

STATE OF NEW YORK

6748

2023-2024 Regular Sessions

IN SENATE

May 8, 2023

Introduced by Sens. GIANARIS, SALAZAR, HOYLMAN-SIGAL, JACKSON, KAVANAGH, MAY, SEPULVEDA -- 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, 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 dominant corporations. These companies possess great and
6 increasing power over all aspects of our lives. More than one hundred
7 years ago, the state and federal governments identified these same prob-
8 lems after corporate combinations and trusts came to dominate the econo-
9 my. Seeing those problems, the state and federal governments enacted
10 transformative legislation to combat cartels, monopolies, and other
11 anti-competitive business practices. It is time to update, expand and
12 clarify our laws to ensure that these dominant corporations cannot abuse
13 their power in ways that undermine competition to the detriment of work-
14 ers, small businesses and communities in New York. The legislature
15 further finds and declares that unilateral actions which seek to create
16 a monopoly or monopsony are as harmful as contracts or agreements of
17 multiple parties to do the same and should be treated similarly under
18 the law. Firms with monopoly or monopsony power are contrary to the
19 public interest. Accordingly, attempts to create monopolies or monopso-
20 nies through anti-competitive conduct should also be treated as actions
21 contrary to the interests of the people of the state of New York and
22 should be penalized accordingly. The legislature further finds and

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

LBD02939-02-3

1 declares that effective enforcement against unilateral anti-competitive
2 conduct has been impeded by courts, for example, applying narrow defi-
3 nitions of monopolies and monopolization, limiting the scope of unilat-
4 eral conduct covered by the federal anti-trust laws, and unreasonably
5 heightening the legal standards that plaintiffs and government enforcers
6 must overcome to establish violations of those laws. The legislature
7 further finds and declares that one of the purposes of the state's anti-
8 trust laws is to ensure that our labor markets are open and fair. The
9 legislature further finds and declares that anti-competitive practices
10 harm great numbers of citizens and therefore must ensure that those
11 harmed by monopolies or monopsonies may seek redress through class
12 actions.

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,
30 monopsony, or unlawfully interfering with the free exercise of any
31 activity in the conduct of any business, trade or commerce or in the
32 furnishing of any service in this state any business, trade or commerce
33 or the furnishing of any service is or may be restrained, is hereby
34 declared to be against public policy, illegal and void.

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

40 (b) It shall be unlawful for any person or persons with a dominant
41 position in the conduct of any business, trade or commerce, in any labor
42 market, or in the furnishing of any service in this state to abuse that
43 dominant position. This paragraph shall not apply to a person or
44 persons meeting the definition of a small business under section one
45 hundred thirty-one of the economic development law.

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

49 (1) Examples of direct evidence include, but are not limited to, the
50 unilateral power to set prices, terms, conditions, or standards; the
51 unilateral power to dictate non-price contractual terms without compen-
52 sation; or other evidence that a person is not constrained by meaningful
53 competitive pressures, such as the ability to degrade quality or reduce
54 output without suffering reduction in profitability. In labor markets,
55 examples of direct evidence include, but are not limited to, the use of

1 non-compete clauses or no-poach agreements, or the unilateral power to
2 set wages.

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

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

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

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

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

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

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

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

55 3. Subject to the exceptions hereinafter provided in this section, the
56 provisions of this article shall apply to licensed insurers, licensed

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

9 ~~[3-]~~ 4. The provisions of this article shall not apply to cooperative
10 associations, corporate or otherwise, of farmers, gardeners, or dairy-
11 men, including live stock farmers and fruit growers, nor to contracts,
12 agreements or arrangements made by such associations, nor to bona fide
13 labor unions, nor to the creation, production, and dissemination of a
14 single expressive work that is copyrighted, including but not limited
15 to, a streaming series, television programs and or motion pictures.

16 ~~[4-]~~ 5. The labor of human beings shall not be deemed or held to be a
17 commodity or article of commerce as such terms are used in this section
18 and nothing herein contained shall be deemed to prohibit or restrict the
19 right of workingmen, including employees and independent contractors, to
20 combine in unions, organizations and associations, not organized for the
21 purpose of profit, to establish or maintain union apprenticeship or
22 training programs that may lead to any government-issued trade license,
23 or to bargain collectively concerning their wages and the terms and
24 conditions of their employment. Nothing in this section shall be deemed
25 to prevent or create liability with respect to any actions to comply
26 with article eight or nine of the labor law. A bona fide collective
27 bargaining agreement, project labor agreement or any other agreement
28 lawful under 29 U.S.C. 158(f), as amended, or any term therein, shall
29 not be considered evidence of a violation or dominance under this
30 section. Project labor agreement shall have the meaning specified in
31 section two hundred twenty-two of the labor law.

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

46 ~~[6-]~~ 7. In any action pursuant to this section, the fact that the
47 state, or any political subdivision or public authority of the state, or
48 any person who has sustained damages by reason of violation of this
49 section has not dealt directly with the defendant shall not bar or
50 otherwise limit recovery; provided, however, that in any action in which
51 claims are asserted against a defendant by both direct and indirect
52 purchasers, the court shall take all steps necessary to avoid duplicate
53 liability, including but not limited to the transfer and consolidation
54 of all related actions. In actions where both direct and indirect
55 purchasers are involved, a defendant shall be entitled to prove as a
56 partial or complete defense to a claim for damages that the illegal

1 overcharge has been passed on to others who are themselves entitled to
2 recover so as to avoid duplication of recovery of damages.

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

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

8 10. (a) Any person conducting business in the state which is required
9 to file the Notification and Report Form for Certain Mergers and Acqui-
10 sitions pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of
11 1976, 15 U.S.C. s. 18a (a), shall provide the same notice and documenta-
12 tion in its entirety to the attorney general at the same time that
13 notice is filed with the federal government.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

49 § 4. Section 341 of the general business law, as amended by chapter
50 333 of the laws of 1975, is amended to read as follows:

51 § 341. Penalty. Every person or corporation, or any officer or agent
52 thereof, who shall ~~make or attempt to make or enter into any such~~
53 ~~contract, agreement, arrangement or combination or who within this state~~
54 ~~shall~~ do or attempt to do, within this state, any act ~~[pursuant there-~~
55 ~~to]~~ declared unlawful under subdivision one and paragraph (a) of subdi-
56 vision two of section three hundred forty of this article, or in, toward

1 or for the consummation thereof[~~, wherever the same may have been made~~],
2 is guilty of a class [~~E~~] D felony, and on conviction thereof shall, if a
3 natural person, be punished by a fine not exceeding one [~~hundred thou-~~
4 ~~sand~~] million dollars, or by imprisonment for not longer than four
5 years, or by both such fine and imprisonment; and if a corporation, by a
6 fine of not exceeding one hundred million dollars. An indictment or
7 information based on a violation of any of the provisions of this
8 section must be found within [~~three~~] five years after its commission. No
9 criminal proceeding barred by prior limitation shall be revived by this
10 act.

11 § 5. Section 342-a of the general business law, as amended by chapter
12 275 of the laws of 1962, is amended to read as follows:

13 § 342-a. Recovery of civil penalty by attorney-general. In lieu of any
14 penalty otherwise prescribed for a violation of a provision of this
15 article and in addition to an action pursuant to section three hundred
16 forty-two of this article, the attorney-general may bring an action in
17 the name and in behalf of the people of the state against any person,
18 trustee, director, manager or other officer or agent of a corporation,
19 or against a corporation, foreign or domestic, to recover a penalty in
20 the sum specified in section three hundred forty-one of this article for
21 the doing in this state of any act [~~herein~~] declared to be illegal in
22 this article, or any act in, toward or for the making or consummation of
23 any contract, agreement, arrangement or combination [~~herein~~] prohibited
24 by this article, wherever the same may have been made. The action must
25 be brought within [~~three~~] five years after the commission of the act
26 upon which it is based.

27 § 6. Section 342-b of the general business law, as amended by chapter
28 420 of the laws of 1975, is amended to read as follows:

29 § 342-b. Recovery of damages by attorney general. In addition to
30 existing statutory and common law authority to bring such actions on
31 behalf of the state, [~~and~~] public authorities, and resident persons and
32 entities, the attorney general may also bring action on behalf of any
33 political subdivision or public authority of the state upon the request
34 of such political subdivision or public authority, or in the name of the
35 state, as parens patriae, on behalf of persons and other entities resid-
36 ing in the state of New York, to recover damages for violations of
37 section three hundred forty of this article, or to recover damages
38 provided for by federal law for violations of the federal antitrust
39 laws. In any class action the attorney general may bring on behalf of
40 [~~these or other subordinate~~] governmental entities, any governmental
41 entity that does not affirmatively exclude itself from the action, upon
42 due notice thereof, shall be deemed to have requested to be treated as a
43 member of the class represented in that action. The attorney general,
44 on behalf of the state of New York, shall be entitled to retain from any
45 moneys recovered in such actions the costs and expenses of such
46 services.

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

49 § 342-d. Recovery of expert witnesses' fees and costs by attorney-gen-
50 eral and private litigants. In any action alleging a violation of a
51 provision of this article, including actions brought under subdivision
52 twelve of section sixty-three of the executive law, the attorney general
53 and private litigants shall recover reasonable fees and costs for its
54 expert witnesses and consultants if the attorney general or private
55 litigants prevail in such action.

56 § 8. Non-compete clauses.

1 1. Definitions. For purposes of this section:

2 (a) (1) "Non-compete clause" means a contractual term between an
3 employer and a worker that prevents the worker from seeking or accepting
4 employment with a person, or operating a business, after the conclusion
5 of the worker's employment with the employer.

6 (2) The term "non-compete clause" includes a contractual term that is
7 a de facto non-compete clause because it has the effect of prohibiting
8 the worker from seeking or accepting employment with a person or operat-
9 ing a business after the conclusion of the worker's employment with the
10 employer. The following types of contractual terms, among others, may be
11 de facto non-compete clauses:

12 i. A non-disclosure agreement between an employer and a worker that is
13 written so broadly that it effectively precludes the worker from working
14 in the same field after the conclusion of the worker's employment with
15 the employer.

16 ii. A contractual term between an employer and a worker that requires
17 the worker to pay the employer or a third-party entity for training
18 costs if the worker's employment terminates within a specified time
19 period, where the required payment is not reasonably related to the
20 costs the employer incurred for training the worker.

21 (b) "Employer" means a person, as defined in 15 U.S.C. 57b-1(a)(6),
22 that hires or contracts with a worker to work for the person.

23 (c) "Employment" means work for an employer, as the term employer is
24 defined in paragraph (b) of this subdivision.

25 (d) "Substantial owner, substantial member, and substantial partner"
26 mean an owner, member, or partner holding at least a 25 percent owner-
27 ship interest in a business entity.

28 (e) "Worker" means a natural person who works, whether paid or unpaid,
29 for an employer. The term includes, without limitation, an employee,
30 individual classified as an independent contractor, extern, intern,
31 volunteer, apprentice, or sole proprietor who provides a service to a
32 client or customer. The term worker does not include a franchisee in the
33 context of a franchisee-franchisor relationship; however, the term work-
34 er includes a natural person who works for the franchisee or franchisor.
35 Non-compete clauses between franchisors and franchisees would remain
36 subject to federal antitrust law as well as all other applicable law.

37 2. Unfair method of competition. It is an unfair method of competition
38 for an employer to enter into or attempt to enter into a non-compete
39 clause with a worker; maintain with a worker a non-compete clause; or
40 represent to a worker that the worker is subject to a non-compete clause
41 where the employer has no good faith basis to believe that the worker is
42 subject to an enforceable non-compete clause.

43 3. Existing non-compete clauses. (a) To comply with subdivision 2 of
44 this section, which states that it is an unfair method of competition
45 for an employer to maintain with a worker a non-compete clause, an
46 employer that entered into a non-compete clause with a worker prior to
47 the compliance date must rescind the non-compete clause no later than
48 the compliance date.

49 (b) (1) An employer that rescinds a non-compete clause pursuant to
50 paragraph (a) of this subdivision must provide notice to the worker that
51 the worker's non-compete clause is no longer in effect and may not be
52 enforced against the worker. The employer must provide the notice to
53 the worker in an individualized communication. The employer must provide
54 the notice on paper or in a digital format such as, for example, an
55 email or text message. The employer must provide the notice to the work-
56 er within 45 days of rescinding the non-compete clause.

(2) The employer must provide the notice to a worker who currently works for the employer. The employer must also provide the notice to a worker who formerly worked for the employer, provided that the employer has the worker's contact information readily available.

(3) The following model language constitutes notice to the worker that the worker's non-compete clause is no longer in effect and may not be enforced against the worker, for purposes of subparagraph one of this paragraph. An employer may also use different language, provided that the notice communicates to the worker that the worker's non-compete clause is no longer in effect and may not be enforced against the worker. "A new state law makes it unlawful for us to maintain a non-compete clause in your employment contract. As of {DATE 180 DAYS AFTER ENACTMENT OF THIS LAW}, the non-compete clause in your contract is no longer in effect. This means that once you stop working for {EMPLOYER NAME}:

You may seek or accept a job with any company or any person-even if they compete with {EMPLOYER NAME}.

You may run your own business-even if it competes with {EMPLOYER NAME}.

You may compete with {EMPLOYER NAME} at any time following your employment with {EMPLOYER NAME}.

This law does not affect any other terms of your employment contract."

(c) An employer complies with the rescission requirement in paragraph (a) of this subdivision where it provides notice to a worker pursuant to paragraph (b) of this subdivision.

4. Applicability. The requirements of this section shall not apply to a non-compete clause that is entered into by a person who is selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity, or by a person who is selling all or substantially all of a business entity's operating assets, when the person restricted by the non-compete clause is a substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the non-compete clause. Non-compete clauses covered by this exception would remain subject to federal anti-trust law as well as all other applicable law.

§ 9. 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.

§ 10. This act shall take effect immediately.