STATE OF NEW YORK

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IN SENATE

(Prefiled)

January 6, 2021

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

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:

Section 1. This act shall be known and may be cited as the "Twenty-First Century Anti-Trust Act".

§ 2. Legislative findings. The legislature hereby finds and declares that there is great concern for the growing accumulation of power in the hands of large corporations. While technological advances have improved society, these companies possess great and increasing power over all aspects of our lives. Over one hundred years ago, the state and federal governments identified these same problems as big businesses blossomed after decades of industrialization. Seeing those problems, the state and federal governments enacted transformative legislation to combat cartels, monopolies, and other anti-competitive business practices. It is time to update, expand and clarify our laws to ensure that these large corporations are subject to strict and appropriate oversight by the state. The legislature further finds and declares that unilateral actions which seek to create a monopoly or monopsony are as harmful as

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

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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 compensation; or other evidence that a person is not constrained by meaningful

competitive pressures, such as the ability to degrade quality without suffering reduction in profitability. In labor markets, examples of direct evidence include, but are not limited to, the use of non-compete clauses or no-poach agreements, or the unilateral power to set 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 by 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 following conduct is per se illegal: the use of noncompete clauses, restrictions on class and collective actions aside from those prerequisites laid out in article nine of the civil practice law and rules, and no-poach agreements. The conduct is per se illegal whether the agreement is horizontal or vertical.

(ii) Any person who violates this section shall be civilly liable to a covered employee or independent contractor for treble damages, attorney's fees, and costs, or alternatively, at the election of the covered employee or independent contractor, statutory damages of two thousand five hundred dollars per violation, including attorney's fees, and costs.

(d) (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 both houses 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 both houses pass 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.

(iv) Nothing in this section shall be deemed to diminish the jurisdiction of the public service commission.

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 nothing 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 dairymen, including live stock farmers and fruit growers, nor to contracts, agreements or arrangements made by such associations, nor to bona fide labor unions, nor to the creation, production, and dissemination of a single expressive work that is copyrighted, including but not limited to, a streaming series, television programs and or motion pictures.

[~~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, to establish or maintain union apprenticeship or training programs that may lead to any government-issued trade license, or to bargain collectively concerning their wages and the terms and conditions of their employment. Nothing in this section shall be deemed to prevent or create liability with respect to any actions to comply with article eight or nine of the labor law. A bona fide collective bargaining agreement, project labor agreement or any other agreement lawful under 29 U.S.C. 158(f), as amended, or any term therein, shall not be considered evidence of a violation or dominance under this section. Project labor agreement shall have the meaning specified in section two hundred twenty-two of the labor law.

[~~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 conducting business in the state which is required to file the Notification and Report Form for Certain Mergers and Acquisitions pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. s. 18a (a), shall provide the same notice and documentation in its entirety to the attorney general at the same time that notice is filed with the federal government.

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

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

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

(iii) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;

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

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

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

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

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

(e) In considering any transaction under this subdivision, the attorney general shall consider such transaction's effects on labor markets.

(f) The attorney general is hereby empowered to:

(i) define the terms used in this subdivision;

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

(iii) adopt, promulgate, amend, and rescind other rules and regulations 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:

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

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

§ 9. This act shall take effect immediately.