

House Bill 96

By: Representative Scott of the 153<sup>rd</sup>

A BILL TO BE ENTITLED  
AN ACT

1 To amend Title 10 of the Official Code of Georgia Annotated, relating to commerce and  
2 trade, so as to provide a short title; to provide for legislative intent; to provide for definitions;  
3 to prohibit certain anticompetitive actions; to provide for exceptions; to authorize the  
4 Attorney General to investigate and litigate such matters; to provide for methods of  
5 investigation; to provide for jurisdiction and authority for enforcement; to provide for  
6 subpoenas; to provide for the authorization of certain immunity from prosecution; to provide  
7 for the determination of whether certain actions are violations through declaratory judgment  
8 actions; to provide for civil actions against violators; to provide for criminal sanctions; to  
9 provide for certain limitations on actions; to provide for enforcement and revision of  
10 covenants not to compete; to provide for certain requirements for such covenants; to provide  
11 for preemption; to provide for related matters; to provide an effective date and for  
12 applicability; to repeal conflicting laws; and for other purposes.

13 BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA:

14 style="text-align:center">**SECTION 1.**

15 Title 10 of the Official Code of Georgia Annotated, relating to commerce and trade, is  
16 amended by adding a new chapter to read as follows:

17 style="text-align:center">"CHAPTER 16

18 10-16-1.

19 This chapter shall be known and may be cited as the 'Georgia Free Enterprise and Antitrust  
20 Act of 2009.'

21 10-16-2.

22 The provisions of this chapter shall be cumulative of each other and of any other provision  
23 of law of this state in effect relating to the same subject. Among other things, the

24 provisions of this chapter shall preserve the constitutional and common law authority of  
25 the Attorney General to bring actions under state and federal law.

26 10-16-3.

27 Except as otherwise provided in subsection (a) of Code Section 10-16-6, as used in this  
28 chapter, the term:

29 (1) 'Attorney General' means the Attorney General of Georgia or any assistant attorney  
30 general acting under his or her direction.

31 (2) 'Goods' means any property, tangible or intangible, real, personal, or mixed, and any  
32 article, commodity, or other thing of value, including insurance.

33 (3) 'Person' means a natural person, proprietorship, partnership, corporation, municipal  
34 corporation, association, or any other public or private group, however organized, but  
35 shall not include the State of Georgia or its offices, departments, agencies, or authorities.

36 (4) 'Services' means any work or labor, including, without limitation, work or labor  
37 furnished in connection with the sale, lease, or repair of goods.

38 (5) 'Trade' and 'commerce' mean the sale, purchase, lease, exchange, or distribution of  
39 any goods or services; the offering for sale, purchase, lease, or exchange of any goods or  
40 services; the advertising of any goods or services; the business of insurance; and all other  
41 economic activity undertaken in whole or in part for the purpose of financial gain  
42 involving or relating to any goods or services.

43 10-16-4.

44 The purpose of this chapter is to maintain and promote economic competition in trade and  
45 commerce occurring wholly or partly within the State of Georgia and to provide the  
46 benefits of that competition to consumers in this state. The provisions of this chapter shall  
47 be construed to accomplish this purpose and shall be construed in harmony with federal  
48 judicial interpretations of comparable federal antitrust statutes to the extent consistent with  
49 this purpose.

50 10-16-5.

51 (a) Every contract, combination, or conspiracy in restraint of trade or commerce shall be  
52 unlawful.

53 (b) It shall be unlawful for any person to monopolize, attempt to monopolize, or conspire  
54 to monopolize any part of trade or commerce.

55 (c) It shall be unlawful for any person to sell, lease, or contract for the sale or lease of any  
56 goods, whether patented or unpatented, for use, consumption, or resale, or to fix a price for  
57 such use, consumption, or resale or to discount from or rebate upon such price, on the

58 condition, agreement, or understanding that the purchaser or lessee shall not use or deal in  
59 the goods of a competitor or competitors of the seller or lessor, where the effect of the  
60 condition, agreement, or understanding may be to lessen competition substantially in any  
61 line of trade or commerce.

62 (d) It shall be unlawful for any person to acquire, directly or indirectly, the whole or any  
63 part of the stock or other share capital or the assets of any other person or persons, where  
64 the effect of such acquisition may be to lessen competition substantially in any line of trade  
65 or commerce. This subsection shall not be construed:

66 (1) To prohibit the purchase of stock or other share capital of another person where the  
67 purchase is made solely for investment and does not confer control of that person in a  
68 manner that could substantially lessen competition;

69 (2) To prevent a corporation from forming subsidiary or parent corporations for the  
70 purpose of conducting its immediately lawful business, or any natural and legitimate  
71 branch extensions of such business, or from owning and holding all or a part of the stock  
72 or other share capital of a subsidiary, or transferring all or part of its stock or other share  
73 capital to be owned and held by a parent, where the effect of such a transaction is not to  
74 lessen competition substantially;

75 (3) To affect or impair any right previously legally acquired; or

76 (4) To apply to transactions duly consummated pursuant to authority given by any statute  
77 of this state or of the United States or pursuant to authority or approval given by any  
78 regulatory agency of this state or of the United States under any constitutional or statutory  
79 provisions vesting the agency with such power.

80 (e) It shall be unlawful for an employer and a labor union or other organization to agree  
81 or combine so that:

82 (1) A person is denied the right to work for an employer because of membership or  
83 nonmembership in the labor union or other organization; or

84 (2) Membership or nonmembership in the labor union or other organization is made a  
85 condition of obtaining or keeping a job with the employer.

86 (f) It shall not be unlawful for:

87 (1) Employees to agree to quit their employment or to refuse to deal with tangible  
88 personal property of their immediate employer, unless their refusal to deal with tangible  
89 personal property of their immediate employer is intended to induce or has the effect of  
90 inducing that employer to refrain from buying or otherwise acquiring tangible personal  
91 property from a person; or

92 (2) Persons to agree to refer for employment a migratory worker who works on seasonal  
93 crops if the referral is made irrespective of whether or not the worker belongs to a labor  
94 union or organization.

95 (g) Nothing in this Code section shall be construed to prohibit activities that are exempt  
 96 from the operation of the federal antitrust laws (15 U.S.C. Section 1, et seq.), except that  
 97 an exemption otherwise available under the McCarran-Ferguson Act (15 U.S.C. Sections  
 98 1011-1015) shall not serve to exempt activities under this chapter. Nothing in this Code  
 99 section shall apply to actions required or affirmatively approved by any statute of this state  
 100 or of the United States or by a regulatory agency of this state or of the United States duly  
 101 acting under any constitutional or statutory authority vesting the agency with such power.

102 (h) In any lawsuit alleging a contract, combination, or conspiracy to fix prices, evidence  
 103 of uniform prices alone shall not be sufficient to establish a violation of subsection (a) of  
 104 this Code section. In determining whether a restraint related to the sale or delivery of  
 105 professional services is reasonable, except in cases involving price fixing or other per se  
 106 violations, the court may consider, but shall not reach its decision solely on the basis of,  
 107 criteria which include:

108 (1) Whether the activities involved maintain or improve the quality of such services to  
 109 benefit the public interest; and

110 (2) Whether the activities involved limit or reduce the cost of such services to benefit the  
 111 public interest.

112 For purposes of this subsection, the term 'professional services' means services performed  
 113 by any licensed accountant, physician, or professional engineer in connection with his or  
 114 her professional employment or practice.

115 10-16-6.

116 (a) For purposes of this Code section, the term:

117 (1) 'Antitrust investigation' and 'investigation' mean any inquiry conducted by the  
 118 Attorney General for the purpose of ascertaining whether any person is or has been  
 119 engaged in or is actively preparing to engage in activities which may constitute an  
 120 antitrust violation.

121 (2) 'Antitrust violation' means any act or omission in violation of any of the prohibitions  
 122 contained in Code Section 10-16-5 or in violation of any of the antitrust laws set forth in  
 123 subsection (a) of Section 12 of Title 15 of the United States Code.

124 (3) 'Civil investigative demand' and 'demand' mean any demand issued by the Attorney  
 125 General under subsection (b) of this Code section.

126 (4) 'Documentary material' and 'material' include the original or any identical copy and  
 127 all nonidentical copies of any contract, agreement, book, booklet, brochure, pamphlet,  
 128 catalog, magazine, notice, announcement, circular, bulletin, instruction, minutes, agenda,  
 129 study, analysis, report, graph, map, chart, table, schedule, note, letter, telegram, telephone

130 or other message, product of discovery, magnetic or electronic recording, and any other  
131 written, printed, or recorded matter.

132 (5) 'Person' means a natural person, proprietorship, partnership, corporation, municipal  
133 corporation, association, or any other public or private group, however organized, and  
134 includes any person acting under color or authority of state law.

135 (6) 'Product of discovery' includes, without limitation, the original or duplicate of any  
136 deposition, interrogatory, document, thing, result of the inspection of land or other  
137 property, examination, or admission obtained by any method of discovery in any judicial  
138 or administrative proceeding of an adversarial nature; any digest, analysis, selection,  
139 compilation, or other derivation thereof; and any index or manner of access thereto.

140 (b) Whenever the Attorney General has reason to believe that any person may be in  
141 possession, custody, or control of any documentary material or may have any information  
142 relevant to a civil antitrust investigation, the Attorney General may, prior to the institution  
143 of a civil proceeding, issue in writing and serve upon such person a civil investigative  
144 demand requiring the person to produce such documentary material for inspection and  
145 copying, to answer in writing written interrogatories, to give oral testimony, or to provide  
146 any combination of such material, answers, and testimony; provided, however, that the  
147 Attorney General shall not issue and serve a demand for documentary material upon a  
148 proprietorship or partnership whose annual gross income does not exceed \$5 million.

149 (c)(1) Each demand shall describe the nature of the activities that are the subject of the  
150 investigation and shall set forth each statute and section of that statute that may have been  
151 or may be violated as a result of such activities. Each demand shall advise the person  
152 upon whom the demand is to be served that such person has the right to object to the  
153 demand as provided for in this Code section.

154 (2) Each demand for production of documentary material shall:

155 (A) Describe the class or classes of material to be produced with reasonable specificity  
156 so that the material demanded is fairly identified;

157 (B) Prescribe a return date or dates which will provide a reasonable period of time  
158 within which the material is to be produced; and

159 (C) Identify the individual or individuals acting on behalf of the Attorney General to  
160 whom the material is to be made available for inspection and copying.

161 (3) Each demand for answers to written interrogatories shall:

162 (A) Propound the interrogatories with definiteness and certainty;

163 (B) Prescribe a date or dates by which answers to interrogatories shall be submitted;  
164 and

165 (C) Identify the individual or individuals acting on behalf of the Attorney General to  
166 whom the answers should be submitted.

167 (4) Each demand for the giving of oral testimony shall:  
168 (A) Prescribe a reasonable date, time, and place at which the testimony shall begin; and  
169 (B) Identify the individual or individuals acting on behalf of the Attorney General who  
170 will conduct the examination.

171 (5) No demand for any product of discovery shall be returned until 20 days after the  
172 Attorney General serves a copy of the demand upon the person from whom the discovery  
173 was obtained.

174 (d)(1) A demand shall only require the production of documentary material, the  
175 submission of answers to written interrogatories, or the giving of oral testimony if the  
176 material or information sought would be discoverable under Chapter 11 of Title 9, the  
177 'Georgia Civil Practice Act,' or other state law relating to discovery.

178 (2) Any demand for a product of discovery shall supercede any inconsistent order, rule,  
179 or provision of law (other than this chapter) preventing or restraining disclosure of such  
180 product of discovery; provided, however, that voluntary disclosure of a product of  
181 discovery under this Code section shall not constitute a waiver of any right or privilege,  
182 including any right or privilege which may be invoked to resist discovery of trial  
183 preparation materials, to which the person making the disclosure may be entitled.

184 (e)(1) Service of any demand or of any petition filed under subsection (f) or (h) of this  
185 Code section may be made upon any natural person by delivering a duly executed copy  
186 of the demand or petition to the person to be served or by mailing such copy by registered  
187 or certified mail, return receipt requested, to such person at his or her residence or  
188 principal office or place of business.

189 (2) Service of any demand or of any petition filed under subsection (f) or (h) of this Code  
190 section may be made upon any person other than a natural person by delivering a duly  
191 executed copy of the demand or petition to a person to whom delivery would be  
192 appropriate under state law if the demand or petition were filed in a civil suit.

193 (3) A verified return by the individual serving any demand or any petition filed under  
194 subsection (f) or (h) of this Code section setting forth the manner of service shall be proof  
195 of such service. In the case of service by registered or certified mail, the return shall be  
196 accompanied by the return post office receipt of delivery of the demand or petition.

197 (f) At any time before the return date specified in a demand or within 20 days after the  
198 demand has been served, whichever period is shorter, the person who has been served and,  
199 in the case of a demand for a product of discovery, the person from whom the discovery  
200 was obtained may file a petition for an order modifying or setting aside the demand in the  
201 superior court in the county of the person's residence or principal office or place of business  
202 or in the Superior Court of Fulton County. Any such petition shall specify each ground  
203 upon which the petitioner relies in seeking the relief sought. The petition may be based

204 upon any failure of such demand to comply with the provisions of this Code section or  
205 upon any constitutional or other legal right or privilege of the petitioner. The petitioner  
206 shall serve a copy of the petition upon the Attorney General. The Attorney General may  
207 submit an answer to the petition. In ruling on the petition, the court shall presume absent  
208 evidence to the contrary that the Attorney General issued the demand in good faith and  
209 within the scope of his or her authority.

210 (g)(1) A person on whom a demand is served shall comply with the terms of the demand  
211 unless otherwise provided by court order.

212 (2) The time for compliance with the demand in whole or in part shall not run during the  
213 pendency of any petition filed under subsection (f) of this Code section; provided,  
214 however, that the petitioner shall comply with any portions of the demand not sought to  
215 be modified or set aside.

216 (3)(A) Any person upon whom any demand for the production of documentary  
217 material has been duly served under this Code section shall make such material  
218 available to the Attorney General for inspection and copying during normal business  
219 hours by the return date specified in the demand at the person's principal office or place  
220 of business or as otherwise may be agreed upon by the person and the Attorney  
221 General. The Attorney General shall bear the expense of any copying. The person may  
222 substitute copies for originals of all or part of the requested documents so long as the  
223 originals are made available for inspection. The person shall indicate in writing which  
224 if any of the documents produced contain trade secrets or confidential information.

225 (B) The production of documentary material in response to any demand shall be made  
226 under a sworn certificate in such form as the demand designates by a natural person  
227 having knowledge of the facts and circumstances relating to such production to the  
228 effect that all of the requested material in the possession, custody, or control of the  
229 person to whom the demand is directed has been produced.

230 (4)(A) Each interrogatory in any demand duly served under this Code section shall be  
231 answered separately and fully in writing, unless it is objected to, in which case the basis  
232 for the objection shall be set forth in lieu of an answer. The person shall indicate in  
233 writing which if any of the answers contain trade secrets or confidential information.

234 (B) Answers to interrogatories shall be submitted under a sworn certificate in such  
235 form as the related demand designates by a natural person having knowledge of the  
236 facts and circumstances relating to the preparation of the answers to the effect that all  
237 of the requested information in the possession, custody, control, or knowledge of the  
238 person to whom the demand is directed has been set forth fully and accurately.

239 (5)(A) The examination of any person pursuant to a demand for oral testimony duly  
240 served under this Code section shall be taken before any person authorized to

241 administer oaths and affirmations by the laws of this state or the United States. The  
242 person before whom the testimony is to be taken shall put the witness on oath or  
243 affirmation and shall personally or by someone acting under his or her direction and in  
244 his or her presence record the witness's testimony. At the expense of the Attorney  
245 General, the testimony shall be taken stenographically and may be transcribed.

246 (B) The oral testimony of any person taken pursuant to a demand served under this  
247 Code section shall be taken in the county where the person resides, is found, transacts  
248 business, or in such other place as may be agreed upon by the person and the Attorney  
249 General.

250 (C) Any person compelled to appear under a demand for oral testimony under this  
251 Code section may be accompanied, represented, and advised by counsel. Counsel may  
252 advise such person in confidence, either upon the request of such person or upon  
253 counsel's own initiative, with respect to any question arising in connection with the  
254 examination.

255 (D) The individual conducting the examination on behalf of the Attorney General shall  
256 exclude from the place of examination all other persons except the person being  
257 examined, the person's counsel, the counsel of the person to whom the demand has been  
258 issued, the person before whom the testimony is to be taken, any stenographer taking  
259 the testimony, and any persons assisting the individual conducting the examination.

260 (E) During the examination, the person being examined or his or her counsel may  
261 object on the record to any question, in whole or in part, and shall briefly state for the  
262 record the reason for the objection. An objection may properly be made, received, and  
263 entered upon the record when it is claimed that such person is entitled to refuse to  
264 answer the question on grounds of any constitutional or other legal right or privilege,  
265 including the privilege against self-incrimination. Neither such person nor his or her  
266 counsel shall otherwise object to or refuse to answer any question or interrupt the oral  
267 examination. If the person refuses to answer any question, the Attorney General may  
268 petition the superior court in the county where the examination is being conducted for  
269 an order compelling the person to answer such question.

270 (F) If and when the testimony has been fully transcribed, the person before whom the  
271 testimony was taken shall promptly transmit the transcript of the testimony to the  
272 witness and a copy of the transcript to the Attorney General. The witness shall have a  
273 reasonable opportunity to examine the transcript and make any changes in form or  
274 substance accompanied by a statement of the reasons for such changes. The witness  
275 shall then sign and return the transcript, unless he or she is ill, cannot be found, refuses  
276 to sign, or in writing waives the signing. If the witness does not sign the transcript  
277 within 15 days of receiving it, the person before whom the testimony has been given



278 shall sign it and state on the record the reason, if known, for the witness's failure to  
279 sign. The officer shall then certify on the transcript that the witness was duly sworn and  
280 that the transcript is a true record of the testimony given by the witness and promptly  
281 transmit a copy of the certified transcript to the Attorney General.

282 (G) Upon request, the Attorney General shall furnish a copy of the certified transcript  
283 to the witness.

284 (H) The witness shall be entitled to the same fees and mileage that are paid to  
285 witnesses in the superior courts of this state.

286 (h)(1) Whenever any person fails to comply with any demand duly served on such  
287 person under this Code section, the Attorney General may file in the superior court in the  
288 county in which the person resides, is found, or transacts business and serve on the person  
289 a petition for an order of the court for enforcement of this Code section. If the person  
290 transacts business in more than one county, the petition shall be filed in the county of the  
291 person's principal office or place of business in this state or in any other county as may  
292 be agreed upon by the person and the Attorney General.

293 (2) Any person, who, with intent to avoid, evade, or prevent compliance in whole or part  
294 with a demand issued under this Code section, removes from any place, conceals,  
295 withholds, destroys, mutilates, alters, or by any other means falsifies any documentary  
296 material or otherwise provides inaccurate information shall be guilty of a misdemeanor.

297 (i)(1) Except as provided in this Code section or ordered by a court for good cause  
298 shown, no documentary material, answers to interrogatories, or transcripts of oral  
299 testimony, or copies or contents thereof, shall be available for examination or used by any  
300 person without the consent of the person who produced the material, answers, or  
301 testimony and, in the case of any product of discovery, of the person from whom the  
302 discovery was obtained.

303 (2) The Attorney General may make available for inspection or prepare copies of  
304 documentary material, answers to interrogatories, or transcripts of oral testimony in his  
305 or her possession as he or she determines may be required by the state in the course of  
306 any investigation or a judicial proceeding in which the state is a party.

307 (3) The Attorney General may make available for inspection or prepare copies of  
308 documentary material, answers to interrogatories, or transcripts of oral testimony in his  
309 or her possession as he or she determines may be required for official use by any officer  
310 of the State of Georgia or of the United States charged with the enforcement of the laws  
311 of the State of Georgia or the United States; provided, however, that any material  
312 disclosed under this subsection shall not be used for criminal law enforcement purposes.

313 (4) Upon request, the Attorney General shall make available copies of documentary  
314 material, answers to interrogatories, and transcripts of oral testimony for inspection by

315 the person who produced such material or information and, in the case of a product of  
316 discovery, the person from whom the discovery was obtained or by any duly authorized  
317 representative of the person, including his or her counsel.

318 (5) Not later than 15 days prior to disclosing any documentary material or answers to  
319 written interrogatories designated as containing trade secrets or confidential information  
320 under this subsection, the Attorney General shall notify the person who produced the  
321 material of the Attorney General's intent to make such disclosure. The person who  
322 produced the documentary material or answers to written interrogatories may petition a  
323 superior court in any county of this state in which the person resides, does business, or  
324 maintains its principal office for a protective order limiting the terms under which the  
325 Attorney General may disclose such trade secrets or confidential information.

326 (6) Upon written request, the Attorney General shall return documentary material  
327 produced under this Code section in connection with an antitrust investigation to the  
328 person who produced it whenever:

329 (A) Any case or proceeding before any court arising out of the investigation has been  
330 completed; or

331 (B) The Attorney General has decided after completing an examination and analysis  
332 of such material not to institute any case or proceeding before a court in connection  
333 with the investigation.

334 (j) Whenever any petition is filed in the superior court of any county as provided for in this  
335 Code section, the court shall have jurisdiction to hear and determine the matter presented  
336 and to enter any order or orders required to implement the provisions of this Code section.  
337 Any final order shall be subject to appeal. Failure to comply with any final order entered  
338 by a court under this Code section shall be punishable by the court as a contempt of the  
339 order.

340 (k) Nothing in this Code section shall preclude the Attorney General from using  
341 procedures not specified in this Code section in conducting an antitrust investigation.

342 10-16-7.

343 (a) A party to a suit brought to enforce any of the prohibitions in Code Section 10-16-5  
344 may apply to the clerk of the superior court in which the suit is pending to subpoena a  
345 witness located anywhere in this state. On receipt of the application, the clerk shall issue  
346 the subpoena applied for but shall not issue more than five subpoenas for a party without  
347 first obtaining the court's written approval.

348 (b) A witness subpoenaed under subsection (a) of this Code section who fails to appear  
349 and testify in compliance with the subpoena shall be guilty of contempt of court and may

350 be fined not more than \$100.00 and arrested and imprisoned in the county jail until he or  
351 she appears in court and testifies as required.

352 10-16-8.

353 In addition to the procedures set forth in this chapter, the Attorney General and any other  
354 party to a suit brought by the Attorney General to enforce any of the prohibitions in Code  
355 Section 10-16-5 may request discovery and production of documents and other things,  
356 serve written interrogatories, and subpoena and depose witnesses in accordance with the  
357 applicable provisions of Chapter 11 of Title 9, the 'Georgia Civil Practice Act,' and other  
358 state law relating to discovery.

359 10-16-9.

360 (a) If a person upon whom an investigative demand or request for discovery has been  
361 properly served pursuant to this chapter refuses or is likely to refuse to comply with the  
362 demand or request on the basis of his or her privilege against self-incrimination, the  
363 Attorney General may apply to the superior court of the county in which such person is  
364 located for an order granting such person immunity from prosecution and compelling such  
365 person's compliance with the demand or request.

366 (b) Upon receipt of an application filed under subsection (a) of this Code section, the court  
367 may issue an order granting such person immunity from prosecution and requiring such  
368 person to comply with the demand or request notwithstanding his or her claim of privilege.  
369 The order shall explain the scope of protection afforded by it.

370 (c) An order may be issued under subsection (b) of this Code section prior to the assertion  
371 of the privilege against self-incrimination but shall not be effective until the person to  
372 whom it is directed asserts the privilege and is informed of the order.

373 (d) A person who has been informed of an order issued by a court under this Code section  
374 compelling his or her testimony or production of material shall not refuse to comply with  
375 the order on the basis of his or her privilege against self-incrimination. A person who  
376 complies with the order shall not be criminally prosecuted for or on account of any act,  
377 transaction, matter, or thing about which he or she is ordered to testify or produce material  
378 unless the alleged offense is perjury or failure to comply with the order. Failure to comply  
379 with the order may be punished by the court as contempt of the order.

380 10-16-10.

381 (a) A person (other than a foreign corporation not having a permit or certificate of  
382 authority to do business in this state) uncertain of whether or not his or her action or  
383 proposed action violates or will violate the prohibitions contained in Code Section 10-16-5

384 may file suit against the state for declaratory judgment, citing this Code section as  
385 authority, in the Superior Court of Fulton County.

386 (b) All process in the suit shall be served on the Attorney General, who shall represent the  
387 state. The petition shall describe in detail the person's action or proposed action and all  
388 other relevant facts, and the court in its declaratory judgment shall fully recite the action  
389 or proposed action and other facts considered.

390 (c) A declaratory judgment granted under this Code section which rules that action or  
391 proposed action does not violate the prohibitions contained in Code Section 10-16-5:

392 (1) Shall be strictly construed and shall not be extended by implication to an action or  
393 fact not recited in the judgment;

394 (2) Shall not bind the state with reference to a person not a party to the suit in which the  
395 judgment was granted; and

396 (3) Shall not estop the state from subsequently establishing a violation of the prohibitions  
397 contained in Code Section 10-16-5 based on an action or fact not recited in the  
398 declaratory judgment, which action or fact, when combined with an action or fact recited  
399 in the judgment, constitutes a violation of the prohibitions contained in Code Section  
400 10-16-5.

401 (d) A person filing suit under this Code section shall pay all costs of the suit.

402 10-16-11.

403 (a) The Attorney General may file suit in the Superior Court of Fulton County or in the  
404 superior court of any county in this state in which any of the named defendants reside, do  
405 business, or maintain their principal office on behalf of the State of Georgia to collect a  
406 civil fine from any person, other than a municipal corporation, whom the Attorney General  
407 believes has violated any of the prohibitions in subsection (a), (b), or (c) of Code  
408 Section 10-16-5. Every person adjudged to have violated any of these prohibitions shall  
409 pay a fine to the state not to exceed \$1 million if a corporation or, if any other person,  
410 \$100,000.00.

411 (b) The Attorney General may file suit against any person, other than a municipal  
412 corporation, in the Superior Court of Fulton County or in the superior court of any county  
413 in this state in which any of the named defendants reside, do business, or maintain their  
414 principal office on behalf of the State of Georgia to enjoin temporarily or permanently any  
415 activity or contemplated activity that violates or threatens to violate any of the prohibitions  
416 in Code Section 10-16-5. In any such suit, the court shall apply the same principles as  
417 those generally applied by courts of equity in suits for injunctive relief against threatened  
418 conduct that would cause injury to business or property. In any such suit in which the state  
419 substantially prevails on the merits, the state shall be entitled to recover the cost of suit.

420 Upon finding a violation of the prohibition against acquiring the stock, share capital, or  
421 assets of a person contained in subsection (d) of Code Section 10-16-5, the court shall,  
422 upon further finding that no other remedy will eliminate the lessening of competition, order  
423 the divestiture or other disposition of the stock, share capital, or assets and shall prescribe  
424 a reasonable time, manner, and degree of the divestiture or other disposition.

425 (c) No suit filed under subsection (a) or (b) of this Code section shall be transferred to  
426 another county except on order of the court.

427 (d) Nothing in this Code section shall be construed to limit the constitutional or common  
428 law authority of the Attorney General to bring actions under state and federal law.

429 10-16-12.

430 (a)(1) Any person or governmental entity, including the State of Georgia and any of its  
431 political subdivisions, whose business or property has been injured by reason of any  
432 conduct declared unlawful in subsection (a), (b), or (c) of Code Section 10-16-5 may sue  
433 any person, other than a municipal corporation, in the superior court of any county of this  
434 state in which any of the named defendants reside, do business, or maintain their principal  
435 office or in any county in which any of the named plaintiffs resided at the time the cause  
436 of action or any part thereof arose and shall recover actual damages sustained, interest on  
437 actual damages for the period beginning on the date of service of such person's pleading  
438 setting forth a claim under the antitrust laws and ending on the date of judgment (the rate  
439 of such interest to be in accordance with state law regarding postjudgment interest rates),  
440 and the cost of suit, including a reasonable attorney's fee; provided, however, that if the  
441 trier of fact finds that the unlawful conduct was willful or flagrant, it shall increase the  
442 recovery to threefold the damages sustained and the cost of suit, including a reasonable  
443 attorney's fee; provided, further, that interest on actual damages as specified above shall  
444 not be recovered when recovered damages are increased threefold.

445 (2) Any person or governmental entity who obtains a judgment for damages under  
446 15 U.S.C. Section 15 or any other provision of federal law comparable to this subsection  
447 shall not recover damages in a suit under this subsection based on substantially the same  
448 conduct that was the subject of the federal suit.

449 (3) On a finding by the court that an action under this Code section was groundless and  
450 brought in bad faith or for the purpose of harassment, the court shall award to the  
451 defendant or defendants a reasonable attorney's fee, court costs, and other reasonable  
452 expenses of litigation.

453 (b) Any person or governmental entity, including the State of Georgia and any of its  
454 political subdivisions, whose business or property is threatened with injury by reason of  
455 anything declared unlawful in subsection (a), (b), or (c) of Code Section 10-16-5 may sue

456 any person, other than a municipal corporation, in the superior court of any county of this  
457 state in which any of the named defendants reside, do business, or maintain their principal  
458 office or in any county in which any of the named plaintiffs resided at the time the cause  
459 of action or any part thereof arose to enjoin the unlawful practice temporarily or  
460 permanently. In any such suit, the court shall apply the same principles as those generally  
461 applied by courts of equity in suits for injunctive relief against threatened conduct that  
462 would cause injury to business or property. In any such suit in which the plaintiff  
463 substantially prevails on the merits, the plaintiff shall be entitled to recover the cost of suit,  
464 including a reasonable attorney's fee based on the fair market value of the attorney services  
465 used.

466 (c) Any person or governmental entity filing suit under this Code section shall mail a copy  
467 of the complaint to the Attorney General. The Attorney General as representative of the  
468 public may intervene in the action by filing a notice of intervention with the court before  
469 which the action is pending and serving copies of the notice on all parties to the action.  
470 The penalty for failure to comply with this subsection shall be a monetary fine not in  
471 excess of \$200.00. The Attorney General may file suit to recover the fine on behalf of the  
472 state in the superior court in which the private suit has been brought.

473 10-16-13.

474 Every person, other than a municipal corporation, who acts in violation of any of the  
475 prohibitions in subsection (a) or (b) of Code Section 10-16-5 shall be guilty of a felony and,  
476 upon conviction, shall be punished by imprisonment for a term of not less than one nor  
477 more than three years or by a fine not to exceed \$5,000.00, or both.

478 10-16-14.

479 A final judgment rendered in an action brought under this chapter to the effect that a  
480 defendant or defendants have violated any of the prohibitions in Code Section 10-16-5 shall  
481 be prima facie evidence against such defendant or defendants in any action brought under  
482 Code Section 10-16-12 as to all matters with respect to which the judgment would be an  
483 estoppel between the parties to the suit. This Code section shall not apply to consent  
484 judgments or decrees entered before any testimony has been taken.

485 10-16-15.

486 (a) Any suit to recover damages under Code Section 10-16-12 shall be barred unless filed  
487 within four years after the cause of action accrued or within one year after the conclusion  
488 of any action brought by the state under Code Section 10-16-11 or a criminal prosecution  
489 under Code Section 10-16-13 based in whole or in part on the same conduct, whichever is

490 longer. For the purpose of this subsection, a cause of action for a continuing violation shall  
491 be considered to accrue at any and all times during the period of the violation.

492 (b) No suit under this chapter shall be barred on the grounds that the activity or conduct  
493 complained of in any way affects or involves interstate or foreign commerce. It is the  
494 intent of the General Assembly to exercise its powers to the full extent consistent with the  
495 Constitutions of the State of Georgia and the United States.

496 10-16-16.

497 Whenever any suit or petition is filed in the superior court of any county in this state as  
498 provided for in Code Section 10-16-6, 10-16-11, or 10-16-12, the court shall have  
499 jurisdiction and venue to hear and determine the matter presented and to enter any order  
500 or orders required to implement the provisions of this chapter. Once suit is properly filed,  
501 it may be transferred to another county upon order of the court for good cause shown.

502 10-16-17.

503 (a) The Attorney General may bring an action on behalf of the state or of any of its  
504 political subdivisions to recover the damages provided for by the federal antitrust laws  
505 contained in Title 15 of the United States Code; provided, however, that the Attorney  
506 General shall notify in writing any political subdivision of his or her intention to bring any  
507 such action on its behalf and, at any time within 30 days thereafter, such political  
508 subdivision may, by formal resolution of its governing body or as otherwise specifically  
509 provided by applicable law, withdraw the authority of the Attorney General to bring such  
510 intended action. In any action brought pursuant to this Code section on behalf of any  
511 political subdivision of the state, the state shall retain for deposit in the general fund of the  
512 state treasury, out of the proceeds, if any, resulting from such action, an amount equal to  
513 the expense incurred by the state in the investigation and prosecution of such action.

514 (b) In any action brought by the Attorney General pursuant to the federal antitrust laws for  
515 the recovery of damages by the state or any of its political subdivisions, in addition to his  
516 or her other powers and authority, the Attorney General may enter into contracts relating  
517 to the investigation and the prosecution of such action with any other party who could bring  
518 a similar action or who has brought such an action for the recovery of damages and with  
519 whom the Attorney General finds it advantageous to act jointly, or to share common  
520 expenses or to cooperate in any manner relative to such action. In any such action, the  
521 Attorney General may undertake, among other things, either to render legal services as  
522 special counsel to, or to obtain the legal services of special counsel from, any department  
523 or agency of the United States, any other state or any department or agency thereof, any  
524 county, city, public corporation or authority, or any district of this state or of any other state

525 that has brought or intends to bring a similar action for the recovery of damages, or their  
526 duly authorized legal representatives in such action.

527 10-16-18.

528 (a) Notwithstanding Code Section 10-16-5, and subject to any applicable provision of  
529 subsection (b) of this Code section, a covenant not to compete shall be enforceable if it is  
530 ancillary to or part of an otherwise enforceable agreement at the time the agreement is  
531 made to the extent that it contains limitations as to time, geographical area, and scope of  
532 activity to be restrained that are reasonable and do not impose a greater restraint than is  
533 necessary to protect the goodwill or other business interest of the promisee.

534 (b) A covenant not to compete shall be enforceable against a person licensed as a  
535 physician by the Composite State Board of Medical Examiners if such covenant complies  
536 with the following requirements:

537 (1) The covenant shall:

538 (A) Not deny the physician access to a list of his or her patients whom he or she had  
539 seen or treated within one year of termination of the contract or employment;

540 (B) Provide access to medical records of the physician's patients upon authorization of  
541 the patient and any copies of medical records for a reasonable fee as established by the  
542 Composite State Board of Medical Examiners; and

543 (C) Provide that any access to a list of patients or to patients' medical records after  
544 termination of the contract or employment shall not require such list or records to be  
545 provided in a format different than that by which such records are maintained except  
546 by mutual consent of the parties to the contract;

547 (2) The covenant shall provide for a buy out of the covenant by the physician at a  
548 reasonable price or, at the option of either party, as determined by a mutually agreed upon  
549 arbitrator or, in the case of an inability to agree, an arbitrator of the court whose decision  
550 shall be binding on the parties; and

551 (3) The covenant shall provide that the physician shall not be prohibited from providing  
552 continuing care and treatment to a specific patient or patients during the course of an  
553 acute illness even after the contract or employment has been terminated.

554 10-16-19.

555 (a) Except as provided in subsection (c) of this Code section, a court may award the  
556 promisee under a covenant not to compete damages, injunctive relief, or both damages and  
557 injunctive relief for a breach by the promisor of the covenant.

558 (b) If the primary purpose of the agreement to which the covenant is ancillary is to obligate  
559 the promisor to render personal services, for a term or at will, the promisee shall have the



560 burden of establishing that the covenant meets the criteria specified by Code Section  
561 10-16-18. If the agreement has a different primary purpose, the promisor shall have the  
562 burden of establishing that the covenant does not meet those criteria. For the purposes of  
563 this subsection, the 'burden of establishing' a fact means the burden of persuading the triers  
564 of fact that the existence of the fact is more probable than its nonexistence.

565 (c) If the covenant is found to be ancillary to or part of an otherwise enforceable agreement  
566 but contains limitations as to time, geographical area, or scope of activity to be restrained  
567 that are not reasonable and impose a greater restraint than is necessary to protect the  
568 goodwill or other business interest of the promisee, the court shall reform the covenant to  
569 the extent necessary to cause the limitations contained in the covenant as to time,  
570 geographical area, and scope of activity to be restrained to be reasonable and to impose a  
571 restraint that is not greater than necessary to protect the goodwill or other business interest  
572 of the promisee and enforce the covenant as reformed, except that the court shall not award  
573 the promisee damages for a breach of the covenant before its reformation, and the relief  
574 granted to the promisee shall be limited to injunctive relief. If the primary purpose of the  
575 agreement to which the covenant is ancillary is to obligate the promisor to render personal  
576 services, the promisor establishes that the promisee knew at the time of the execution of  
577 the agreement that the covenant did not contain limitations as to time, geographical area,  
578 and scope of activity to be restrained that were reasonable and the limitations imposed a  
579 greater restraint than necessary to protect the goodwill or other business interest of the  
580 promisee, and the promisee sought to enforce the covenant to a greater extent than was  
581 necessary to protect the goodwill or other business interest of the promisee, the court may  
582 award the promisor the costs, including reasonable attorney's fees, actually and reasonably  
583 incurred by the promisor in defending the action to enforce the covenant.

584 10-16-20.

585 The criteria for enforceability of a covenant not to compete provided by Code  
586 Section 10-16-18 and the procedures and remedies in an action to enforce a covenant not  
587 to compete provided by Code Section 10-16-19 shall be exclusive and shall preempt any  
588 other criteria for enforceability of a covenant not to compete or procedures and remedies  
589 in an action to enforce a covenant not to compete under common law or otherwise."

## 590 **SECTION 2.**

591 This Act shall become effective on July 1, 2009, and shall apply to all matters arising on and  
592 after that date.

593

**SECTION 3.**

594 All laws and parts of laws in conflict with this Act are repealed.