

STATE OF NEW YORK

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2023-2024 Regular Sessions

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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 -- recommitted to the Committee on Consumer Protection in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- 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 New York's great concern with the growing accumulation of power in the
5 hands of dominant corporations that harms our marketplace, our democra-
6 cy, and that undermines the power of workers, consumers, and small busi-
7 nesses. It is time to update, expand, and clarify our laws, consistent
8 with the purposes of the anti-trust reforms of the early Twentieth
9 Century, to police abuses of power by dominant firms. The legislature
10 further finds and declares that unilateral actions which seek to create
11 a monopoly or monopsony are as harmful as contracts or agreements of
12 multiple parties to do the same and should be treated similarly under
13 the law. Firms with monopoly or monopsony power are contrary to the
14 public interest. The legislature further finds and declares that laws
15 governing multi-firm conduct should be updated, consistent with the
16 purposes of anti-trust law, to adequately address abuses of power by
17 dominant firms embodied in coercive vertical restraints on small busi-

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

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1 nesses, workers, and consumers. The legislature further finds and
2 declares that effective enforcement against unfair competition, espe-
3 cially on the part of dominant firms, has been impeded by courts, for
4 example, applying narrow definitions of monopolies and monopolization,
5 limiting the scope of unilateral conduct, making it excessively diffi-
6 cult to challenge unfair competition and unreasonably heightening the
7 legal standards that plaintiffs and government enforcers must overcome
8 to establish violations of those laws. The legislature further finds and
9 declares that one of the purposes of the state's anti-trust laws is to
10 ensure that our labor markets are open and fair. The legislature further
11 finds and declares that anti-competitive practices harm great numbers of
12 citizens and therefore must ensure that those harmed by monopolies or
13 monopsonies may seek redress through private enforcement.

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

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

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

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

30 For the purpose of establishing or maintaining any such monopoly,
31 monopsony, or unlawfully interfering with the free exercise of any
32 activity in the conduct of any business, trade or commerce or in the
33 furnishing of any service in this state any business, trade or commerce
34 or the furnishing of any service is or may be restrained, is hereby
35 declared to be against public policy, illegal 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. This paragraph shall not apply to a person or
45 persons that are independently owned and operated and employ one hundred
46 or fewer persons.

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

50 (1) Examples of direct evidence include, but are not limited to,
51 reduction in output or in quality of goods or services, the imposition
52 of supracompetitive prices, or the ability to force, induce, or other-
53 wise coerce a supplier to offer a lower price, discount, advertising
54 allowance, or other service than what the supplier offers others. In
55 labor markets, examples of direct evidence of a dominant position
56 include, but are not limited to, the imposition of subcompetitive wages

1 or working conditions; the repeated violation of laws protecting workers
2 such as labor laws, wage-and-hour laws, and workplace health and safety
3 laws; or the interference with, restraint of, or coercion of workers in
4 the exercise of their full freedom of association to obtain acceptable
5 terms and conditions of employment, including through self-organization,
6 designation of workplace representatives, and engagement in concerted
7 activities for the purposes of collective bargaining or other mutual aid
8 or protection. Direct evidence of dominant position includes conduct
9 that is carried out directly or indirectly through another entity or
10 person such as an independent contractor or other intermediary.

11 (2) A person's dominant position may also be established by indirect
12 evidence such as the person's share of a relevant market. A person who
13 has a share of forty percent or greater of a relevant market as a seller
14 shall be presumed to have a dominant position in that market under this
15 paragraph. A person who has a share of thirty percent or greater of a
16 relevant market as a buyer shall be presumed to have a dominant position
17 in that market under this paragraph. When determining a relevant market,
18 courts shall examine factors including, but not limited to, industry or
19 public recognition of the market as separate and distinct, the product's
20 peculiar characteristics and uses, unique protection facilities,
21 distinct customers, distinct prices, sensitivity to price changes, and
22 specialized vendors.

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

28 (ii) In any action brought under this paragraph, abuse of a dominant
29 position may include, but is not limited to, conduct that tends to fore-
30 close or limit the ability or incentive of one or more actual or poten-
31 tial competitors to compete, such as leveraging a dominant position in
32 one market to limit competition in a separate market; refusing to deal
33 with another person with the effect of unnecessarily excluding or handi-
34 capping actual or potential competitors; coercing the purchaser of one
35 product, service, or contract into purchasing or obtaining a separate
36 and distinct product, service, or contract; or engaging in, or coercing
37 a third party into, an exclusive agreement or contract that serves to
38 foreclose or increase costs for a competitor. In labor markets, abuse
39 may include, but is not limited to, imposing restraints, direct or indi-
40 rect, on the mobility of workers between employers or on the ability of
41 workers to seek employment from multiple employers; restricting the
42 freedom of workers and independent contractors to disclose wage and
43 benefit information; and wage discrimination based on any undisclosed or
44 hidden considerations.

45 (c) (i) Except as provided in subparagraph (ii) of this paragraph, the
46 following restraints are presumed to be illegal when engaged in by domi-
47 nant firms:

48 (1) Any restraint that requires another person to deal exclusively or
49 primarily with the firm imposing the restraint or another person speci-
50 fied by that firm or any restraint that has the necessary effect of
51 requiring another person to deal exclusively or primarily with the firm
52 imposing the restraint or another person specified by that firm;

53 (2) Any restraint that conditions the sale or purchase of any product
54 or services on an agreement to sell or purchase another product or
55 service;

1 (3) Any restraint on a person's ability to engage in a profession,
2 trade, or business of any kind, including any restraint on a person's
3 ability to employ another person;

4 (4) Any restraint on the prices or wages offered by another firm;

5 (5) Any restraint on another firm's right to independently decide
6 whether to recognize a union of its employees or to otherwise agree to
7 negotiate with its employees collectively over terms and conditions of
8 employment;

9 (6) Any restraint that the attorney general, through rulemaking,
10 determines poses a substantial risk of harming competition that is not
11 already presumed illegal;

12 (7) Any additional restraint that the attorney general determines,
13 through rulemaking, generally serves no legitimate business purpose that
14 cannot be achieved in some less restrictive way.

15 (ii) Subparagraph (i) of this paragraph shall not apply if the defend-
16 ant establishes, by clear and convincing evidence, that the pro-competi-
17 tive benefits of the challenged conduct (1) are achievable only through
18 that conduct and (2) outweigh that conduct's harm to competition. The
19 harm to competition in one market from the challenged conduct may not be
20 offset by purported benefits in a separate market; and the harm to a
21 person or persons from the challenged conduct may not be offset by
22 purported benefits to another person or persons.

23 (d) (i) The attorney general is hereby empowered to adopt, promulgate,
24 amend, and repeal rules, as such term is defined in paragraph (a) of
25 subdivision two of section one hundred two of the state administrative
26 procedure act, to carry out the purposes of paragraph (b) of this subdivi-
27 vision, including those considerations specified in the findings and
28 declarations of the legislature for this act.

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

42 (iii) The attorney general shall issue guidance on how it will achieve
43 the purposes of paragraph (b) of this subdivision. The attorney general
44 may issue other guidance with respect to paragraph (b) of this subdivi-
45 sion.

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

48 3. Subject to the exceptions hereinafter provided in this section, the
49 provisions of this article shall apply to licensed insurers, licensed
50 insurance agents, licensed insurance brokers, licensed independent
51 adjusters and other persons and organizations subject to the provisions
52 of the insurance law, to the extent not regulated by provisions of arti-
53 cle twenty-three of the insurance law; and further provided, that noth-
54 ing in this section shall apply to the marine insurances, including
55 marine protection and indemnity insurance and marine reinsurance,

1 exempted from the operation of article twenty-three of the insurance
2 law.

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

10 ~~[4-]~~ 5. The labor of human beings shall not be deemed or held to be a
11 commodity or article of commerce as such terms are used in this section
12 and nothing herein contained shall be deemed to prohibit or restrict the
13 right of workingmen, including employees and independent contractors, to
14 combine in unions, organizations and associations, not organized for the
15 purpose of profit, to establish or maintain union apprenticeship or
16 training programs that may lead to any government-issued trade license,
17 or to bargain collectively concerning their wages and the terms and
18 conditions of their employment. Nothing in this section shall be deemed
19 to prevent or create liability with respect to any actions to comply
20 with article eight or nine of the labor law. A bona fide collective
21 bargaining agreement, project labor agreement or any other agreement
22 lawful under 29 U.S.C. 158(f), as amended, or any term therein, shall
23 not be considered evidence of a violation or dominance under this
24 section. Project labor agreement shall have the meaning specified in
25 section two hundred twenty-two of the labor law.

26 ~~[5-]~~ 6. An action to recover damages caused by a violation of this
27 section must be commenced within four years after the cause of action
28 has accrued. The state, or any political subdivision or public authority
29 of the state, or any person who shall sustain damages by reason of any
30 violation of this section, shall recover three-fold the actual damages
31 sustained thereby, as well as costs not exceeding ten thousand dollars,
32 and reasonable attorneys' fees. At or before the commencement of any
33 civil action by a party other than the attorney-general for a violation
34 of this section, notice thereof shall be served upon the attorney-gener-
35 al. Where the aggrieved party is a political subdivision or public
36 authority of the state, notice of intention to commence an action under
37 this section must be served upon the attorney-general at least ten days
38 prior to the commencement of such action. This section shall not apply
39 to any action commenced prior to the effective date of this act.

40 ~~[6-]~~ 7. In any action pursuant to this section, the fact that the
41 state, or any political subdivision or public authority of the state, or
42 any person who has sustained damages by reason of violation of this
43 section has not dealt directly with the defendant shall not bar or
44 otherwise limit recovery; provided, however, that in any action in which
45 claims are asserted against a defendant by both direct and indirect
46 purchasers, the court shall take all steps necessary to avoid duplicate
47 liability, including but not limited to the transfer and consolidation
48 of all related actions. In actions where both direct and indirect
49 purchasers are involved, a defendant shall be entitled to prove as a
50 partial or complete defense to a claim for damages that the illegal
51 overcharge has been passed on to others who are themselves entitled to
52 recover so as to avoid duplication of recovery of damages.

53 8. Any person harmed by this section, whether harmed directly or
54 indirectly by the purported violation, shall be entitled to bring suit.

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

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

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

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;

27 (vi) transactions by, between, or among manufacturing, importing, or
28 wholesale businesses that are directly regulated by the New York state
29 liquor authority; and

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

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

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

43 (e) In considering any transaction under this subdivision, the attor-
44 ney general shall consider such transaction's effects on labor markets,
45 including but not limited to effects on workers' countervailing lever-
46 age, by establishing a process for affected workers or representatives
47 designated by affected workers to meaningfully comment on such trans-
48 actions within ten days following the filing of the transacting parties'
49 notice and documentation of their intended transaction pursuant to para-
50 graph (a) of subdivision eleven of this section. The attorney general
51 shall establish this new process within ninety days following the effec-
52 tive date of the chapter of the laws of two thousand twenty-four that
53 amended this section.

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

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

1 (ii) exempt, from the requirements of this subdivision, classes of
2 persons, acquisitions, transfers, or transactions which are not likely
3 to violate the provisions of this article; and
4 (iii) adopt, promulgate, amend, and rescind other rules and regu-
5 lations to carry out the purposes of this subdivision.

6 § 4. Section 341 of the general business law, as amended by chapter
7 333 of the laws of 1975, is amended to read as follows:

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

24 § 5. Section 342-a of the general business law, as amended by chapter
25 275 of the laws of 1962, is amended to read as follows:

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

40 § 6. Section 342-b of the general business law, as amended by chapter
41 420 of the laws of 1975, is amended to read as follows:

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

1 on behalf of the state of New York, shall be entitled to retain from any
2 moneys recovered in such actions the costs and expenses of such
3 services.

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

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

13 § 8. The general business law is amended by adding a new section 348
14 to read as follows:

15 § 348. Prohibition on unfair methods of competition. 1. Unfair methods
16 of competition are hereby declared unlawful. As used in this section,
17 "unfair methods of competition" shall mean and include any act or prac-
18 tice that threatens an incipient violation of an anti-trust law, or
19 violates the policy or spirit of an anti-trust law because its effects
20 are comparable to or the same as a violation of the law, or otherwise
21 significantly threatens or harms competition.

22 2. The attorney general shall have the authority through rulemaking to
23 declare certain conduct or practices as unfair methods of competition.

24 § 9. Severability. If any provision of this act, or the application
25 thereof to any person or circumstances, is held invalid or unconstitu-
26 tional, that invalidity or unconstitutionality shall not affect other
27 provisions or applications of this act that can be given effect without
28 the invalid or unconstitutional provision or application, and to this
29 end the provisions of this act are severable.

30 § 10. This act shall take effect immediately.