or members illegal combinations or conspiracies in
9 restraint of trade under the provisions of this chapter.

10 (b) This chapter does not forbid actions or arrangements author-
11 ized or regulated under the laws of the United States which exempt
12 these actions or arrangements from application of the antitrust laws
13 of the United States or under the following statutes of this state:

14 (1) AS 06.05.235;

15 (2) AS 10.15; and

16 (3) AS 31.05.110.

17 (c) This chapter does not forbid persons engaged in the fishing
18 industry as fishermen, catching or collecting aquatic products, from
19 acting together in associations for the purpose of catching, collecting,
20 or preparing for market their product.

21 (d) This chapter does not apply to public utilities which have
22 been issued a certificate of public convenience and necessity under AS
23 42.05.

24 (e) This chapter does not apply to carriers regulated under AS
25 42.10, AS 42.15, and AS 02.05, or to ferries regulated under AS 42.25.

26 (f) This chapter does not apply to banks and financial institutions
27 regulated under AS 06.

28 (g) This chapter does not forbid activities expressly required
29 by a regulatory agency of the state. Activities permitted by a regu-

1 latory agency of the state are not forbidden by this chapter if the
2 regulatory agency has given due consideration to the possible anti-
3 competitive effects before permitting the activities, and enforcement
4 of the provisions of this chapter would be disruptive of the regulatory
5 scheme.

6 (h) This chapter does not forbid actions or arrangements expressly
7 required under the Alaska Native Claims Settlement Act.

8 ARTICLE 2. ENFORCEMENT PROVISIONS.

9 Sec. 45.52.100. CONTRACTS VOIDABLE. A contract or agreement in
10 violation of a provision of this chapter is voidable by either party
11 as to future performance by either party; however, the court may, in
12 its discretion, order payment for goods or services already received
13 to prevent unjust enrichment.

14 Sec. 45.52.110. SUITS BY PERSONS INJURED: (a) A person who is
15 injured in his business or property by a violation of secs. 10, 20,
16 30, 40 or 50 of this chapter, or a person so injured because he refuses
17 to accede to a proposal for an arrangement which, if consummated,
18 would be a violation of secs. 10, 20, 30, 40 or 50 of this chapter,
19 may bring a civil action

20 (1) for damages sustained by him plus the costs of the
21 suit, including reasonable attorney fees; if judgment is for the
22 plaintiff and if the trier of fact finds that the violation was knowing
23 and wilfull, the court may increase recovery to an amount not in
24 excess of three times the damages sustained; and

25 (2) to enjoin the unlawful practice, and if judgment is for
26 the plaintiff, he may be awarded the costs of the suit, including
27 reasonable attorney fees.

28 (b) When the state, a home rule or general law city or borough
29 or other government entity is injured by reason of a violation of

1 secs. 10, 20, 30, 40 or 50 of this chapter, it may maintain an action
2 in the same manner as prescribed in (a) of this section for an injured
3 person; and the state, city, borough, or other governmental entity is
4 entitled to the same relief as provided in (a) of this section.

5 Sec. 45.52.120. CERTAIN VIOLATIONS CONSTITUTE MISDEMEANOR. A
6 person who violates secs. 10 or 20 of this chapter is guilty of a
7 misdemeanor and, upon conviction is punishable, if a natural person,
8 by a fine of not more than \$20,000 or by imprisonment for not more
9 than one year, or by both; and if not a natural person, by a fine of
10 not more than \$50,000.

11 Sec. 45.52.130. INJUNCTION BY ATTORNEY GENERAL. (a) In addition
12 to any other relief provided by this chapter, the attorney general may
13 bring an action to enjoin a violation of this chapter. This action
14 may be brought as a sole action or in conjunction with another action
15 which the attorney general is authorized to bring.

16 (b) The court may make additional orders or judgments as may be
17 necessary to restore to a person in interest any money or property,
18 real or personal, which may have been acquired by an act prohibited by
19 this chapter, and as may be necessary to prevent continuing or future
20 violations of this chapter.

21 Sec. 45.52.140. JURISDICTION OF COURT. An action arising under
22 this chapter shall be brought in the superior court.

23 Sec. 45.52.150. CONSENT JUDGMENT. (a) In an action maintained
24 under this chapter, the parties to it may file with the court a consent
25 judgment or decree. The consent judgment or decree shall set out the
26 alleged violations, future obligations of the parties, if any, damages,
27 or other relief, the defendant agrees to make, if any, and the reasons
28 for entering into the consent judgment or decree.

29 (b) No consent judgment or decree becomes final until 60 days

1 from its filing. During the 60-day period an interested party may
2 file verified exceptions to the form or substance of the consent
3 judgment or decree, and the court, upon a full hearing on those excep-
4 tions, may approve or refuse to enter the consent judgment or decree.

5 Sec. 45.52.160. JUDGMENT IN FAVOR OF THE STATE AS EVIDENCE IN
6 ACTION. A final judgment rendered in a civil or criminal action
7 brought by the state under this chapter is prima facie evidence against
8 the defendant in any other action under this chapter brought by another
9 party, or by the state, a city, a borough, or other governmental
10 entity; however, this section does not apply to consent judgments or
11 decrees entered under sec. 150 of this chapter.

12 Sec. 45.52.170. LIMITATION OF ACTIONS. An action to enforce a
13 claim arising under this chapter is barred unless commenced within
14 four years after the claim accrues, except that when an action is
15 brought by the attorney general under this chapter, the running of
16 this period of limitation, with respect to every private right of
17 action for damages which is based in whole or in part on a matter
18 complained of in the action by the attorney general, shall be suspended
19 during the pendency of the action brought by the attorney general.
20 For the purpose of this section, a claim for a continuing violation is
21 considered to accrue at any time during the period of the violation.

22 ARTICLE 3. INVESTIGATORY POWERS.

23 Sec. 45.52.200. POWERS OF THE ATTORNEY GENERAL. If the attorney
24 general has reasonable cause to believe that a person has engaged in,
25 or engages in, or is about to engage in an act or practice prohibited
26 or declared unlawful by this chapter, or that a person has assisted or
27 participated in a plan, scheme, agreement or combination of the nature
28 described in this chapter, or when he believes it to be in the public
29 interest, the attorney general may commence an investigation. The

1 attorney general may compel production of documentary material and
2 take testimony, under oath, before the institution of an action under
3 this chapter.

4 Sec. 45.52.210. DOCUMENTARY EVIDENCE. (a) If the attorney
5 general has reasonable cause to believe that a person is in
6 possession, custody, or control of a documentary evidence, wherever
7 situated, which he believes to be relevant to an investigation author-
8 ized in sec. 200 of this chapter, he may execute in writing and cause
9 to be served upon that person an investigative demand requiring him to
10 produce the documentary material and permit inspection and copying.

11 (b) Each demand shall

12 (1) state the specific statute the alleged violation of
13 which is under investigation, and the general subject matter of the
14 investigation;

15 (2) describe, with reasonable specificity so as fairly to
16 indicate the material demanded, the documentary material to be produced;

17 (3) prescribe a return date within which the documentary
18 material is to be produced; and

19 (4) identify the state employees or representatives to whom
20 the documentary material is to be made available for inspection and
21 copying.

22 (c) No demand may

23 (1) require the production of documentary material which
24 would be privileged from disclosure if demanded by a subpoena duces
25 tecum issued by a court of the state; or

26 (2) contain a requirement which would be unreasonable or
27 improper if contained in a subpoena duces tecum issued by a court of
28 the state; however, this shall not limit the power of the attorney
29 general to require production of documents located outside the state

1 which pertain to matters affecting the state.

2 (d) The demand may be served by the attorney general or his
3 designee by

4 (1) delivering a copy of it to the person to be served, or,
5 if the person is not a natural person, to an officer of the person to
6 be served;

7 (2) delivering a copy of it to a place of business in the
8 state of the person to be served; or

9 (3) mailing by registered or certified mail a copy of it
10 addressed to the person to be served at a place of business in the
11 state, or, if the person has no place of business in the state, to his
12 principal office or place of business.

13 (e) No documentary material produced pursuant to a demand, or
14 copies of it, unless otherwise ordered by a superior court for good
15 cause shown, may be produced for inspection or copying by, nor may its
16 contents be disclosed, to anyone other than an authorized employee of
17 the state without the consent of the person who produced the material.
18 However, under those reasonable terms and conditions the attorney gen-
19 eral prescribes, copies of the documentary material shall be available
20 for inspection and copying by the person who produced the material or
21 an authorized representative of him. The attorney general, or his
22 designee, may use copies of the documentary material as he considers
23 necessary in the enforcement of this chapter, including presentation
24 before a court; however, material which contains trade secrets may not
25 be presented except with the approval of the court in which the action
26 is pending after adequate notice to the person furnishing the material.

27 (f) At any time before the return date specified in the demand,
28 or within 20 days after the demand has been served, whichever period
29 is shorter, a petition to extend the return date for, or to modify or

1 set aside a demand issued under (a) of this section, stating good
2 cause, may be filed in the superior court for the judicial district
3 where the parties reside. A petition by a person on whom a demand is
4 served, stating good cause, to require the attorney general or another
5 person to act in accordance with the requirements of (e) of this
6 section, and all other petitions in connection with a demand, may be
7 filed in the superior court for the judicial district in which the
8 person on whom the demand is served resides.

9 (g) A person upon whom a demand is served under this section
10 shall comply with the terms of the demand unless otherwise provided by
11 an order of court issued in response to a petition filed under (f) of
12 this section. A person who, with intent to avoid, prevent, or obstruct
13 compliance, in whole or in part, with an investigative demand under
14 this section removes from any place, conceals, withholds, or destroys,
15 mutilates, alters, or by any other means falsifies, a documentary
16 material in the possession, custody, or control of a person which is
17 the subject of a demand duly served upon any person, or who otherwise
18 wilfully disobeys any such demand, is guilty of a misdemeanor, and is
19 punishable upon conviction by a fine of not more than \$5,000, or by
20 imprisonment for a term of not more than one year, or by both. Failure
21 of the state to serve the demand properly under (d) of this section is
22 a defense to prosecution under this subsection, but invalidity of the
23 demand under (b) or (c) of this section is not a defense, and that
24 invalidity may be tested only in an action under (f) of this section
25 to modify or set aside the demand.

26 (h) Nothing in this section impairs the authority of the attorney
27 general or his designee to lay before a grand jury of this state
28 evidence concerning a violation of this chapter, to invoke the power
29 of a court to compel the production of evidence before a grand jury,

1 or to file a civil complaint or criminal information alleging a
2 violation of this chapter.

3 Sec. 45.52.220. TESTIMONY OF WITNESSES. (a) In connection with
4 an investigation authorized by sec. 200 of this chapter, the attorney
5 general may issue an investigative demand compelling the attendance of
6 a person for examination under oath before himself or before a court
7 of record.

8 (b) Each demand shall

9 (1) state the specific statute the alleged violation of
10 which is under investigation, and the general subject matter of the
11 investigation;

12 (2) state the date, time and place at which the examination
13 is to take place.

14 (c) A demand may be served by the attorney general, or his
15 designee, in accordance with the procedures prescribed in sec. 210(d)
16 of this chapter.

17 (d) If a person ordered to attend the inquiry fails to attend
18 without good cause, he is guilty of a misdemeanor and upon conviction
19 is punishable by a fine of not more than \$5,000, or by imprisonment
20 for not more than one year, or by both. If a person in attendance at
21 the inquiry refuses to answer a question on the ground that he may be
22 incriminated by his answer, and if the attorney general, or his designee,
23 in a writing directed to the person being questioned orders the person
24 to answer the question, the person shall comply with the order. After
25 complying, and if but for this section he would have been privileged
26 to withhold the answer given, he may not be prosecuted for an offense
27 or subjected to a penalty or forfeiture for or on account of a transac-
28 tion, matter or thing concerning which he gave evidence. However, he
29 may nevertheless be prosecuted or subjected to penalty or forfeiture

1 for a perjury, false swearing or contempt committed in answering or
2 failing to answer. If a person refuses to testify after being granted
3 immunity from prosecution and after being ordered to testify, he may
4 be adjudged in contempt and committed to jail until the time he purges
5 himself of contempt by testifying. A grant of immunity does not
6 prevent the attorney general from instituting civil contempt proceedings
7 against a person who violates any of the above provisions.

8 ARTICLE 4. GENERAL PROVISIONS.

9 Sec. 45.52.300. DEFINITIONS. In this chapter

10 (1) "asset" includes any property, tangible or intangible,
11 real, personal, or mixed and wherever located, and any other thing of
12 value;

13 (2) "documentary evidence" includes an original or copy of
14 a book, record, report, memorandum, paper, communication, tabulation,
15 map, chart, photograph, mechanical tabulation, magnetic tape, or other
16 computer data storage system, or other tangible document or recording;

17 (3) "trade" and "commerce" include but are not limited to,
18 trade in goods, merchandise, natural resources, whether or not severed,
19 extracted, harvested or produced, agricultural products, produce,
20 choses in action, commodities, and any other article of commerce; they
21 include trade or business in service trades, transportation, banking,
22 lending, advertising, bonding and any other business whether or not
23 that business furnishes a personal service.
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