

# STATE OF NEW YORK

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933

2021-2022 Regular Sessions

## IN SENATE

(Prefiled)

January 6, 2021

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

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

10 § 340. Contracts or agreements for monopoly or in restraint of trade  
11 illegal and void. 1. Every contract, agreement, arrangement or combina-  
12 tion whereby

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

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

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

26 2. (a) It shall be unlawful:

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

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

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

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

52 (iii) The attorney general shall issue guidance on how it will inter-  
53 pret market shares and other relevant market conditions to achieve the  
54 purposes of subparagraph (ii) of paragraph (a) of this subdivision while  
55 taking into account the important role of small and medium-sized busi-  
56 nesses 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:

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

17 § 5. Section 342-a of the general business law, as amended by chapter  
18 275 of the laws of 1962, is amended to read as follows:

19 § 342-a. Recovery of civil penalty by attorney-general. In lieu of any  
20 penalty otherwise prescribed for a violation of a provision of this  
21 article and in addition to an action pursuant to section three hundred  
22 forty-two of this article, the attorney-general may bring an action in  
23 the name and in behalf of the people of the state against any person,  
24 trustee, director, manager or other officer or agent of a corporation,  
25 or against a corporation, foreign or domestic, to recover a penalty in  
26 the sum specified in section three hundred forty-one of this article for  
27 the doing in this state of any act [~~herein~~] declared to be illegal in  
28 this article, or any act in, toward or for the making or consummation of  
29 any contract, agreement, arrangement or combination [~~herein~~] prohibited  
30 by this article, wherever the same may have been made. The action must  
31 be brought within three years after the commission of the act upon which  
32 it is based.

33 § 6. Section 342-b of the general business law, as amended by chapter  
34 420 of the laws of 1975, is amended to read as follows:

35 § 342-b. Recovery of damages by attorney general. In addition to  
36 existing statutory and common law authority to bring such actions on  
37 behalf of the state, [~~and~~] public authorities, and resident persons and  
38 entities, the attorney general may also bring action on behalf of any  
39 political subdivision or public authority of the state upon the request  
40 of such political subdivision or public authority, or in the name of the  
41 state, as parens patriae, on behalf of persons and other entities resid-  
42 ing in the state of New York, to recover damages for violations of  
43 section three hundred forty of this article, or to recover damages  
44 provided for by federal law for violations of the federal antitrust  
45 laws. In any class action the attorney general may bring on behalf of  
46 [~~these or other subordinate~~] governmental entities, any governmental  
47 entity that does not affirmatively exclude itself from the action, upon  
48 due notice thereof, shall be deemed to have requested to be treated as a  
49 member of the class represented in that action. The attorney general,  
50 on behalf of the state of New York, shall be entitled to retain from any  
51 moneys recovered in such actions the costs and expenses of such  
52 services.

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

55 § 342-d. Recovery of expert witnesses' fees and costs by attorney-gen-  
56 eral. 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.