

Statement
The Connecticut Business & Industry Association
&
Insurance Association of Connecticut

Judiciary Committee

March 6, 2009

SB 964, An Act Concerning The Connecticut Antitrust Act

The Connecticut Business and Industry Association (CBIA) and the Insurance Association of Connecticut (IAC) strongly support the concept contained within SB 964, An Act Concerning The Connecticut Antitrust Act. However, that support is tempered by our reservations concerning the scope of confidentiality protections afforded to all information provided to the Office of the Attorney general, regardless of its source.

SB 964 will ensure that any documents submitted to the Attorney General's office voluntarily are afforded, in theory, the same level of protection provided documents subpoenaed in connection with an antitrust investigation. (See C.G.S. §35-42.) Affording protections against public disclosure to voluntarily produced documents will permit companies to be able to work willingly and cooperatively with the Attorney General's office. There exists a shared goal between business and the state to encourage cooperation with state investigations, because such cooperation provides unquestionable efficiencies and savings for both parties.

Due to current events, however, the actual scope of protection provided by SB 964 is unclear. Indeed, SB 964 adopts the same standard established in subdivision (d) of Sec. 35-42, which states that documents furnished “shall be held in the custody of the Attorney General, or the Attorney General’s designee, and shall not be available to the public.” The meaning of the second clause, however, “shall not be available to the public” is currently under great scrutiny and was argued before the Connecticut Supreme Court in the matter of Brown & Brown, Inc. v. Richard Blumenthal, Attorney General. (288 Conn. 646, 2008). In Brown & Brown, a business intended to provide documents to the Attorney General’s office in response to a state antitrust subpoena. A question arose what protection will be provided by the Attorney General’s office to documents that were to be furnished that contained trade secrets and other confidential information. The Attorney General’s office took the position that Sec. 35-42 places only limited restrictions on his ability to disseminate such information. Furthermore, the Attorney General’s office claimed that the inclusion of the term “public” in the statute permits his office to show or share such information with anyone he chooses in the course of the investigation. The lower court actually determined because the statute uses the term “public” the legislature did not intend to prohibit the Attorney General’s ability, on his own initiative, to disclose the information as he deems necessary. (Mem. Dec. at 447) Under this rationale, and echoed during the argument before the Connecticut Supreme Court, the Attorney General’s office could share proprietary information with a business’s competitor if the Attorney General feels it benefits his investigation. For example; if Coke provided the Attorney General’s office, either under subpoena or

voluntarily pursuant to SB 964, its secret formula, the Attorney General's office would not be precluded from sharing it with Pepsi if the office deemed it would assist its investigation. We do not believe this was the intent of the legislature in adopting the provisions of Sec. 35-42. Without clarification, however, that same standard could be applied to voluntarily disclosed documents if SB 964 is enacted.

Additionally, the lower court declared that the limitations of Sec. 35-42 only apply to the physical custody of the subpoenaed documents, the Attorney General's obligation to keep them within his possession, and his obligation to return them to the persons who provided them once his need for them has expired. The lower court concluded the protections afforded by Sec. 35-42 do not extend to copies of any documents that are in the possession of his office and provided to any other party.

The scope of protection advanced by the Attorney's General and the lower court in the matter of Brown is not what the legislature intended in adopting Sec. 35-42. Sec. 35-42 was intended to provide protections to information while expediting the investigation process. To read it any other way will only slow down the investigatory process while parties seek protective orders from the court prior to complying with a subpoena. Such an interpretation will do nothing to encourage voluntary compliance with an anti-trust investigation conducted by the Attorney General's office.

Since the Supreme Court only ruled on procedure and not the underlying issue of document privacy, CBIA and IAC strongly urge that as this bill moves forward that strong legislative intent be included detailing the scope of protection

afforded all documents given to the Attorney General's office during an antitrust investigation. This will afford protections to proprietary information and encourage cooperation between the Attorney General's office and private industry.