AMERICAN ECONOMIC LIBERTIES PROJECT

SB 933A: Protecting Workers and Small Businesses from Dominant Corporations

Senate Bill 933A, introduced by Sen. Mike Gianaris, would update New York antitrust law, giving enforcers the ability to rein in many abusive tactics against small and medium size businesses and workers that are difficult to challenge under current antitrust law and precedent. This memo details why the bill provides New Yorkers with important new protections from the abuses of dominant corporations.

Since 1979, the Supreme Court has accepted that the goal of the antitrust law is to promote efficiency, known as the "consumer welfare" standard, rather than its traditional role of protecting workers and businesses from abusive or anti-competitive tactics by powerful firms. The consumer welfare standard has caused a dramatic erosion of antimonopoly rules, which has harmed workers and small and medium size businesses by allowing a few corporations to become dominant in many sectors of the economy. Case law for New York's antitrust law, the Donnelly Act, closely follows federal interpretations of antitrust law, making it difficult for enforcers, workers, or small and mid-sized businesses to hold dominant corporations accountable for predatory and unfair tactics.

In this legislation, the New York legislature finds that the goal of antitrust laws is to prevent the abuse of power by monopolies, stop anti-competitive conduct, and keep labor markets open and fair. In addition, it finds that courts have excessively narrowed the law so that it is too difficult to prove a firm has monopoly power, and that it should be easier to bring class actions against monopolistic conduct. The bill is designed to restore the original intent of the Donnelly Act.

What does the bill actually do? SB 933A creates a framework so that dominant firms with market power, whether on the selling, distribution, or buying side, are held accountable for abusing their power. This is accomplished through implementing what is known as an

“abuse of dominance” standard, rather than the current consumer welfare standard, which requires stricter proof of monopolization.

Applying an abuse of dominance standard is a significant change, allowing New Yorkers to challenge many of the practices that have led to today’s concentrated economy and that current antitrust law and precedent allow to go unchecked.

The bill also closes a loophole in the Donnelly Act that harms New York’s ability to bring cases against single-firm conduct; currently, New York antitrust law is not explicit that single-firm actions can be prosecuted.

How will this affect most businesses? Only a small proportion of firms will have any changes to their legal obligations, as most firms do not have market power. The main thing this legislation will do for businesses in New York is provide tools for addressing abusive arrangements to which they are often subjected. Most businesspeople will find that gatekeeping distributors, buyers, and sellers will find it harder to mistreat them, and pricing for their inputs will become more transparent.

How does a firm become dominant? In general, dominance means dramatic bargaining power for a firm in a market. For example, a firm is dominant if it has: a high market share (above 40 percent); sets prices, terms, conditions, or standards across a market; can dictate non-price contractual terms without compensation; sets wages across a market without competition; or can cut product quality without facing competitive pressure.

What happens if a firm is dominant? Being dominant is not illegal. It just means that a firm has special obligations. If a firm is dominant, it may not abuse its position.

What constitutes “abuse”? The legislation defines it as: foreclosing or limiting competition by leveraging a dominant position from one market into another; refusing to deal with another firm, which results in excluding that firm from the market; or imposing contracts on employees that prevent them from finding different or better work. In addition, the Attorney General can craft rules defining abuse of dominance: this may include rules on practices such as predatory pricing, self-preferencing, and predatory surveillance that current law makes difficult to police. Before a rule takes effect, the state legislature may vote it down with a denial by resolution.

What if a corporation does abuse its position? The law allows enforcers or private actors to bring suits against the dominant corporations. It allows for treble damages plus attorneys fees, with a four year statute of limitations, and for both direct and indirect purchasers or sellers to recover damages.

Are there any exceptions to which entities could be "dominant"? The legislation doesn't apply to most agricultural cooperatives or labor unions and doesn't affect collective bargaining negotiations.

How does the bill protect workers? By explicitly pointing to labor market dominance as worthy of antitrust scrutiny. This includes not just the ability to set wages without competition, but also the ability to impose no-poach or non-disclosure agreements onto workers. Corporations with a 30 percent labor market share could be found to be dominant when it comes to treatment of workers. Highly-concentrated labor markets are associated with significantly lower wages for workers.

That seems like a big deal, right? Yes, antitrust enforcers have traditionally not enforced antitrust laws on behalf of workers whose wages are pushed down due to the dominant power of their employers. New York would be the first state with such explicit protections for workers.

What does the bill do about mergers? It modifies merger law for New York, requiring two things: merging parties above certain thresholds must notify the New York Attorney General of their intent to merge, and when considering whether to approve that merger, the Attorney General must take into account its potential effects on labor markets.

What about its effect on hospitals? Hospitals are currently subject to antitrust laws, so a change to antitrust law could affect dominant hospitals who abuse their power, or could help hospitals subject to abuse by dominant firms. Hospitals in competitive markets tend to offer high quality services to patients and good opportunities to healthcare workers. By contrast, concentrated hospital markets have significantly worse patient outcomes, including higher mortality rates. Health care is one of the more concentrated sectors in the American economy, so better protecting the health of New Yorkers could be one beneficial outcome of this legislation.

And seriously, this isn't going to harm small businesses? Seriously. Large corporations are using small businesses as a shield to protect their own anticompetitive behavior, but most small and medium firms simply do not have enough market power to fall under this bill's purview.

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