REPORT ON LEGISLATION BY THE
ANTITRUST AND TRADE REGULATION COMMITTEE

A.1812-A **M. of A. Dinowitz**

-and-

S.933-C **Sen. Gianaris**

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.

THIS BILL IS APPROVED WITH MODIFICATION

The New York City Bar Association ("City Bar") generally supports the enactment of this bill, the "Twenty-First Century Anti-Trust Act" ("Bill"),[1] subject to certain modifications. The City Bar disapproves of the Bill without the modifications.

The Bill introduces, among others, the following major revisions to current law:[2]

(1) a prohibition against anticompetitive single-firm conduct.

(2) a premerger notification regime.[3]

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[1] Assembly Bill 1812-A and Senate Bill 933-A are identical, while S.933-C differs in several respects from them. The references to the Bill are to S.933-C; differences between A.1812-A and S.933-C are noted where relevant to the City Bar's analysis.

[2] The Bill also expressly permits class actions and the recovery of treble damages, as well as increases penalties for violations, lengthens the statute of limitations, and authorizes parens patriae actions and prevailing plaintiffs and the attorney general to recover fees and costs. The City Bar takes no position on these proposals.

[3] Assembly Bill 1812-A also amends Section 340 of the General Business Law to prohibit "1. Every contract, agreement, arrangement or combination whereby… For the purpose of [~~establishing or maintaining any such monopoly 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~~] engaging in the conduct specified in this section any business,… is or may be restrained." The City Bar disapproves of this amendment because it introduces ambiguity to a prohibition against coordinated anticompetitive conduct that has been interpreted by the courts over decades and generally understood.

The City Bar supports the addition of a prohibition against anticompetitive single-firm conduct, subject to the caveats noted below, because it fills a gap in the current law, which has been interpreted to prohibit only multi-party anticompetitive conduct. However, the City Bar recommends the deletion of the proposed provisions regarding "abuse of a dominant position", which diverges substantially from current U.S. antitrust jurisprudence. The City Bar recommends the deletion of the proposed creation of a premerger notification regime.

I. SINGLE-FIRM CONDUCT

The Bill provides that:

> (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.

The City Bar approves this provision to the extent it tracks Section 2 of the Sherman Act, 15 U.S.C. §2,[4] and fills a gap in the current law, which has been interpreted to prohibit only multi-party anticompetitive conduct. The City Bar notes that there has been extensive debate about the appropriate contours of competition law provisions relating to single-firm conduct,[5] and recommends that the New York attorney general be authorized to study and issue guidelines on the interpretation and enforcement of this provision in light of the extensive federal jurisprudence and academic literature on single-firm conduct. The City Bar suggests that the New York attorney general consider in developing such guidelines the Constitutional limits to the state's exercise of jurisdiction.[6]

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[4] Notwithstanding the inclusion of this language in the current prohibition against anticompetitive multi-party conduct, the City Bar recommends that to ensure the Bill tracks Section 2 of the Sherman Act, the words "any business" and "or the furnishing of any service" be stricken from the Bill. Section 2 of the Sherman Act prohibits monopolization of "any part of the trade or commerce" among states, and the Bill should track that language. Absent existing case law on the subject, it is unclear how the monopolization of a "business" or a "service" would be interpreted in the context of single-firm conduct, creating unnecessary uncertainty, as courts could view them as necessarily encompassing monopolization of commercial activity that is neither "commerce" nor "trade".

[5] For example, there has been much debate about the wisdom of the U.S. Supreme Court's application of Sherman Act § 2 in cases such as Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Weyerhaeuser Co. v. Ross-Simmons Hard-Wood Lumber Co., 549 U.S. 312 (2006); Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009); and Ohio v. Am. Express Co., 585 U.S. ___, 138 S. Ct. 2274 (2018). *See, e.g.*, E. Hovenkamp and H. Hovenkamp, *The Viability of Price Squeeze Claims*, 51 ARIZ. L. REV. 273 (2009); C.R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695 (2013); C.R. Leslie, *Antitrust Made (Too) Simple*, 79 ANTITRUST L.J. 917 (2014); J.B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 1 (2015); P. Kennedy, *Squeezing linkLine: Rethinking Recoupment in Price Squeeze Cases*, 57 AM BUS. L.J. 383 (2020); H. Hovenkamp, *Monopolizing and the Sherman Act* (April 30, 2022), U of Penn, Inst for Law & Econ Research Paper No. 22-02, WILLIAM & MARY LAW REVIEW, 2022, https://ssrn.com/abstract=3963245 (All websites last visited June 1, 2022.)

[6] *See, e.g.*, North Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Fam. Tr., 588 U.S. ___, 139 S. Ct. 2213, 2219 (2019); Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 388 (2015); Nat'l Priv. Truck Council, Inc. v. Oklahoma Tax Comm'n, 515 U.S. 582, 585 (1995); Healy v. The Beer Institute, Inc., 491 U.S. 324, 335-36 (1989);

However, the Bill also provides that:

> (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.

The concept of "abuse of dominant position" is one novel to U.S. antitrust jurisprudence, although the European Union and other jurisdictions have adopted it. The Bill would introduce into New York jurisprudence a concept generally unfamiliar to U.S. courts, and may create conflict with federal law.

Moreover, the standard for determining the existence of a "dominant position" may chill normal competitive conduct, create uncertainty for business, and unduly burden business.

The Bill provides that:

> (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.
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> (1) Examples of direct evidence include, but are not limited to,[7] 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,[8] the use of non-compete clauses or no-poach agreements, or the unilateral power to set wages.
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> (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.
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> (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

California v. ARC America Corp., 490 U.S. 93, 101-105 (1989). The Supreme Court's disposition of National Pork Producers Council v. Ross, 456 F. Supp. 3d 1201 (S.D. Cal. 2020), aff'd, 6 F.4th 1021 (9th Cir. 2021), cert. granted, 2022 WL 892100 (Mar. 28, 2022), may provide additional guidance on this issue.

[7] A.1812-A provides: "Direct evidence may include, but is not limited to, …"

[8] A.1812-A provides: "direct evidence of a dominant position may include, but is not limited to, …"

> order to evaluate the evidence, find liability, or find that a claim has been stated under this paragraph.

The presumption in the Bill of "dominant position" in a relevant market for a seller with 40 percent or more of sales in that market and for a buyer with 30 percent or more of purchases in that market, means that single-firm conduct by a market participant with market share far below that generally considered to indicate monopoly may violate the law.[9] In fact, these market shares are below that which the European Commission currently applies to determine the existence of a dominant position.[10]

The Bill also appears to include as "abuse of a dominant position" conduct that under current U.S. antitrust law would not necessarily be a violation even if undertaken by a monopolist, thus arguably subjecting non-monopolists to a stricter standard. The Bill provides:

> (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.[11]

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[9] *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) (L. Hand, J., writing for U.S. Supreme Court) ("[I]t is doubtful whether sixty or sixty-four percent would be enough [to constitute a monopoly]; and certainly thirty-three percent is not."); Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 121 (1st Cir. 2011) (70% market share, while "considerable," insufficient to show "market has suffered a reduction in output or an increase in consumer prices").

[10] See, e.g., Differences and Alignment: Final Report of the Task Force on International Divergence of Dominance Standards of the ABA Antitrust Law Section (Sept. 1, 2019) 36 ("While the market shares associated with some past dominance cases in Europe are decidedly lower than those associated with monopoly cases in the United States, more recent enforcement actions of both the United States and the EC have alleged market shares at or above 70 percent."), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/october-2019/report-sal-dominance-divergence-10112019.pdf; Frances Dethmers & Jonathan Blondeel, *EU enforcement policy on abuse of dominance: Some statistics and facts*, 38(4) EUR. COMPETITION L. REV. 147, 149 (2017) ("the Commission's enforcement policy is clearly focused on companies with so-called super dominant shares in excess of 70%"). The Bill also allows for more than one entity to be in a dominant position in the same market context, contrary to the consensus of the International Competition Network ("ICN"), a network of 141 national and multinational competition authorities devoted to improving competition laws globally. ICN, Unilateral Conduct Workbook, Chapter 2: Analytical Framework for Evaluating Unilateral Exclusionary Conduct 11 (May 2017), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_UCW_Ch2.pdf.

[11] A.1812-A omits the word "by", providing "or restricting the freedom of workers and independent contractors".

The inclusion of "refusing to deal with another person with the effect of unnecessarily excluding or handicapping actual or potential competitors" as an "abuse of a dominant position" arguably is the adoption of an extreme version of the essential facilities doctrine (given the size of facilities that could be considered essential under the Bill). The U.S. Supreme Court has neither adopted nor repudiated the essential facilities doctrine in applying Section 2 of the Sherman Act, despite opportunities to do so.[12] Therefore, this provision may impose a far more stringent standard of conduct for a non-monopolist than the standard federal antitrust law imposes for even an actual monopolist.[13]

The consequences of a violation under the Bill are also more severe than under federal antitrust law. The Bill provides that:

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

This provision effectively renders an abuse of dominant position a per se violation, in sharp contrast to federal antitrust law that reserves per se treatment only for egregious anticompetitive conduct such as a price-fixing cartel, and establishes harsher treatment for abuse of dominant position than for monopolization/monopsonization or the maintenance of a monopoly/monopsony by firms with far greater market shares. Moreover, by barring consideration of pro-competitive effects and allowing consideration only of competitive harm, the provision may be construed to protect competitors, rather than competition or consumers, which is more consistent with industrial policy than competition policy.[14]

The City Bar, therefore, recommends that the Bill's proposed new General Business Law §340.2(b) relating to dominant position be deleted.[15] If the abuse of dominant position provisions are retained, there should be language added to clarify that the intent is to protect competition, not competitors,[16] and not to regulate prices. At the least, the provision barring consideration of pro-competitive effects should be deleted, and language added to make clear that abuse of dominant position is a lesser offense than monopolization. To be clear, the City Bar's recommendation is that the abuse of dominance provisions be stricken from the Bill in their entirety. We offer these modifications only as a form of mitigation of harm and do not support them over deletion of the provisions. Finally, especially given the divergence with federal antitrust law, it is important that

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[12] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410-11 (2004).

[13] This would also be the case for margin squeezes and leveraging monopoly power in one market to gain competitive advantage in another. *See*, Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009); Trinko, 540 U.S. at 415 n.4; Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

[14] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) ("The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.").

[15] Gregory J. Werden, *Exploitative abuse of a dominant position: A bad idea that now should be abandoned*, EUR. COMPETITION J. (forthcoming).

[16] The reference to "the important role of small and medium-sized businesses in the state's economy" may also impermissibly promote in-state business by discriminating against out-of-state competitors. *See*, *e.g.*, Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

any guidance issued by the New York attorney general regarding abuse of dominant position consider the Constitutional limits to the state's exercise of jurisdiction.[17]

II. PREMERGER NOTIFICATION

The Bill provides that:

> (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.[18]

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[17] *See* note 6.

[18] A.1812-A provides:

> (a) Any person acquiring, directly or indirectly, any voting securities or assets of any other person, shall file notification with the attorney general pursuant to rules under paragraph (h) of this subdivision hereunder if:
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> (i) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person in excess of ten per centum of the current thresholds specified by the United States Federal Trade Commission pursuant to 15 U.S.C. § 18a(a)(2); and
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> (ii) the acquiring or acquired person has assets or annual net sales within the state in excess of two and one-half per centum of the current thresholds specified by the United States Federal Trade Commission pursuant to 15 U.S.C. § 18a(a)(2)(A).

These notification thresholds are likely to capture many transactions with little or no connection to New York and inundate the New York attorney general with notifications of transactions unlikely to raise any competition concerns, which would be inappropriate. *Cf*., North Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Fam. Tr., 588 U.S. ___, 139 S. Ct. 2213, 2219 (2019); United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 346 (2007); Healy v. The Beer Institute, Inc., 491 U.S. 324, 335-36 (1989); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

A.1812-A also provides for an unnecessarily lengthy waiting period: "(b) The notification required under paragraph (a) of this subdivision shall be filed no later than sixty calendar days before the closing of the acquisition." This waiting period is twice the length of the HSR general initial waiting period of 30 days (the HSR Act provides for an initial waiting period of 15 calendar days for cash tender offers and acquisitions of assets out of Chapter 11 bankruptcy proceedings), is unnecessary, and places an undue burden on the parties, especially in the majority of transactions that raise no competition concerns. Historically, less than 5% of transactions notified under the HSR Act received a request for additional information ("second request") that extended the waiting period beyond the initial 30 days. U.S. Dep't Justice & Fed. Trade Comm'n, HSR Annual Report, Fiscal Year 2019, Appendix A, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf. Even if the federal antitrust enforcers chronically under-enforced the Clayton Act by a factor of 10 and should have issued second requests to almost 50% of notified transactions, which is unlikely, the majority of transactions still raise no concerns.

A.1812-A would create an even greater unnecessary disharmony than S.933-C with the HSR system. Therefore, the City Bar recommends that the provisions in A.1812-A relating to a premerger notification regime be deleted. If the creation of a premerger notification regime is retained, then, at the least, the City Bar recommends that:

The Bill would create the first state-level general premerger notification system.[19] While some transactions that affect New York State significantly or even primarily may not be subject to notification under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), they have been noticed and subjected to antitrust scrutiny.[20] Therefore, the City Bar considers the introduction of a premerger notification regime in New York the creation of a redundancy with few benefits and many clear costs.

Moreover, the requirement that "[a]ny person conducting business in the state" and satisfying the HSR Act's notification thresholds must also file the HSR notification materials with the New York attorney general is likely instead to create uncertainty and confusion, capture many transactions with little or no connection to New York and inundate the New York attorney general with notifications of transactions unlikely to raise any competition concerns in New York,[21] which would be inappropriate.[22]

Therefore, the City Bar recommends that the provisions relating to a premerger notification regime be deleted. If the creation of a premerger notification regime is retained, then, at the least, the City Bar recommends that the Bill be revised to replace "conducting business in the state" with objective and readily determined indicators of a transaction's nexus to the state that would subject

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(a) the threshold in subparagraph (i) be raised to at least 50 percent of the thresholds set annually by the FTC, and in subparagraph (ii) be raised to at least ten percent of the thresholds set by the FTC. The increases would help ensure that only substantial transactions with material nexus to New York will be subject to the notification requirement and a waiting period (*see* Comments of the ABA Antitrust Law Section on Certain Aspects of New York Senate Bill 933-A, New York Assembly Bill 1812-A, and New York Assembly Bill 3399 at 2-4, 4-14, June 14, 2021, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/june-2021/comments-ny-donnelly-61421.pdf; ICN, Recommended Practices for Merger Notification and Review Procedures, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf); and

(b) the initial waiting period be 30 days, with a provision for the potential for one extension as in the HSR system, if the attorney general determines that additional information and investigation are needed. Otherwise, a $10 million transaction between parties one of which has sales or assets of $10 million in New York and clearly no competition concerns could not close for 60 days even though it would be free to close in 30 days under the HSR Act. In fact, given the possibility of discretionary early termination of the waiting period under the HSR Act, the lack of any provision in A.1812-A for discretionary early termination of the waiting period means that some transactions that might be able to close in under 30 days under the HSR Act might still need to wait for 60 days under A.1812-A.

[19] Connecticut and Washington have premerger notification statutes addressed to healthcare mergers.

[20] *See*, *e.g.*, United States v. Twin America, LLC, Civil Action No. 12-cv-8989 (ALC)(GWG) (S.D.N.Y.).

[21] The New York C.P.L.R. 302(a) provides for personal jurisdiction by New York courts over non-domiciliaries as to causes of action arising from (1) "transact[ing] any business within the state" or (2) tortious acts causing injury within the state if the non-domiciliaries "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state". There is substantial jurisprudence regarding the scope of C.P.L.R. 302(a) as to transacting business, and regularly doing or soliciting business in the state. However, this jurisprudence offers inadequate guidance to parties seeking clarity on when a notification is required under the Bill, and would extend the Bill's jurisdiction to many transactions with only minor nexus to New York.

[22] *See* n.18.

it to notification.[23] Such objective standards would help ensure that only substantial transactions with material nexus to New York will be subject to the notification requirement and a waiting period.[24] In addition, the City Bar recommends that the notification exemptions available under the HSR Act and rules and regulations thereunder be added to avoid the unnecessary burden to the New York attorney general and transacting parties associated with notifying and reviewing classes of persons, acquisitions, and transactions that the federal enforcement authorities have determined are unlikely to violate the antitrust laws.[25]

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[23] For example, the European Union's Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("EC Merger Regulation") includes objective standards for determining when a transaction has EU dimension and is therefore subject to notification to the European Commission if additional conditions are met, and provides that a transaction nonetheless lacks EU dimension and would be subject instead to competition law review by the relevant member state if each of the transaction parties achieves more than two-thirds of its aggregate EU-wide revenues in one and the same member state.

[24] *See* Comments of the ABA Antitrust Law Section on Certain Aspects of New York Senate Bill 933-A, New York Assembly Bill 1812-A, and New York Assembly Bill 3399 at 2-4, 4-14, June 14, 2021, https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/june-2021/comments-ny-donnelly-61421.pdf; ICN, Recommended Practices for Merger Notification and Review Procedures, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

[25] *See* 15 U.S.C. § 18a(d)(2)(B). A.1812-A and S.933-C contain identical exemptions to the premerger notification requirement, with the exception that A.1812-A lacks the exemption in S.933-C of "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".