



Colorado Strengthens State Antitrust Law

With significant focus on the Colorado legislature's attempts to address significant property tax increases during its 2023 session, Coloradans may have missed some notable changes to competition law in Colorado. This summer, the Colorado State Antitrust Act of 2023 (the 2023 Act) went into effect. The 2023 Act repeals, re-enacts, and amends, in some substantial ways, the Colorado State Antitrust Act of 1992 (the 1992 Act). Although the final version of the bill that Governor Jared Polis ultimately signed is not as expansive as the original version, its passage still represents some significant changes to Colorado's state antitrust statute.

First, the 2023 Act extends the effective period of Colorado's relatively young price gouging statute. As readers may be aware, during the 2020 legislative session, the Colorado General Assembly passed, and Governor Polis signed, Colorado's first general price gouging statute. Colorado's price gouging statute applies to the sale of certain goods and services during a declared disaster. Until the enactment of the 2023 Act, the provisions of the price gouging statute were effective only from the time period beginning with the disaster declaration and expiring 180 days after the declaration.

Now, the price gouging statute is effective from the date of a disaster declaration until 180 days after the "final disaster declaration concerning the disaster expires." This change appears driven by a desire to address a situation where a declared disaster lasts more than 180 days, much like the COVID-19 pandemic did.

More directly related to antitrust issues, the 2023 Act broadens who may bring suit for an alleged violation of its provisions. Under the 2023 Act, indirect purchasers (those who purchase from an intermediary or "middleman" rather than the party alleged to have engaged in anticompetitive conduct) may bring suit in addition to direct purchasers. The Colorado Attorney General may also now bring suit on behalf

of individual indirect purchasers, whereas under the 1992 Act, the Attorney General could only do so on behalf of governmental or public entities that were indirect purchasers.

The 2023 Act also broadens the attorney general's investigative and enforcement powers. The attorney general may now subpoena not just the target of an investigation, but those the attorney general believes may have information related to a potential violation of 2023 Act.

Under the 2023 Act, the Attorney General also now has authority to bring suit to "prevent or restrain unfair methods of competition in or affecting commerce." The 1992 Act did not give the attorney general such powers. As such, the 2023 Act presents uncharted waters and arguably provides the Attorney General with broad discretion, especially given that the 2023 Act removes the provision of the 1992 Act directing courts to harmonize its provisions with federal antitrust law.

Further, the 2023 Act's legislative declaration states that "competition is fundamental to" not just a "free market system" but also to a "health marketplace that protects workers and consumers." Given this declaration highlighting protection of workers and the broad grant of discretionary authority to the Attorney General, Colorado businesses may expect the Attorney General, and private plaintiffs, to press challenges to conduct allegedly affecting workers.

And, although the 2023 Act's four-year limitations period for civil actions is the same as the 1992 Act's limitations period, the 2023 Act modifies when a civil antitrust action accrues. Now, a claim accrues "on the date the last in a series of acts or practices" that violates the 2023 Act "occurred, including any acquisition or series of acquisitions that, in the aggregate, may constitute a violation." This broader accrual language, when coupled with the 2023's proviso that, except as expressly stated in the 2023 Act, "no other limitation terminates the period within which the attorney general may file an action", effectively precludes all other defenses based on undue delay, such as laches, for claims involving a string of mergers in which one or more of the mergers occurred more than four years ago.

Last, but certainly not least, the 2023 Act significantly increases civil and criminal fines and does away with the 1992 Act's prohibition on criminal penalties when the Attorney General has already obtained civil penalties or damages. The 2023 Act

increases maximum criminal fines five-fold, from \$1 million to \$5 million, and maximum civil penalties four-fold, from \$250,000 to \$1 million per violation. So, with the removal of the prohibition on obtaining criminal fines when civil penalties or damages have been obtained, the 2023 Act effectively increases the maximum penalty / fine six times, from \$1 million to \$6 million, plus damages.

Given the greatly increased financial exposure, broader powers of the Attorney General, and the effectively increased limitations period, businesses operating in Colorado will want to keenly watch how the Attorney General's office wields its new authority.

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