

MAINE STATE LEGISLATURE

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131st MAINE LEGISLATURE

FIRST SPECIAL SESSION-2023

Legislative Document

No. 1815

H.P. 1161

House of Representatives, April 27, 2023

An Act to Protect Maine's Consumers by Establishing an Abuse of Dominance Right of Action and Requiring Notification of Mergers

Reference to the Committee on Innovation, Development, Economic Advancement and Business suggested and ordered printed.

A handwritten signature in cursive script that reads "Robert B. Hunt".

ROBERT B. HUNT
Clerk

Presented by Representative MILLETT of Cape Elizabeth.
Cosponsored by President JACKSON of Aroostook and
Representatives: GATTINE of Westbrook, MILLETT of Waterford, MOONEN of Portland,
SHEEHAN of Biddeford, Speaker TALBOT ROSS of Portland, Senator: BENNETT of
Oxford.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 5 MRSA §194-L** is enacted to read:

3 **§194-L. Premerger notification and approval requirement**

4 **1. Notice required.** Notwithstanding any provision of law to the contrary, any person
5 conducting business in this State that is required to file a notification and report form prior
6 to a merger pursuant to 15 United States Code, Section 18a(a), in effect on January 1, 2024,
7 shall provide the notification and report to the Attorney General at the same time the
8 notification and report is filed with the Federal Government.

9 **2. Violation; penalty.** A person that violates subsection 1 commits a civil violation for
10 which a fine of not more than \$10,000 may be adjudged for each day the person is in
11 violation.

12 **3. Exceptions.** The requirements of subsection 1 do not apply to the following types
13 of transactions:

14 A. Acquisitions of foods or real property transferred in the ordinary course of business;

15 B. The creation, production or dissemination of a single expressive work that is
16 copyrighted, including, but not limited to, a streaming series, television program or
17 motion picture;

18 C. Acquisitions of bonds, mortgages, deeds of trust or other obligations that are not
19 voting securities;

20 D. Transfers to or from a federal agency, a state or a political subdivision of a state;
21 and

22 E. Any other acquisitions, transfers or transactions that may be exempted by the
23 Attorney General in accordance with subsection 5.

24 **4. Confidentiality.** Notwithstanding any provision of law to the contrary, all
25 notifications and reports filed pursuant to subsection 1 are confidential, except that the
26 notifications and reports may be disclosed as necessary in an administrative or judicial
27 action or proceeding.

28 **5. Rules.** The Attorney General may adopt rules to implement this section, including,
29 but not limited to, rules relating to identifying acquisitions, transfers or transactions to be
30 exempt from the requirements of this section or defining terms used in this section. Rules
31 adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter
32 375, subchapter 2-A.

33 **Sec. 2. 10 MRSA §1104, sub-§1,** as amended by PL 1989, c. 367, is further
34 amended to read:

35 **1. Right of action and damages.** Any person, including the State or any political
36 subdivision of the State, injured directly or indirectly in its business or property by any
37 other person or corporation by reason of anything forbidden or declared to be unlawful by
38 section 1101, 1102 or 1102-A, may sue for the injury in a civil action. If the court finds for
39 the plaintiff, the plaintiff ~~shall~~ is entitled to recover 3 times the amount of the damages
40 sustained and cost of suit, including necessary and reasonable investigative costs,

1 reasonable experts' fees and reasonable attorney's fees. The State may recover equitable
2 monetary relief, including restitution and disgorgement.

3 **Sec. 3. 10 MRSA §1104, sub-§3**, as amended by PL 1991, c. 137, §3, is further
4 amended to read:

5 **3. Civil penalty.** Each course of conduct that constitutes a violation of section 1101
6 or 1102 is a civil violation for which a civil penalty of not more than ~~\$100,000~~ \$250,000
7 for each defendant may be adjudged.

8 A. In any action initiated by the Attorney General pursuant to this section to prevent
9 and restrain violations of sections 1101 and 1102, the Attorney General may include
10 an action to recover civil penalties by each defendant for each course of conduct
11 alleged.

12 B. An action to recover a civil penalty from a defendant under this section bars a
13 criminal prosecution pursuant to section 1101 or 1102 against that defendant for the
14 same course of conduct on which the action to recover the civil penalty is based.

15 C. A criminal prosecution against a defendant pursuant to section 1101 or 1102 bars
16 any action to recover a civil penalty under this section from that defendant for the same
17 course of conduct on which the criminal prosecution is based.

18 **Sec. 4. 10 MRSA §1109, sub-§3**, as amended by PL 1991, c. 488, is further
19 amended to read:

20 **3. Report.** The person acquiring stock or assets under subsection 2 shall provide
21 notice of this acquisition to the Department of the Attorney General at least ~~30~~ 90 days
22 prior to the date of acquisition. That period may be shortened with the consent of the
23 Attorney General.

24 **Sec. 5. 10 MRSA §1109, sub-§5**, as enacted by PL 1989, c. 750, is amended to
25 read:

26 **5. Penalty.** Violation of this section is a civil violation for which a civil penalty not
27 to exceed ~~\$10,000~~ \$50,000 may be assessed.

28 **Sec. 6. 10 MRSA c. 201-B** is enacted to read:

29 **CHAPTER 201-B**

30 **ABUSE OF DOMINANCE**

31 **§1120-K. Abuse of dominance right of action and damages**

32 **1. Unlawful acts and conduct.** It is unlawful for a person with a dominant position in
33 the conduct of any business, trade or commerce, in any labor market or in the furnishing of
34 any service in this State to abuse that dominant position.

35 **2. Right of action and damages.** Any person, including the State or any political
36 subdivision of the State, that sustained damages as a result of a violation of subsection 1,
37 may sue for injury in a civil action under this chapter, including as a class action. The State
38 may sue on behalf of residents in the State that sustained damages as a result of a violation

1 of subsection 1. If the court finds for the plaintiff, the plaintiff is entitled to recover 3 times
2 the amount of the damages sustained and cost of suit and any reasonable attorney's fees.

3 **3. Commencement of action; notice required.** A plaintiff other than the Attorney
4 General shall provide notice of the commencement of a civil action under this chapter to
5 the Attorney General at or before the commencement of the action, except that, if the
6 plaintiff is a political subdivision of the State, notice must be provided to the Attorney
7 General at least 10 days prior to the commencement of the action.

8 **4. Direct or indirect evidence of dominant position.** In any action brought under this
9 section, a person's dominant position may be established by:

10 A. Direct evidence, including, but not limited to:

11 (1) The unilateral power of a person to set prices, terms, conditions or standards;

12 (2) The unilateral power of a person to dictate nonprice contractual terms without
13 compensation;

14 (3) Other evidence that a person is not constrained by meaningful competitive
15 pressures, such as the ability to degrade quality without suffering reduction in
16 profitability; or

17 (4) In labor markets, the use of noncompete clauses or so-called no-poach
18 agreements or the unilateral power to set wages;

19 B. Indirect evidence, including, but not limited to, a person's share of a relevant market;
20 or

21 C. A combination of direct and indirect evidence.

22 If direct evidence is sufficient to demonstrate that a person has a dominant position or has
23 abused the dominant position, a court may not require definition of a relevant market in
24 order to evaluate the evidence, find liability or find that a claim has been stated under this
25 chapter.

26 **5. Presumption; dominant position.** A person that has a share of 60% or more of a
27 relevant market as a seller is presumed to have a dominant position in that market. A person
28 that has a share of 50% or more of a relevant market as a buyer is presumed to have a
29 dominant position in that market.

30 **6. Presumption; evidence of abuse of a dominant position.** This subsection governs
31 evidence establishing an abuse of a dominant position.

32 A. In any action brought under this section, a person's abuse of a dominant position
33 may be established by conduct that tends to foreclose or limit the ability or incentive
34 of one or more actual or potential competitors to compete, such as leveraging a
35 dominant position in one market to limit competition in a separate market or refusing
36 to deal with another person with the effect of unnecessarily excluding or handicapping
37 actual or potential competitors. In labor markets, abuse of a dominant position may be
38 established by imposing contracts by which any person is restrained from engaging in
39 a lawful profession, trade or business of any kind or by restricting the freedom of
40 workers and independent contractors to disclose wage and benefit information.

41 B. A person with 50 or more employees and \$25 million in annual revenues is
42 presumed to abuse a dominant position if the person:

1 (1) Engages in conduct that tends to foreclose or limit the ability or incentive of
2 one or more actual or potential competitors to compete, such as leveraging a
3 dominant position in one market to limit competition in a separate market,
4 including bundling, tying, self-preferencing or refusing to interoperate;

5 (2) Refuses to deal with another person with the effect of unnecessarily excluding
6 or handicapping actual or potential competitors;

7 (3) In labor markets, imposes contracts restraining a person from engaging in a
8 lawful profession, trade or business or restricting the freedom of workers and
9 independent contractors to disclose wage and benefit information, including, but
10 not limited to, noncompete provisions imposed on workers and so-called no-poach
11 provisions imposed on franchisees or any other would-be competitors in labor
12 markets;

13 (4) Refuses access to competitors or potential competitors to an essential facility
14 or resource that is necessary to compete effectively;

15 (5) Buys up a scarce supply of intermediate goods or services required by a
16 competitor;

17 (6) Refuses to supply scarce goods or services to a competitor or consumer;

18 (7) Imposes antisteering provisions or most favored nation provisions on input
19 providers with the goal of preventing suppliers from offering their consumers a
20 lower price at a rival distributor;

21 (8) Imposes exclusivity on suppliers or consumers as a condition of doing business;
22 or

23 (9) Engages in predatory tactics, such as pricing a good or service below
24 incremental costs.

25 **7. Defenses.** Evidence of procompetitive effects is not a defense to abuse of dominance
26 and does not offset or cure competitive harm.

27 **8. Duplicate liability.** In any action in which claims are asserted against a defendant
28 by both direct and indirect purchasers, the court shall take all steps necessary to avoid
29 duplicate liability, including, but not limited to, the transfer and consolidation of all related
30 actions.

31 **9. Rules.** The Attorney General may adopt rules to implement this chapter, including,
32 but not limited to, the Attorney General's interpretation of market share and other relevant
33 market conditions while taking into account the role of small and medium-sized businesses
34 in the State's economy. Rules adopted pursuant to this subsection are routine technical
35 rules as defined in Title 5, chapter 375, subchapter 2-A.

36 **10. Construction.** This chapter may not be construed to:

37 A. Limit the jurisdiction of the Public Utilities Commission; or

38 B. Limit the rights of employees or independent contractors to combine in unions,
39 organizations or associations, to establish or maintain union apprenticeship or training
40 programs or to bargain collectively concerning wages and the terms and conditions of
41 employment.

42 **§1120-L. Exceptions**

