

STATE OF NEW YORK

933

2021-2022 Regular Sessions

IN SENATE

(Prefiled)

January 6, 2021

Introduced by Sen. GIANARIS -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

AN ACT to amend the general business law, in relation to actions or practices that establish or maintain a monopoly or restraint of trade, and in relation to authorizing a class action lawsuit in the state anti-trust law

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. This act shall be known and may be cited as the "Twenty-
2 First Century Anti-Trust Act".
3 § 2. Legislative findings. The legislature hereby finds and declares
4 that there is great concern for the growing accumulation of power in the
5 hands of large corporations. While technological advances have improved
6 society, these companies possess great and increasing power over all
7 aspects of our lives. Over one hundred years ago, the state and federal
8 governments identified these same problems as big businesses blossomed
9 after decades of industrialization. Seeing those problems, the state
10 and federal governments enacted transformative legislation to combat
11 cartels, monopolies, and other anti-competitive business practices. It
12 is time to update, expand and clarify our laws to ensure that these
13 large corporations are subject to strict and appropriate oversight by
14 the state. The legislature further finds and declares that unilateral
15 actions which seek to create a monopoly are as harmful as contracts or
16 agreements of multiple parties to do the same and should be treated
17 similarly under the law. After monopolies have been established, it is
18 typically too late to repair or mitigate the damage which has been done.
19 Accordingly, mere attempts to create monopolies should also be treated
20 as actions contrary to the interests of the people of the state of New
21 York and should be penalized accordingly. The legislature further finds
22 and declares that anti-competitive practices harm great numbers of citi-

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

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zens and therefore must ensure that class actions may be raised in anti-trust suits.

§ 3. Section 340 of the general business law, as amended by chapter 12 of the laws of 1935, subdivision 1 as amended by chapter 893 of the laws of 1957, subdivision 2 as amended by chapter 805 of the laws of 1984, subdivisions 3 and 4 as renumbered by chapter 502 of the laws of 1948, subdivision 5 as amended by chapter 333 of the laws of 1975 and subdivision 6 as amended by chapter 31 of the laws of 1999, is amended to read as follows:

§ 340. Contracts or agreements for monopoly or in restraint of trade illegal and void. 1. Every contract, agreement, arrangement or combination whereby

A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby

For the purpose of [~~establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state~~] engaging in the conduct specified in this section any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.

2. (a) It shall be unlawful:

(i) for any person or persons to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any business, trade or commerce or the furnishing of any service in this state; and

(ii) for any person or persons with a dominant position in the conduct of any business, trade or commerce or in the furnishing of any service in this state to abuse that dominant position.

(b) (i) The attorney general is hereby empowered to adopt, promulgate, amend, and repeal rules, as such term is defined in paragraph (a) of subdivision two of section one hundred two of the state administrative procedures act, to carry out the purposes of subparagraph (ii) of paragraph (a) of this subdivision.

(ii) Before any such rule shall take effect, at such time that the attorney general is prepared to file a notice of adoption pursuant to subdivision five of section two hundred two of the state administrative procedure act, the attorney general shall transmit a copy of the rule in its final form to the temporary president of the senate and the speaker of the assembly and, in addition, shall provide any relevant information regarding the need for such rule. Such proposed rule, or proposed repeal of a rule, is subject to the denial by either house of the legislature and shall take the form of a resolution. Each house of the legislature shall have sixty days following the transmission of such rule to issue denial by resolution or take no action. Such rule shall not take effect if either house passes a resolution denying such proposed rule within the time prescribed by this subparagraph.

(iii) The attorney general shall issue guidance on how it will interpret market shares and other relevant market conditions to achieve the purposes of subparagraph (ii) of paragraph (a) of this subdivision while taking into account the important role of small and medium-sized businesses in the state's economy. The attorney general may issue other

1 guidance with respect to subparagraph (ii) of paragraph (a) of this
2 subdivision.

3 3. Subject to the exceptions hereinafter provided in this section, the
4 provisions of this article shall apply to licensed insurers, licensed
5 insurance agents, licensed insurance brokers, licensed independent
6 adjusters and other persons and organizations subject to the provisions
7 of the insurance law, to the extent not regulated by provisions of arti-
8 cle twenty-three of the insurance law; and further provided, that noth-
9 ing in this section shall apply to the marine insurances, including
10 marine protection and indemnity insurance and marine reinsurance,
11 exempted from the operation of article twenty-three of the insurance
12 law.

13 ~~[3-]~~ 4. The provisions of this article shall not apply to cooperative
14 associations, corporate or otherwise, of farmers, gardeners, or dairy-
15 men, including live stock farmers and fruit growers, nor to contracts,
16 agreements or arrangements made by such associations, nor to bona fide
17 labor unions.

18 ~~[4-]~~ 5. The labor of human beings shall not be deemed or held to be a
19 commodity or article of commerce as such terms are used in this section
20 and nothing herein contained shall be deemed to prohibit or restrict the
21 right of workingmen to combine in unions, organizations and associ-
22 ations, not organized for the purpose of profit.

23 ~~[5-]~~ 6. An action to recover damages caused by a violation of this
24 section must be commenced within four years after the cause of action
25 has accrued. The state, or any political subdivision or public authority
26 of the state, or any person who shall sustain damages by reason of any
27 violation of this section, shall recover three-fold the actual damages
28 sustained thereby, as well as costs not exceeding ten thousand dollars,
29 and reasonable attorneys' fees. At or before the commencement of any
30 civil action by a party other than the attorney-general for a violation
31 of this section, notice thereof shall be served upon the attorney-gener-
32 al. Where the aggrieved party is a political subdivision or public
33 authority of the state, notice of intention to commence an action under
34 this section must be served upon the attorney-general at least ten days
35 prior to the commencement of such action. This section shall not apply
36 to any action commenced prior to the effective date of this act.

37 ~~[6-]~~ 7. In any action pursuant to this section, the fact that the
38 state, or any political subdivision or public authority of the state, or
39 any person who has sustained damages by reason of violation of this
40 section has not dealt directly with the defendant shall not bar or
41 otherwise limit recovery; provided, however, that in any action in which
42 claims are asserted against a defendant by both direct and indirect
43 purchasers, the court shall take all steps necessary to avoid duplicate
44 liability, including but not limited to the transfer and consolidation
45 of all related actions. In actions where both direct and indirect
46 purchasers are involved, a defendant shall be entitled to prove as a
47 partial or complete defense to a claim for damages that the illegal
48 overcharge has been passed on to others who are themselves entitled to
49 recover so as to avoid duplication of recovery of damages.

50 8. Any damages recoverable pursuant to this section may be recovered
51 in any action which a court may authorize to be brought as a class
52 action pursuant to article nine of the civil practice law and rules.

53 9. An arrangement, as this term is used in this article, includes, but
54 is not limited to, a contract, combination, agreement or conspiracy.

55 10. Premerger notification.

1 (a) Any person acquiring, directly or indirectly, any voting securi-
2 ties or assets of any other person, shall file notification with the
3 attorney general pursuant to rules under paragraph (f) of this subdivi-
4 sion hereunder if:

5 (i) as a result of such acquisition, the acquiring person would hold
6 an aggregate total amount of the voting securities and assets of the
7 acquired person in excess of eight million dollars as adjusted and
8 published for each fiscal year beginning after the effective date of any
9 regulations promulgated pursuant to paragraph (f) of this subdivision to
10 reflect the percentage change in the gross national product for such
11 fiscal year compared to the gross national product for the preceding
12 fiscal year; and

13 (ii) the acquiring or acquired person is subject to the jurisdiction
14 of the courts of this state pursuant to sections three hundred one or
15 three hundred two of the civil practice law and rules.

16 (b) The notification required under paragraph (a) of this subdivision
17 shall be filed no later than sixty calendar days before the closing of
18 the acquisition.

19 (c) The notification required under paragraph (a) of this subdivision
20 shall identify:

21 (i) All parties to the acquisition.

22 (ii) The assets being transferred in the acquisition.

23 (iii) The anticipated closing date of the acquisition.

24 (iv) Persons subject to the requirements of this paragraph who file a
25 notification with the United States department of justice and the United
26 States federal trade commission pursuant to 15 U.S.C. § 18a et seq.
27 shall comply with the requirements of this subdivision by filing with
28 the attorney general the same materials filed with the aforementioned
29 federal agencies, at the same time that they file those materials with
30 those federal agencies.

31 (d) The following classes of transactions are exempt from the
32 requirements of this section:

33 (i) acquisitions of goods or realty transferred in the ordinary course
34 of business;

35 (ii) acquisitions of bonds, mortgages, deeds of trust, or other obli-
36 gations which are not voting securities;

37 (iii) transfers to or from a federal agency or a state or political
38 subdivision thereof;

39 (iv) transactions specifically exempted from the provisions of this
40 article; and

41 (v) such other acquisitions, transfers, or transactions, as may be
42 exempted under paragraph (e) of this subdivision hereunder.

43 (e) Any information or documentary material filed with the attorney
44 general pursuant to this subdivision shall be exempt from disclosure
45 under article six of the public officers law, and no such information or
46 documentary material may be made public, except as may be relevant to
47 any administrative or judicial action or proceeding.

48 (f) The attorney general is hereby empowered to:

49 (i) define the terms used in this section;

50 (ii) exempt, from the requirements of this section, classes of
51 persons, acquisitions, transfers, or transactions which are not likely
52 to violate the provisions of this article; and

53 (iii) adopt, promulgate, amend, and rescind other rules and regu-
54 lations to carry out the purposes of this subdivision.

55 § 4. Section 341 of the general business law, as amended by chapter
56 333 of the laws of 1975, is amended to read as follows:

§ 341. Penalty. Every person or corporation, or any officer or agent thereof, who shall ~~[make or attempt to make or enter into any such contract, agreement, arrangement or combination or who within this state shall]~~ do or attempt to do, within this state, any act ~~[pursuant thereto]~~ declared unlawful under subdivision one and subparagraph (i) of paragraph (a) of subdivision two of section three hundred forty of this article, or in, toward or for the consummation thereof~~[, wherever the same may have been made]~~, is guilty of a class E felony, and on conviction thereof shall, if a natural person, be punished by a fine not exceeding one ~~[hundred thousand]~~ million dollars, or by imprisonment for not longer than four years, or by both such fine and imprisonment; and if a corporation, by a fine of not exceeding one hundred million dollars. An indictment or information based on a violation of any of the provisions of this section must be found within ~~[three]~~ five years after its commission. No criminal proceeding barred by prior limitation shall be revived by this act.

§ 5. Section 342-a of the general business law, as amended by chapter 275 of the laws of 1962, is amended to read as follows:

§ 342-a. Recovery of civil penalty by attorney-general. In lieu of any penalty otherwise prescribed for a violation of a provision of this article and in addition to an action pursuant to section three hundred forty-two of this article, the attorney-general may bring an action in the name and in behalf of the people of the state against any person, trustee, director, manager or other officer or agent of a corporation, or against a corporation, foreign or domestic, to recover a penalty in the sum specified in section three hundred forty-one of this article for the doing in this state of any act ~~[herein]~~ declared to be illegal in this article, or any act in, toward or for the making or consummation of any contract, agreement, arrangement or combination ~~[herein]~~ prohibited by this article, wherever the same may have been made. The action must be brought within three years after the commission of the act upon which it is based.

§ 6. Section 342-b of the general business law, as amended by chapter 420 of the laws of 1975, is amended to read as follows:

§ 342-b. Recovery of damages by attorney general. In addition to existing statutory and common law authority to bring such actions on behalf of the state, ~~[and]~~ public authorities, and resident persons and entities, the attorney general may also bring action on behalf of any political subdivision or public authority of the state upon the request of such political subdivision or public authority, or in the name of the state, as parens patriae, on behalf of persons and other entities residing in the state of New York, to recover damages for violations of section three hundred forty of this article, or to recover damages provided for by federal law for violations of the federal antitrust laws. In any class action the attorney general may bring on behalf of ~~[these or other subordinate]~~ governmental entities, any governmental entity that does not affirmatively exclude itself from the action, upon due notice thereof, shall be deemed to have requested to be treated as a member of the class represented in that action. The attorney general, on behalf of the state of New York, shall be entitled to retain from any moneys recovered in such actions the costs and expenses of such services.

§ 7. The general business law is amended by adding a new section 342-d to read as follows:

§ 342-d. Recovery of expert witnesses' fees and costs by attorney-general. In any action alleging a violation of a provision of this article,

1 including actions brought under subdivision twelve of section sixty-
2 three of the executive law, the attorney general shall recover reason-
3 able fees and costs for its expert witnesses and consultants if the
4 attorney general prevails in such action.

5 § 8. This act shall take effect immediately.