

# STATE OF NEW YORK

10323

## IN ASSEMBLY

May 17, 2024

Introduced by COMMITTEE ON RULES -- (at request of M. of A. Peoples-Stokes) -- read once and referred to the Committee on Economic Development

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-  
18 nesses, workers, and consumers. The legislature further finds and  
19 declares that effective enforcement against unfair competition, espe-  
20 cially on the part of dominant firms, has been impeded by courts, for  
21 example, applying narrow definitions of monopolies and monopolization,  
22 limiting the scope of unilateral conduct, making it excessively diffi-  
23 cult to challenge unfair competition and unreasonably heightening the  
24 legal standards that plaintiffs and government enforcers must overcome  
25 to establish violations of those laws. The legislature further finds and

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

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1 declares that one of the purposes of the state's anti-trust laws is to  
2 ensure that our labor markets are open and fair. The legislature further  
3 finds and declares that anti-competitive practices harm great numbers of  
4 citizens and therefore must ensure that those harmed by monopolies or  
5 monopsonies may seek redress through private enforcement.

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

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

16 A monopoly or monopsony in the conduct of any business, trade or  
17 commerce or in the furnishing of any service in this state, is or may be  
18 established or maintained, or whereby

19 Competition or the free exercise of any activity in the conduct of any  
20 business, trade or commerce or in the furnishing of any service in this  
21 state is or may be restrained or whereby

22 For the purpose of establishing or maintaining any such monopoly,  
23 monopsony, or unlawfully interfering with the free exercise of any  
24 activity in the conduct of any business, trade or commerce or in the  
25 furnishing of any service in this state any business, trade or commerce  
26 or the furnishing of any service is or may be restrained, is hereby  
27 declared to be against public policy, illegal and void.

28 2. (a) It shall be unlawful for any person or persons to monopolize or  
29 monopsonize, or attempt to monopolize or monopsonize, or combine or  
30 conspire with any other person or persons to monopolize or monopsonize  
31 any business, trade or commerce or the furnishing of any service in this  
32 state.

33 (b) It shall be unlawful for any person or persons with a dominant  
34 position in the conduct of any business, trade or commerce, in any labor  
35 market, or in the furnishing of any service in this state to abuse that  
36 dominant position. This paragraph shall not apply to a person or  
37 persons that are independently owned and operated and employ one hundred  
38 or fewer persons.

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

42 (1) Examples of direct evidence include, but are not limited to,  
43 reduction in output or in quality of goods or services, the imposition  
44 of supracompetitive prices, or the ability to force, induce, or other-  
45 wise coerce a supplier to offer a lower price, discount, advertising  
46 allowance, or other service than what the supplier offers others. In  
47 labor markets, examples of direct evidence of a dominant position  
48 include, but are not limited to, the imposition of subcompetitive wages  
49 or working conditions; the repeated violation of laws protecting workers  
50 such as labor laws, wage-and-hour laws, and workplace health and safety  
51 laws; or the interference with, restraint of, or coercion of workers in  
52 the exercise of their full freedom of association to obtain acceptable  
53 terms and conditions of employment, including through self-organization,  
54 designation of workplace representatives, and engagement in concerted  
55 activities for the purposes of collective bargaining or other mutual aid  
56 or protection. Direct evidence of dominant position includes conduct

1 that is carried out directly or indirectly through another entity or  
2 person such as an independent contractor or other intermediary.

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. When determining a relevant market,  
10 courts shall examine factors including, but not limited to, industry or  
11 public recognition of the market as separate and distinct, the product's  
12 peculiar characteristics and uses, unique protection facilities,  
13 distinct customers, distinct prices, sensitivity to price changes, and  
14 specialized vendors.

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

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

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

40 (1) Any restraint that requires another person to deal exclusively or  
41 primarily with the firm imposing the restraint or another person speci-  
42 fied by that firm or any restraint that has the necessary effect of  
43 requiring another person to deal exclusively or primarily with the firm  
44 imposing the restraint or another person specified by that firm;

45 (2) Any restraint that conditions the sale or purchase of any product  
46 or services on an agreement to sell or purchase another product or  
47 service;

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

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

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

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

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

7 (ii) Subparagraph (i) of this paragraph shall not apply if the defend-  
8 ant establishes, by clear and convincing evidence, that the pro-competi-  
9 tive benefits of the challenged conduct (1) are achievable only through  
10 that conduct and (2) outweigh that conduct's harm to competition. The  
11 harm to competition in one market from the challenged conduct may not be  
12 offset by purported benefits in a separate market; and the harm to a  
13 person or persons from the challenged conduct may not be offset by  
14 purported benefits to another person or persons.

15 (d) (i) The attorney general is hereby empowered to adopt, promulgate,  
16 amend, and repeal rules, as such term is defined in paragraph (a) of  
17 subdivision two of section one hundred two of the state administrative  
18 procedure act, to carry out the purposes of paragraph (b) of this subdivi-  
19 sion, including those considerations specified in the findings and  
20 declarations of the legislature for this act.

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

34 (iii) The attorney general shall issue guidance on how it will achieve  
35 the purposes of paragraph (b) of this subdivision. The attorney general  
36 may issue other guidance with respect to paragraph (b) of this subdivi-  
37 sion.

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

40 3. Subject to the exceptions hereinafter provided in this section, the  
41 provisions of this article shall apply to licensed insurers, licensed  
42 insurance agents, licensed insurance brokers, licensed independent  
43 adjusters and other persons and organizations subject to the provisions  
44 of the insurance law, to the extent not regulated by provisions of arti-  
45 cle twenty-three of the insurance law; and further provided, that noth-  
46 ing in this section shall apply to the marine insurances, including  
47 marine protection and indemnity insurance and marine reinsurance,  
48 exempted from the operation of article twenty-three of the insurance  
49 law.

50 [3-] 4. The provisions of this article shall not apply to cooperative  
51 associations, corporate or otherwise, of farmers, gardeners, or dairy-  
52 men, including live stock farmers and fruit growers, nor to contracts,  
53 agreements or arrangements made by such associations, nor to bona fide  
54 labor unions, nor to the creation, production, and dissemination of a  
55 single expressive work that is copyrighted, including but not limited  
56 to, a streaming series, television programs and/or motion pictures.

1     ~~[4.]~~ 5. The labor of human beings shall not be deemed or held to be a  
2 commodity or article of commerce as such terms are used in this section  
3 and nothing herein contained shall be deemed to prohibit or restrict the  
4 right of workingmen, including employees and independent contractors, to  
5 combine in unions, organizations and associations, not organized for the  
6 purpose of profit, to establish or maintain union apprenticeship or  
7 training programs that may lead to any government-issued trade license,  
8 or to bargain collectively concerning their wages and the terms and  
9 conditions of their employment. Nothing in this section shall be deemed  
10 to prevent or create liability with respect to any actions to comply  
11 with article eight or nine of the labor law. A bona fide collective  
12 bargaining agreement, project labor agreement or any other agreement  
13 lawful under 29 U.S.C. 158(f), as amended, or any term therein, shall  
14 not be considered evidence of a violation or dominance under this  
15 section. Project labor agreement shall have the meaning specified in  
16 section two hundred twenty-two of the labor law.

17     ~~[5.]~~ 6. An action to recover damages caused by a violation of this  
18 section must be commenced within four years after the cause of action  
19 has accrued. The state, or any political subdivision or public authority  
20 of the state, or any person who shall sustain damages by reason of any  
21 violation of this section, shall recover three-fold the actual damages  
22 sustained thereby, as well as costs not exceeding ten thousand dollars,  
23 and reasonable attorneys' fees. At or before the commencement of any  
24 civil action by a party other than the attorney-general for a violation  
25 of this section, notice thereof shall be served upon the attorney-gener-  
26 al. Where the aggrieved party is a political subdivision or public  
27 authority of the state, notice of intention to commence an action under  
28 this section must be served upon the attorney-general at least ten days  
29 prior to the commencement of such action. This section shall not apply  
30 to any action commenced prior to the effective date of this act.

31     ~~[6.]~~ 7. In any action pursuant to this section, the fact that the  
32 state, or any political subdivision or public authority of the state, or  
33 any person who has sustained damages by reason of violation of this  
34 section has not dealt directly with the defendant shall not bar or  
35 otherwise limit recovery; provided, however, that in any action in which  
36 claims are asserted against a defendant by both direct and indirect  
37 purchasers, the court shall take all steps necessary to avoid duplicate  
38 liability, including but not limited to the transfer and consolidation  
39 of all related actions. In actions where both direct and indirect  
40 purchasers are involved, a defendant shall be entitled to prove as a  
41 partial or complete defense to a claim for damages that the illegal  
42 overcharge has been passed on to others who are themselves entitled to  
43 recover so as to avoid duplication of recovery of damages.

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

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

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

51     11. (a) Any person conducting business in the state which is required  
52 to file the Notification and Report Form for Certain Mergers and Acqui-  
53 sitions pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of  
54 1976, 15 U.S.C. s. 18a (a), shall provide the same notice and documenta-  
55 tion in its entirety to the attorney general at the same time that  
56 notice is filed with the Federal Trade Commission and the assistant

1 attorney general in charge of the Antitrust Division of the Department  
2 of Justice.

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

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

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

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

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

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

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

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

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

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

32 (e) In considering any transaction under this subdivision, the attor-  
33 ney general shall consider such transaction's effects on labor markets,  
34 including but not limited to effects on workers' countervailing lever-  
35 age, by establishing a process for affected workers or representatives  
36 designated by affected workers to meaningfully comment on such trans-  
37 actions within ten days following the filing of the transacting parties'  
38 notice and documentation of their intended transaction pursuant to para-  
39 graph (a) of subdivision eleven of this section. The attorney general  
40 shall establish this new process within ninety days following the effec-  
41 tive date of the chapter of the laws of two thousand twenty-four that  
42 amended this section.

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

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

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

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

50 § 4. Section 341 of the general business law, as amended by chapter  
51 333 of the laws of 1975, is amended to read as follows:

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

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

12 § 5. Section 342-a of the general business law, as amended by chapter  
13 275 of the laws of 1962, is amended to read as follows:

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

28 § 6. Section 342-b of the general business law, as amended by chapter  
29 420 of the laws of 1975, is amended to read as follows:

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

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

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

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

3 § 348. Prohibition on unfair methods of competition. 1. Unfair methods  
4 of competition are hereby declared unlawful. As used in this section,  
5 "unfair methods of competition" shall mean and include any act or prac-  
6 tice that threatens an incipient violation of an anti-trust law, or  
7 violates the policy or spirit of an anti-trust law because its effects  
8 are comparable to or the same as a violation of the law, or otherwise  
9 significantly threatens or harms competition.

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

12 § 9. Severability. If any provision of this act, or the application  
13 thereof to any person or circumstances, is held invalid or unconstitu-  
14 tional, that invalidity or unconstitutionality shall not affect other  
15 provisions or applications of this act that can be given effect without  
16 the invalid or unconstitutional provision or application, and to this  
17 end the provisions of this act are severable.

18 § 10. This act shall take effect immediately.