

# STATE OF NEW YORK

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Cal. No. 131

2021-2022 Regular Sessions

## IN SENATE

(Prefiled)

January 6, 2021

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Introduced by Sens. GIANARIS, SALAZAR, BIAGGI, HOYLMAN, JACKSON, KAVANAGH, MAY -- read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Consumer Protection in accordance with Senate Rule 6, sec. 8 -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading -- again amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the general business law, in relation to actions or practices that establish or maintain a monopoly, monopsony 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

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

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actions which seek to create a monopoly or monopsony are as harmful as contracts or agreements of multiple parties to do the same and should be treated similarly under the law. After monopolies or monopsonies have been established, it is typically too late to repair or mitigate the damage which has been done. Accordingly, mere attempts to create monopolies or monopsonies through anti-competitive conduct should also be treated as actions contrary to the interests of the people of the state of New York and should be penalized accordingly. The legislature further finds and declares that effective enforcement against unilateral anti-competitive conduct has been impeded by courts, for example, applying narrow definitions of monopolies and monopolization, limiting the scope of unilateral conduct covered by the federal anti-trust laws, and unreasonably heightening the legal standards that plaintiffs and government enforcers must overcome to establish violations of those laws. The legislature further finds and declares that one of the purposes of the state's anti-trust laws is to ensure that our labor markets are open and fair. The legislature further finds and declares that anti-competitive practices harm great numbers of citizens 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, monopsony, or in restraint of trade illegal and void. 1. Every contract, agreement, arrangement or combination whereby

A monopoly or monopsony 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, monopsony, 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 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 for any person or persons to monopolize or monopsonize, or attempt to monopolize or monopsonize, or combine or conspire with any other person or persons to monopolize or monopsonize any business, trade or commerce or the furnishing of any service in this state.

(b) It shall be unlawful for any person or persons 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.

(i) In any action brought under this paragraph, a person's dominant position may be established by direct evidence, indirect evidence, or a combination of the two.

(1) Examples of direct evidence include, but are not limited to, the unilateral power to set prices, terms, conditions, or standards; the unilateral power to dictate non-price contractual terms without compen-

1 sation; or other evidence that a person is not constrained by meaningful  
2 competitive pressures, such as the ability to degrade quality without  
3 suffering reduction in profitability. In labor markets, examples of  
4 direct evidence include, but are not limited to, the use of non-compete  
5 clauses or no-poach agreements, or the unilateral power to set wages.

6 (2) A person's dominant position may also be established by indirect  
7 evidence such as the person's share of a relevant market. A person who  
8 has a share of forty percent or greater of a relevant market as a seller  
9 shall be presumed to have a dominant position in that market under this  
10 paragraph. A person who has a share of thirty percent or greater of a  
11 relevant market as a buyer shall be presumed to have a dominant position  
12 in that market under this paragraph.

13 (3) If direct evidence is sufficient to demonstrate that a person has  
14 a dominant position or has abused such a dominant position, no court  
15 shall require definition of a relevant market in order to evaluate the  
16 evidence, find liability, or find that a claim has been stated under  
17 this paragraph.

18 (ii) In any action brought under this paragraph, abuse of a dominant  
19 position may include, but is not limited to, conduct that tends to fore-  
20 close or limit the ability or incentive of one or more actual or poten-  
21 tial competitors to compete, such as leveraging a dominant position in  
22 one market to limit competition in a separate market, or refusing to  
23 deal with another person with the effect of unnecessarily excluding or  
24 handicapping actual or potential competitors. In labor markets, abuse  
25 may include, but is not limited to, imposing contracts by which any  
26 person is restrained from engaging in a lawful profession, trade, or  
27 business of any kind, or by restricting the freedom of workers and inde-  
28 pendent contractors to disclose wage and benefit information.

29 (iii) Evidence of pro-competitive effects shall not be a defense to  
30 abuse of dominance and shall not offset or cure competitive harm.

31 (c) (i) The attorney general is hereby empowered to adopt, promulgate,  
32 amend, and repeal rules, as such term is defined in paragraph (a) of  
33 subdivision two of section one hundred two of the state administrative  
34 procedure act, to carry out the purposes of paragraph (b) of this subdivi-  
35 vision, including those considerations specified in the findings and  
36 declarations of the legislature for this act.

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

50 (iii) The attorney general shall issue guidance on how it will inter-  
51 pret market shares and other relevant market conditions to achieve the  
52 purposes of paragraph (b) of this subdivision while taking into account  
53 the important role of small and medium-sized businesses in the state's  
54 economy. The attorney general may issue other guidance with respect to  
55 paragraph (b) of this subdivision.

1 (iv) Nothing in this section shall be deemed to diminish the jurisdic-  
2 tion of the public service commission.

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, nor to the creation, production, and dissemination of a  
18 single expressive work that is copyrighted, including but not limited  
19 to, a streaming series, television programs and or motion pictures.

20 ~~[4-]~~ 5. The labor of human beings shall not be deemed or held to be a  
21 commodity or article of commerce as such terms are used in this section  
22 and nothing herein contained shall be deemed to prohibit or restrict the  
23 right of workingmen, including employees and independent contractors, to  
24 combine in unions, organizations and associations, not organized for the  
25 purpose of profit, to establish or maintain union apprenticeship or  
26 training programs that may lead to any government-issued trade license,  
27 or to bargain collectively concerning their wages and the terms and  
28 conditions of their employment. Nothing in this section shall be deemed  
29 to prevent or create liability with respect to any actions to comply  
30 with article eight or nine of the labor law. A bona fide collective  
31 bargaining agreement, project labor agreement or any other agreement  
32 lawful under 29 U.S.C. 158(f), as amended, or any term therein, shall  
33 not be considered evidence of a violation or dominance under this  
34 section. Project labor agreement shall have the meaning specified in  
35 section two hundred twenty-two of the labor law.

36 ~~[5-]~~ 6. An action to recover damages caused by a violation of this  
37 section must be commenced within four years after the cause of action  
38 has accrued. The state, or any political subdivision or public authority  
39 of the state, or any person who shall sustain damages by reason of any  
40 violation of this section, shall recover three-fold the actual damages  
41 sustained thereby, as well as costs not exceeding ten thousand dollars,  
42 and reasonable attorneys' fees. At or before the commencement of any  
43 civil action by a party other than the attorney-general for a violation  
44 of this section, notice thereof shall be served upon the attorney-gener-  
45 al. Where the aggrieved party is a political subdivision or public  
46 authority of the state, notice of intention to commence an action under  
47 this section must be served upon the attorney-general at least ten days  
48 prior to the commencement of such action. This section shall not apply  
49 to any action commenced prior to the effective date of this act.

50 ~~[6-]~~ 7. In any action pursuant to this section, the fact that the  
51 state, or any political subdivision or public authority of the state, or  
52 any person who has sustained damages by reason of violation of this  
53 section has not dealt directly with the defendant shall not bar or  
54 otherwise limit recovery; provided, however, that in any action in which  
55 claims are asserted against a defendant by both direct and indirect  
56 purchasers, the court shall take all steps necessary to avoid duplicate

1 liability, including but not limited to the transfer and consolidation  
2 of all related actions. In actions where both direct and indirect  
3 purchasers are involved, a defendant shall be entitled to prove as a  
4 partial or complete defense to a claim for damages that the illegal  
5 overcharge has been passed on to others who are themselves entitled to  
6 recover so as to avoid duplication of recovery of damages.

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

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

12 10. (a) Any person conducting business in the state which is required  
13 to file the Notification and Report Form for Certain Mergers and Acqui-  
14 sitions pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of  
15 1976, 15 U.S.C. s. 18a (a), shall provide the same notice and documenta-  
16 tion in its entirety to the attorney general at the same time that  
17 notice is filed with the federal government.

18 (b) The following classes of transactions are exempt from the  
19 requirements of this section:

20 (i) acquisitions of goods or realty transferred in the ordinary course  
21 of business;

22 (ii) the creation, production, and dissemination of a single expres-  
23 sive work that is copyrighted, including but not limited to, a streaming  
24 series, television programs and or motion pictures;

25 (iii) acquisitions of bonds, mortgages, deeds of trust, or other obli-  
26 gations which are not voting securities;

27 (iv) transfers to or from a federal agency or a state or political  
28 subdivision thereof;

29 (v) transactions specifically exempted from the provisions of this  
30 article; and

31 (vi) such other acquisitions, transfers, or transactions, as may be  
32 exempted under paragraph (f) of this subdivision hereunder.

33 (c) Any information or documentary material filed with the attorney  
34 general pursuant to this subdivision shall be exempt from disclosure  
35 under article six of the public officers law, and no such information or  
36 documentary material may be made public, except as may be relevant to  
37 any administrative or judicial action or proceeding.

38 (d) Any person, or any officer, director, or partner thereof, who  
39 fails to comply with any provision of this subdivision shall be liable  
40 to the state for a civil penalty of not more than ten thousand dollars  
41 for each day during which such person is in violation of this section.  
42 Such penalty may be recovered in a civil action brought by the attorney  
43 general.

44 (e) In considering any transaction under this subdivision, the attor-  
45 ney general shall consider such transaction's effects on labor markets.

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

47 (i) define the terms used in this subdivision;

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

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

53 § 4. Section 341 of the general business law, as amended by chapter  
54 333 of the laws of 1975, is amended to read as follows:

55 § 341. Penalty. Every person or corporation, or any officer or agent  
56 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 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]~~ D 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]~~ five 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 and private litigants. In any action alleging a violation of a provision of this article, including actions brought under subdivision twelve of section sixty-three of the executive law, the attorney general

1 and private litigants shall recover reasonable fees and costs for its  
2 expert witnesses and consultants if the attorney general or private  
3 litigants prevail in such action.

4 § 8. Severability. If any provision of this act, or the application  
5 thereof to any person or circumstances, is held invalid or unconstitu-  
6 tional, that invalidity or unconstitutionality shall not affect other  
7 provisions or applications of this act that can be given effect without  
8 the invalid or unconstitutional provision or application, and to this  
9 end the provisions of this act are severable.

10 § 9. This act shall take effect immediately.