

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

ACR 95 (Cunningham)
Version: July 8, 2021
Hearing Date: June 28, 2022
Fiscal: Yes
Urgency:
CK

SUBJECT

California Law Revision Commission: studies: antitrust

DIGEST

This bill directs the California Law Revision Commission to study whether revisions to the law should be made to address antitrust and market competition concerns.

EXECUTIVE SUMMARY

The California Law Revision Commission (CLRC) was created in 1953 and tasked with the responsibility for a continuing substantive review of California statutory and decisional law. The CLRC studies the law in order to discover defects and make related recommendations to the Legislature for needed reforms. The CLRC's enabling statute recognizes two types of topics the CLRC is authorized to study: (1) those that the CLRC identifies for study and lists in the Calendar of Topics that it reports to the Legislature; and (2) those that the Legislature assigns to the CLRC directly, by statute or concurrent resolution. Once the CLRC identifies a topic for study, it cannot begin to work on the topic until the Legislature, by concurrent resolution, authorizes the CLRC to conduct the study. Direct legislative assignments have become much more common in recent years, and many of the CLRC's recent studies were directly assigned by the Legislature.

In recent years, there has been growing concern about market concentration in digital markets and the lack of adequate regulatory oversight over monopolies in this new age of technology. As the federal government and other states have introduced legislation to address these problems through changes to antitrust laws, this resolution directs the CLRC to undertake a review of California law to determine whether revisions should be made to address these concerns.

The resolution is author sponsored. It is supported by various groups, including Media Alliance. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Provides, under the federal Sherman Act, that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is illegal. (15 U.S.C. § 1.)
- 2) Authorizes the CLRC to study topics approved by concurrent resolution of the Legislature. (Gov. Code § 8293.)
- 3) Prohibits an employee or member of the CLRC, with respect to any proposed legislation concerning matters assigned to the CLRC for study, to advocate for the passage or defeat of the legislation by the Legislature or the approval or veto of the legislation by the Governor or appear before any committee of the Legislature unless requested to do so by the committee or its chairperson. (Gov. Code § 8288.)
- 4) Establishes the Cartwright Act and therein prohibits unreasonable restraints on commerce. (Bus. & Prof. Code § 16700 et seq.)
- 5) Defines, for purposes of the Cartwright Act, a “trust” as a combination of capital, skill, or acts by two or more persons for any of the following purposes:
 - a) to create or carry out restrictions in trade or commerce;
 - b) to limit or reduce the production, or increase the price of merchandise or of any commodity;
 - c) to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce, or any commodity;
 - d) to fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use, or consumption in this State; or
 - e) to make, enter into, execute, or carry out any contracts, obligations, or agreements of any kind or description, by which they make certain agreements, including price fixing. (Bus. & Prof. Code § 16720.)
- 6) Provides, with limited exceptions, that every trust is unlawful, against public policy and void. (Bus. & Prof. Code § 16726.)
- 7) Establishes the Unfair Competition Law (UCL) and therein defines “unfair competition” to mean and include any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of

Division 7 of the Business and Professions Code (False Advertising Law). (Bus. & Prof. Code § 17200 et seq.)

- 8) Provides that any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. (Bus. & Prof. Code § 17203.)
- 9) Prohibits, under the Unfair Practices Act, acts which injure competition, including sales below cost, locality discrimination, and secret rebates or unearned discounts. (Business & Professions Code Section 17000 et seq.)

This bill:

- 1) Makes the following findings:
 - a) On June 3, 2019, the House of Representatives' Judiciary Committee's Subcommittee on Antitrust, Commercial and Administrative Law, launched a bipartisan investigation into competition in digital markets which in part concluded: "...we firmly believe that the totality of the evidence produced during this investigation demonstrates the pressing need for legislative action and reform";
 - b) The American Antitrust Institute published a policy brief in 2016 finding that "[t]here is a growing consensus that inadequate antitrust policy has contributed to the concentration problem and associated inequality effects";
 - c) In February 2017, the director of the Open Markets program at the New America Foundation, stated: "The idea that America has a monopoly problem is now beyond dispute";
 - d) Concern about market power concentration has reached even the so-called "Chicago School," leading The Economist magazine's April 15, 2017, headline, about an antitrust conference held there, to read "The University of Chicago worries about a lack of competition. Its economists used to champion big firms, but the mood has shifted";
 - e) Federal legislative reforms are being considered. On February 4, 2021, Senator Amy Klobuchar introduced a comprehensive bill called the "Competition and Antitrust Law Enforcement Reform Act of 2021" that would make wholesale changes to federal antitrust jurisprudence;
 - f) While much of current federal antitrust law is premised upon market concentration leading to a rise in prices, the business models of some technology companies in part relies upon consumers paying with their

- data rather than their dollars, such that price alone may no longer be a viable basis upon which to base antitrust analysis and enforcement;
- g) New York State is considering legislation that would fundamentally rewrite its antitrust laws. The legislative findings in the proposed act in part state that “The legislature hereby finds and declares that there is great concern for the growing accumulation of power in the hands of large corporations ... It is time to update, expand and clarify our laws ...”;
 - h) California should be uniquely sensitive to the threat of market concentration because much of early state history was shaped by monopoly power wielded by the “Big Four” of Huntington, Crocker, Stanford, and Hopkins, who, through the Central Pacific Railroad, acted as monopolistic gatekeepers for businesses that needed to bring goods to market. California therefore should not depend on federal laws or federal enforcement to protect its citizens from monopolistic anticompetitive behavior;
 - i) No California statute deals expressly with monopolization or attempted monopolization by one giant company;
 - j) California’s primary antitrust statute, the Cartwright Act, unlike Section 2 of the federal Sherman Antitrust Act of 1890, does not apply to monopoly conduct of single powerful companies, and, for the same reason, does not address mergers and contains statutory exemptions that lessen its impact;
 - k) While arguably such claims may be brought under California’s Unfair Competition Law or California’s Unfair Practices Act, neither expressly addresses monopolization and foundational issues such as what is needed for standing to bring such claims and the damages available are unsettled; and
 - l) The CLRC is authorized to study topics that have been referred to the commission for study by concurrent resolution of the Legislature or by statute.
- 2) Resolves that the Legislature approves for study by the CLRC the following new topics:
- a) whether the law should be revised to outlaw monopolies by single companies as outlawed by Section 2 of the Sherman Act, as proposed in New York State’s “Twenty-First Century Anti-Trust Act” and in the “Competition and Antitrust Law Enforcement Reform Act of 2021” introduced in the United States Senate, or as outlawed in other jurisdictions;
 - b) whether the law should be revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices; and

- c) whether the law should be revised in any other fashion such as approvals for mergers and acquisitions and any limitation of existing statutory exemptions to the state's antitrust laws to promote and ensure the tangible and intangible benefits of free market competition for Californians.
- 3) Resolves that, before commencing work on the project, the CLRC submit a detailed description of the scope of work to the chairs and vice chairs of the Assembly and Senate Committees on Judiciary, and any other policy committee that has jurisdiction over the subject matter of the study, and if during the course of the project there is a major change to the scope of work, the CLRC submit a description of the change.

COMMENTS

1. Stated intent of the bill

According to the author:

The Cartwright Act was written half a century before the idea of computer networks even existed, and cannot possibly be expected to give government the tools it needs to ensure a fair and competitive modern marketplace. California's antitrust statutes are ripe for modernization and the nonpartisan California Law Revision Commission is the best body to advise the legislature on how to do that.

2. Rising concern with anticompetitive markets, especially in the digital world

In June 2019, the House Committee on the Judiciary initiated a bipartisan investigation into the state of competition online, spearheaded by the Subcommittee on Antitrust, Commercial and Administrative Law.¹ The Subcommittee's report urged that the relevant laws "must be updated to ensure that our economy remains vibrant and open in the digital age." The Subcommittee "uncovered evidence that the antitrust agencies failed, at key occasions, to stop monopolists from rolling up their competitors and failed to protect the American people from abuses of monopoly power." Looking back and forward, the over 450-page report found:

Over the past decade, the digital economy has become highly concentrated and prone to monopolization. Several markets investigated by the Subcommittee—such as social networking, general online search, and online advertising—are dominated by just one or two firms. The

¹ Subcommittee on Antitrust, Commercial, and Administrative Law, *Investigation of Competition in Digital Markets* (June 2019) House Committee on the Judiciary, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

companies investigated by the Subcommittee – Amazon, Apple, Facebook, and Google – have captured control over key channels of distribution and have come to function as gatekeepers. Just a decade into the future, 30% of the world’s gross economic output may lie with these firms, and just a handful of others.

In an article in *The Atlantic*, entitled *America’s Monopolies Are Holding Back the Economy*, the director of the Open Markets program at New America makes the stakes and scope clear:

Monopoly is a main driver of inequality, as profits concentrate more wealth in the hands of the few. The effects of monopoly enrage voters in their day-to-day lives, as they face the sky-high prices set by drug-company cartels and the abuses of cable providers, health insurers, and airlines. Monopoly provides much of the funds the wealthy use to distort American politics. . . .

The idea that America has a monopoly problem is now beyond dispute. Since 2008 there have been more than \$10 trillion in mergers, and the pace of deal-making continues to accelerate, with 2015 setting a record for the most mergers in a year and October 2016 setting the record for the most mergers in a month.²

In response to these concerns, legislation has been introduced at the state and federal level. In February 2021, Senator Amy Klobuchar introduced the Competition and Antitrust Law Enforcement Reform Act of 2021, which, in part, grants the DOJ and FTC new authority to seek substantial civil monetary penalties for antitrust violations and prohibits dominant firms from engaging in “exclusionary conduct that presents an appreciable risk of harming competition.” Senator Klobuchar explained the need:

Competition and effective antitrust enforcement are critical to protecting workers and consumers, spurring innovation, and promoting economic equity. While the United States once had some of the most effective antitrust laws in the world, our economy today faces a massive competition problem. We can no longer sweep this issue under the rug and hope our existing laws are adequate. The Competition and Antitrust Law Enforcement Reform Act is the first step to overhauling and modernizing our laws so we can effectively promote competition and protect American consumers.³

² Barry C. Lynn, *America’s Monopolies Are Holding Back the Economy* (February 22, 2017) *The Atlantic*, <https://www.theatlantic.com/business/archive/2017/02/antimonopoly-big-business/514358/>.

³ Press Release, *Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement* (February 4, 2021) Senator Klobuchar, <https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement>.

Legislation has also been introduced in New York State. The *Twenty-First Century Anti-Trust Act* would, among other things, make it unlawful for any person or persons to monopolize or monopsonize any business, trade or commerce or the furnishing of any service in the state.⁴ It would further make it 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.

3. A thoughtful step forward

This resolution recognizes the concerns detailed above and the steps that other jurisdictions are taking, including introduction of sweeping legislation to reform antitrust and similar competition laws. The resolution resolves that the right path forward should be studied by the CLRC. Specifically, that the commission should determine whether the law should be updated to outlaw monopolies as done in other laws or revised in other ways to address such things as approvals of mergers and acquisitions. Specific to the digital market context, the CLRC is tasked with studying whether the law in the context of the technology industry should be revised so that “analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices.”

This marks a first, thoughtful step forward to assess an issue that has raised considerable alarm throughout the country.

Media Alliance writes in support:

The proposed resolution points to a few key areas that are ripe for revision.

One of them is using price-setting power to define inadequate competition and the existence of monopoly or oligopoly power in a marketplace. While this certainly one cogent definition of inadequate competition, the growth of large and powerful technologies that provide their primary services free of charge, while operating secondary markets in data sales or advertising, has made that definition a mismatch with several heavily dominated technology marketplaces. When we can clearly see dominant market power as we do with online shopping and social media platforms, but cannot frame how those marketplaces work in our existing definitions of anti-competitive behavior and monopoly, then we force the use of statutes like the UCL to be distorted to try to address what are, in essence, issues of antitrust. We can and should do better.

⁴ New York State Senate, Assembly Bill A1812A,
<https://www.nysenate.gov/legislation/bills/2021/A1812>.

Another is mergers and acquisitions. Again, what we call “classical antitrust” effectively defined competition shortfalls in vertical or horizontal combinations for 19th and 20th century business models. But they have struggled for more than two decades to be applied to the mega-mergers in already highly concentrated marketplaces that are, in some ways, much more difficult to define than railroads or coal mining and yet have many of the same negative effects of the empires of old.

None of this is to say that outcomes can or should be predicted in advance, nor that laws should be rewritten with specific targets in mind. But the tools available to regulators to deal with problems need to be up to date, and this is one tool that is not. It is appropriate to have the Commission review and make recommendations for improvements.

SUPPORT

The American Economic Liberties Project
CA Conference of Machinists
California Labor Federation
California Teamsters Public Affairs Council
Consumer Attorneys of California
Consumer Federation of California
Consumer Watchdog
Foundation for Fairness in Commerce
Media Alliance
UFCW Western States Council
United Steelworkers District 12
Writers Guild of America West

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: SCR 92 (Leyva, 2022) authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to revise California law to remedy any defects in its language or impact that discriminate on the basis of sex. This bill is currently on the Senate Floor.

Prior Legislation:

ACR 173 (Gallagher, Res. Ch. 26, Stats. 2020) authorized the CLRC to continue its study of 13 topics.

AB 1790 (Wicks, Ch. 635, Stats. 2019) requires the terms and conditions of marketplaces, physical or electronic places where sellers offer services or goods for delivery in California, to meet specified requirements. This bill requires marketplaces to communicate with sellers its decision-making process with respect to various terms and processes.

SCR 91 (Roth, Res. Ch. 158, Stats. 2018) granted approval to the CLRC to continue its study of designated topics that the Legislature previously authorized or directed the CLRC to study; authorized and requested the CLRC to study and report on topics relating to hazardous waste control and hazardous substances; provided that before commencing work on any project within the list of topics authorized for study by the Legislature, the CLRC shall submit a detailed description of the scope of work to the Senate and Assembly Committees on Judiciary and any legislative policy committee with jurisdiction over the study's subject matter; and expressly allowed the CLRC to provide copies of its recommendations to members of a legislative policy committee and invited CLRC staff to hearings for the purpose of explaining recommendations and answering questions from committee members.

ACR 148 (Chau, Res. Ch. 150, Stats. 2016) authorized the CLRC to continue its studies on whether specified laws should be revised; authorized an additional study of the California Public Records Act; provided that before commencing work on any project within the list of topics authorized for study by the Legislature, the CLRC shall submit a detailed description of the scope of work to the Senate and Assembly Committees on Judiciary and any legislative policy committee with jurisdiction over the study's subject matter; and expressly allowed the CLRC to provide copies of its recommendations to members of a legislative policy committee and invite CLRC staff to hearings for the purpose of explaining recommendations and answering questions from committee members.

SCR 54 (Padilla, Res. Ch. 115, Stats. 2013) authorized the CLRC report on and prepare recommended legislation concerning statutes governing access by state and local government agencies to customer information from communications service providers.

AB 567 (Wagner, Res. Ch. 15, Stats. 2013) repealed the requirement that the CLRC make the decennial recommendations, and retained the CLRC's general authority to study, review, and make recommendations regarding the enforcement of judgments law.

ACR 125 (Papan, Res. Ch. 167, Stats. 2002) authorized the CLRC to study, report on, and prepare recommended legislation concerning the issue of financial privacy to address protection and control of a consumer's personal information and provide both administrative and civil penalties.

PRIOR VOTES:

Assembly Floor (Ayes 73, Noes 0)

Assembly Appropriations Committee (Ayes 16, Noes 0)

Assembly Judiciary Committee (Ayes 10, Noes 0)
