

Second Supplement to Memorandum 2023-7

**Antitrust Law: Status Report
(Letter from American Economics Liberties Project)**

The Commission has received a letter commenting on its study of antitrust law. The letter is from Lee Hepner, of the American Economics Liberties Project. It is attached.

Respectfully submitted,

Brian Hebert
Executive Director

January 18, 2023

Mr. Brian Herbert
Executive Director
California Law Review Commission
c/o UC Davis School of Law
400 Mark Hall Drive
Davis, CA 95616

Re: Support for ACR-95 and Introductory Comments

Honorable Chair Carrillo and Commission Members:

In the matter of your ongoing study of California antitrust law, we at the American Economic Liberties Project write to thank you for your deliberations and to provide some preliminary comments in furtherance of your study.

By way of background, the American Economic Liberties Project is a non-profit, non-partisan organization advocating for policy tools – including reforms to federal and state antitrust laws – that challenge corporate dominance over markets and society. We were early supporters of Assembly Concurrent Resolution 95 (Cunningham; Wicks),¹ which initiated this Study B-750, and were among the core organizational sponsors providing policy and drafting input to New York State’s 21st Century Antitrust Act, which is referenced in ACR 95.

Legislation like the NY 21st Century Antitrust Act would accomplish a number of valid policy goals. It would:

- **Protect consumers and small businesses from dominant corporations that act unilaterally to stifle competition.** While so-called “single firm” conduct – like refusals to deal, self-preferencing and predatory pricing – were once at the forefront of federal antitrust enforcement, they have fallen out of favor in the wake of a string of legal decisions that have narrowed the application of federal antitrust laws. Model “abuse of dominance” legislation would reinvigorate enforcement against single firm conduct and restore protections to consumers, workers and small businesses who suffer associated harms.
- **Create a level playing field for small businesses.** Dominant corporations have long wielded their concentrated market power to box out small businesses, including via the

¹ Assembly Concurrent Resolution 95:
https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202120220ACR95

aforementioned single firm conduct. When large corporations self-preference, or refuse to deal or offer access to essential facilities, the ability of small businesses to participate in markets is foreclosed. Model abuse of dominance legislation would inject fairness into a system that has long left small businesses at a competitive disadvantage, and enhance their power to block abusive behavior by dominant corporations.

- **Protect workers with an explicit prohibition on abuse of “monopsony” power.** While antitrust laws apply in theory to both product and labor markets, enforcement efforts have overwhelmingly focused on preventing harm to consumers via the monopolization of product markets. An effective “abuse of dominance” standard would expressly prohibit the abuse of “monopsony,” or buyer-side market power, and create bright line rules to curb anticompetitive harm to workers.
- **Focus on the anticompetitive abuse of corporate power, rather than its formation.** Courts have long shifted the focus of antitrust laws toward the formation or entrenchment of market power, and away from the types of conduct that amount to the exploitation of that power. An effective “abuse of dominance” standard would create bright line rules that prohibit anticompetitive conduct like refusals to deal, monopoly leveraging, and predatory pricing.
- **Create clear, objective methods for proving “dominance.”** Antitrust enforcement has long been hobbled by complex debates surrounding market definition. The resulting costs required for expert testimony and unpredictability of judicial discretion in turn create barriers to relief for consumers, small businesses and workers harmed by objectively anticompetitive conduct. An effective “abuse of dominance” standard would create an objective burden of proof for determining of dominance, based on a firm’s ability to unilaterally engage in certain forms of anticompetitive conduct.

These improvements to existing law are far from comprehensive, and we encourage the Commission to review, among other foundational documents, the House Subcommittee on Antitrust’s Investigation of Competition in Digital Markets.² We also submit by incorporation herein the American Economic Liberties Project’s Guide for State Lawmakers on Reforming Antitrust Policy to Challenge Corporate Power.³

Avoiding Pitfalls of the “Technology Company” Limitation

We’d also like to take this opportunity to discourage the Commission from revising the law to apply only to “technology companies.” While “Big Tech” has been at the center of conversations surrounding the abuse of corporate power, it is far from the only industry capable of such abuse. A recent White House Executive Order on Promoting Competition in the

² Investigation of Competition in Digital Markets, House Subcommittee on Antitrust, Majority Staff Report and Recommendations: <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf>

³ Reforming Antitrust Policy to Challenge Corporate Power: A Guide for State Lawmakers, American Economic Liberties Project: http://www.economicliberties.us/wp-content/uploads/2022/09/State-Antitrust-Toolkit_FINAL.pdf

American Economy⁴ finds that over 75% of U.S. industries are now controlled by a small number of large corporations, from healthcare, to financial services, agriculture and beyond. Furthermore, we find ourselves in an era where many industries now rely on highly-complex technologies, rendering a definitional challenge for “technology company” that threatens to swallow the thrust of the rule.

Narrowing the legislation to apply only to Big Tech companies would also unnecessarily exclude numerous other industries and constituent stakeholders who have been impacted by the crisis of corporate concentration – from retail grocers to nurses and beyond.

Relationship with CA Unfair Competition Law & Unfair Practices Act

Finally, while ACR 95 references California’s Unfair Competition Law (Cal. Bus. & Prof. Code Sec. 17200 et seq.) and Unfair Practices Act (Cal. Bus. & Prof. Code Sec. 17000 et seq.) as existing frameworks for addressing some of the harms addressed by an “abuse of dominance” standard, we understand and agree that neither expressly addresses monopolization, corporate dominance, or the adequacy of remedies to deter abusive conduct. We encourage the Commission to approach their study with an eye toward where other gaps exist in the existing law and jurisprudence.

We intend to remain engaged in this conversation and will make ourselves available to discuss our experience with New York State’s parallel efforts and the deficiencies of existing antitrust laws more generally.

Sincerely,

Lee Hepner
Legal Counsel
American Economic Liberties Project

Pat Garofalo
Director, State & Local Policy
American Economic Liberties Project

Cc: CA Assemblymember Jordan Cunningham (AD-35)
CA Assemblymember Buffy Wicks (AD-14)

⁴ White House Executive Order on Promoting Competition in the American Economy:
<https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>