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.

Presented by Representative MILLETT of Cape Elizabeth.
Be it enacted by the People of the State of Maine as follows:

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

§194-L. Premerger notification and approval requirement

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

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

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

A. Acquisitions of foods or real property transferred in the ordinary course of business;
B. The creation, production or dissemination of a single expressive work that is copyrighted, including, but not limited to, a streaming series, television program or motion picture;
C. Acquisitions of bonds, mortgages, deeds of trust or other obligations that are not voting securities;
D. Transfers to or from a federal agency, a state or a political subdivision of a state; and
E. Any other acquisitions, transfers or transactions that may be exempted by the Attorney General in accordance with subsection 5.

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

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

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

1. Right of action and damages. Any person, including the State or any political subdivision of the State, injured directly or indirectly in its business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by section 1101, 1102 or 1102-A, may sue for the injury in a civil action. If the court finds for the plaintiff, the plaintiff shall be entitled to recover 3 times the amount of the damages sustained and cost of suit, including necessary and reasonable investigative costs,
reasonable experts’ fees and reasonable attorney’s fees. The State may recover equitable
monetary relief, including restitution and disgorgement.

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

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

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

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

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

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

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

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

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

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

CHAPTER 201-B

ABUSE OF DOMINANCE

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

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

2. Right of action and damages. Any person, including the State or any political
subdivision of the State, that sustained damages as a result of a violation of subsection 1,
may sue for injury in a civil action under this chapter, including as a class action. The State
may sue on behalf of residents in the State that sustained damages as a result of a violation
of subsection 1. If the court finds for the plaintiff, the plaintiff is entitled to recover 3 times
the amount of the damages sustained and cost of suit and any reasonable attorney's fees.

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

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

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

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

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

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

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

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

or

C. A combination of direct and indirect evidence.

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

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

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

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

B. A person with 50 or more employees and $25 million in annual revenues is
presumed to abuse a dominant position if the person:
(1) Engages in conduct that tends to foreclose or limit the ability or incentive of
one or more actual or potential competitors to compete, such as leveraging a
dominant position in one market to limit competition in a separate market,
including bundling, tying, self-preferencing or refusing to interoperate;

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

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

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

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

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

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

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

or

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

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

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

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

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

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

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

§1120-L. Exceptions
This section governs exceptions to the abuse of dominance right of action.

1. Exceptions. Nothing in this chapter applies to the following:

A. Cooperative associations of farmers or gardeners or dairy producers, including livestock farmers and fruit growers;

B. Contracts, agreements or arrangements made by the industries described in paragraph A;

C. Bona fide labor unions; and

D. Creation, production or dissemination of a single expressive work that is copyrighted, including, but not limited to, a streaming series, television program or motion picture.

SUMMARY

This bill establishes a right of action against a person with a dominant position in the conduct of any business, trade or commerce, in any labor market or in the furnishing of any service in this State that abuses that dominant position. The bill requires any person conducting certain types of business in this State that is required to file a notification and report form prior to a merger pursuant to federal law to provide the same notification and report to the Attorney General. It establishes a penalty for failing to file the required notice. The bill increases the cap on monetary penalties from $10,000 to $50,000 for violations of provisions of law relating to the acquisition of gasoline and heating oil assets and increases the notification requirement from 30 days to 90 days. The bill increases the cap on monetary penalties from $100,000 to $250,000 for violations of provisions of law relating to antimonopoly provisions. It also clarifies that the State may recover equitable monetary relief in proceedings related to antitrust violations.