

STATE OF NEW YORK

1812--A

2021-2022 Regular Sessions

IN ASSEMBLY

January 11, 2021

Introduced by M. of A. DINOWITZ, GOTTFRIED, REYES -- read once and referred to the Committee on Economic Development -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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
15 actions which seek to create a monopoly or monopsony are as harmful as
16 contracts or agreements of multiple parties to do the same and should be
17 treated similarly under the law. After monopolies or monopsonies have
18 been established, it is typically too late to repair or mitigate the
19 damage which has been done. Accordingly, mere attempts to create monopo-
20 lies or monopsonies through anti-competitive conduct should also be
21 treated as actions contrary to the interests of the people of the state

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

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1 of New York and should be penalized accordingly. The legislature
2 further finds and declares that effective enforcement against unilateral
3 anti-competitive conduct has been impeded by courts, for example, apply-
4 ing narrow definitions of monopolies and monopolization, limiting the
5 scope of unilateral conduct covered by the federal anti-trust laws, and
6 unreasonably heightening the legal standards that plaintiffs must over-
7 come to establish violations of those laws. The legislature further
8 finds and declares that one of the purposes of the state's anti-trust
9 laws is to ensure that our labor markets are open and fair. The legisla-
10 ture further finds and declares that anti-competitive practices harm
11 great numbers of citizens and therefore must ensure that class actions
12 may be raised in anti-trust suits.

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

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

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

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

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

36 2. (a) It shall be unlawful for any person or persons to monopolize or
37 monopsonize, or attempt to monopolize or monopsonize, or combine or
38 conspire with any other person or persons to monopolize or monopsonize
39 any business, trade or commerce or the furnishing of any service in this
40 state.

41 (b) It shall be unlawful for any person or persons with a dominant
42 position in the conduct of any business, trade or commerce, in any labor
43 market, or in the furnishing of any service in this state to abuse that
44 dominant position.

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

48 (1) Direct evidence may include, but is not limited to, the unilateral
49 power to set prices, terms, conditions, or standards; the unilateral
50 power to dictate non-price contractual terms without compensation; or
51 other evidence that a person is not constrained by meaningful compet-
52 itive pressures, such as the ability to degrade quality without suffer-
53 ing reduction in profitability. In labor markets, direct evidence of a
54 dominant position may include, but is not limited to, the use of non-
55 compete clauses or no-poach agreements, or the unilateral power to set
56 wages.

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

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

(ii) In any action brought under this paragraph, abuse of a dominant position may include, but is not limited to, conduct that tends to foreclose or limit the ability or incentive of one or more actual or potential competitors to compete, such as leveraging a dominant position in one market to limit competition in a separate market, or refusing to deal with another person with the effect of unnecessarily excluding or handicapping actual or potential competitors. In labor markets, abuse may include, but is not limited to, imposing contracts by which any person is restrained from engaging in a lawful profession, trade, or business of any kind, or restricting the freedom of workers and independent contractors to disclose wage and benefit information.

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

(c) (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 procedure act, to carry out the purposes of paragraph (b) of this subdivision, including those considerations specified in the findings and declarations of the legislature for this act.

(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 paragraph (b) 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 guidance with respect to paragraph (b) of this subdivision.

3. Subject to the exceptions hereinafter provided in this section, the provisions of this article shall apply to licensed insurers, licensed insurance agents, licensed insurance brokers, licensed independent adjusters and other persons and organizations subject to the provisions of the insurance law, to the extent not regulated by provisions of article twenty-three of the insurance law; and further provided, that noth-

ing in this section shall apply to the marine insurances, including marine protection and indemnity insurance and marine reinsurance, exempted from the operation of article twenty-three of the insurance law.

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

~~[4-]~~ 5. The labor of human beings shall not be deemed or held to be a commodity or article of commerce as such terms are used in this section and nothing herein contained shall be deemed to prohibit or restrict the right of workingmen, including employees and independent contractors, to combine in unions, organizations and associations, not organized for the purpose of profit, or to bargain collectively concerning their wages and the terms and conditions of their employment. A bona fide collective bargaining agreement, or any term therein, shall not be considered evidence of a violation or dominance under this section.

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

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

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

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

10. Premerger notification.

(a) Any person acquiring, directly or indirectly, any voting securities or assets of any other person, shall file notification with the attorney general pursuant to rules under paragraph (h) of this subdivision hereunder if:

1 (i) as a result of such acquisition, the acquiring person would hold
2 an aggregate total amount of the voting securities and assets of the
3 acquired person in excess of ten per centum of the current thresholds
4 specified by the United States Federal Trade Commission pursuant to 15
5 U.S.C. § 18a(a)(2); and

6 (ii) the acquiring or acquired person has assets or annual net sales
7 within the state in excess of two and one-half per centum of the current
8 thresholds specified by the United States Federal Trade Commission
9 pursuant to 15 U.S.C. § 18a(a)(2)(A).

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

13 (c) The notification required under paragraph (a) of this subdivision
14 shall identify:

15 (i) All parties to the acquisition.

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

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

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

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

27 (i) acquisitions of goods or realty transferred in the ordinary course
28 of business;

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

31 (iii) transfers to or from a federal agency or a state or political
32 subdivision thereof;

33 (iv) transactions specifically exempted from the provisions of this
34 article; and

35 (v) such other acquisitions, transfers, or transactions, as may be
36 exempted under paragraph (h) of this subdivision hereunder.

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

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

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

50 (h) The attorney general is hereby empowered to:

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

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

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

§ 4. Section 341 of the general business law, as amended by chapter 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 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:

1 § 342-d. Recovery of expert witnesses' fees and costs by attorney-gen-
2 eral and private litigants. In any action alleging a violation of a
3 provision of this article, including actions brought under subdivision
4 twelve of section sixty-three of the executive law, the attorney general
5 and private litigants shall recover reasonable fees and costs for its
6 expert witnesses and consultants if the attorney general or private
7 litigants prevail in such action.

8 § 8. This act shall take effect immediately.