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# California Antitrust & Unfair Competition Law



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# CALIFORNIA ANTITRUST & UNFAIR COMPETITION LAW

## I. SUMMARY AND OVERVIEW

Since the third edition of this book was published over two years ago, the major development has been the passage of Proposition 64 by the California voters on November 2, 2004. Prior to its passage, private parties could bring actions under the Unfair Competition Law (“UCL”), individually or on behalf of the general public, without satisfying the requirements for a class action and even though they had suffered no injury or damage from the challenged conduct. Proposition 64 put an end to this. It amended the UCL to provide that private actions may be brought only by a person “who has suffered injury in fact” and “has lost money or property as a result of unfair competition.” Bus. & Prof. Code §§ 17204, 17535. Proposition 64 further amended the UCL to provide that a private party “may pursue representative claims or relief on behalf of others only if the claimant meets the [foregoing] standing requirements . . . and complies with Section 382 of the Code of Civil Procedure . . .” Bus. & Prof. Code §§ 17203, 17535. The requirements for a class to be certified under Section 382 are analogous to Federal Rule 23, and include predominance of common issues, adequacy of representation and the notice and other due process safeguards often absent in representative actions. The issue of whether Proposition 64 applies to actions pending at the time of its passage, or only to later filed actions, has yet to be resolved by the Supreme Court, but most Courts of Appeal thus far have applied it to pending actions.

In addition to Proposition 64, California courts have also issued significant decisions dealing with class actions, federal preemption, below cost pricing and other subjects which will be covered in this Fourth Edition. These include *J.P. Morgan v. Superior Court*, 113 Cal. App. 4<sup>th</sup> 195 (2003) and *Cipro Cases I & II*, 121 Cal. App. 4<sup>th</sup> 402 (2004), dealing with the certification of indirect purchaser classes, *Fisherman’s Wharf Bay Cruises v. Superior Court*, 114 Cal. App. 4<sup>th</sup> 309, 333 (2004), dealing with below cost pricing and the standards for exclusive dealing and tying under the Cartwright Act, and several decisions holding that Cartwright and UCL claims may be preempted by federal law.

This Fourth Edition also contains an Appendix which sets forth the key statutory antitrust and competition laws found at Sections 16600, *et seq.* of the Business & Professions Code. They consist of the Cartwright Act, the Unfair Practices Act (“UPA”), and the Unfair Competition Law (“UCL”), as well as various statutory restrictions on covenants not to compete. The Cartwright Act prohibits trusts, which are defined as a combination of capital, skill or acts by two or more persons to, *inter alia*, create or carry out restrictions in trade or commerce. Bus. & Prof. Code § 16720. It also prohibits sales or leases of goods or commodities on the condition that the purchaser not deal in the goods of a competitor where the effect is to substantially lessen competition or tend to create a monopoly in any line of commerce. Bus. & Prof. Code § 16727. The UPA prohibits sales below cost, locality discrimination, and secret rebates or un-

earned discounts which injure competition. Bus. & Prof. Code § 17000, *et seq.* The UCL generally prohibits any unlawful, unfair, or fraudulent business act or practice, as well as deceptive or misleading advertising. Bus. & Prof. Code § 17200, *et seq.*

The statutes alone, however, are rather vague and one must usually resort to case law to determine what is or is not permitted. There is a body of published case law from both California's Supreme Court and its Courts of Appeal. Although the Cartwright Act is not based on or derived from the federal Sherman Act (*State ex rel. Van de Kamp v. Texaco*, 46 Cal 3d 1147, 1162-64 (1988)), California courts have continued to view federal precedents as persuasive authority. *Aguilar v. Atlantic Richfield Corp.*, 25 Cal. 4<sup>th</sup> 826 (2001) (embracing federal conspiracy and summary judgment standards); *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4<sup>th</sup> 363 (2001) (adopting federal *Colgate* doctrine to permit unilateral terminations of retailers who do not comply with minimum resale prices set by the manufacturer.)

Like federal antitrust law, California treats some conduct and agreements which presumptively raise prices or restrict output as *per se* illegal. Other agreements are analyzed under the rule of reason. An extensive factual analysis of market conditions and business justifications is necessary to determine their legality. California also treats horizontal collusion among competitors more harshly than vertical restraints and is more likely to apply criminal penalties to such collusion.

Despite the passage of Proposition 64, the most ubiquitous aspect of California antitrust law will probably remain the Unfair Competition Law ("UCL"). Bus. & Prof. Code § 17200, *et seq.* It generally prohibits any "unlawful, unfair or fraudulent" conduct. Courts have interpreted these terms rather broadly although there is a discernible trend in recent years to cut back on the scope of the UCL. *See Cel-Tech Communications v. L. A. Cellular*, 20 Cal. 4<sup>th</sup> 163 (1999). Proposition 64, moreover, had no impact on claims that public prosecutors may bring under Section 17200, for civil penalties or injunctive relief, except to provide that civil penalties collected can be used only to enforce consumer protection laws. In fact, Proposition 64 explicitly exempted public prosecutor actions from the standing and class certification requirements now imposed on private actions. Thus, the UCL remains a formidable tool in the hands of an aggressive prosecutor.

California's price discrimination law, the Unfair Practices Act, also has some unusual wrinkles, such as those dealing with below cost pricing and the requirement that destroying competition must be defendant's "conscious objective." *Cel-Tech, supra*, 20 Cal. 4<sup>th</sup> at 175. Unlike its federal counterpart, the UPA is not limited to price discrimination on commodities. It also applies to services and intangibles, and may include intellectual property.

The penalties for violations of California antitrust laws can be severe. Treble damages and recovery of attorney fees are available for both private and government enforcement. Criminal penalties include fines of \$1 million for corporations and

\$250,000 and imprisonment for up to 3 years for individuals. While the UCL does not allow recovery of damages, it does permit injunctive relief and restitution. It also allows government enforcers to seek civil penalties of up to \$2,500 per violation. Bus. and Prof. Code § 17206(a).

Finally, California has aggressive government antitrust enforcement. It includes lawyers from both the Attorney General's office and district attorneys, particularly in the larger counties. In addition to vigorous civil and criminal prosecution of localized price fixing and other cartel behavior, the state enforcement authorities actively review mergers and acquisitions in conjunction with the federal enforcement agencies.

## II. JURISDICTIONAL ISSUES

California antitrust law applies to restraints imposed in interstate commerce that significantly affect state interests. *Younger v. Jensen*, 26 Cal. 3d 397, 405 (1980) (State Attorney General had authority to investigate possible state and federal antitrust violations in the marketing of natural gas that originates in Alaska); *R.E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal. App. 3d 653, 659 (1974). The existence of parallel federal investigations about the same subject does not preclude or preempt state laws or enforcement. *Younger v. Jensen*, *supra*; *California v. ARC America Corp.*, 490 U.S. 93 (1989). In practical terms, this means that California antitrust law can be applied to most interstate business activities.

In some cases, however, federal regulation of an area can be so pervasive as to preempt claims under the Cartwright Act or UCL under principles of field or conflict preemption. In *Public Utility District No. 1 of Snohomish County v. Dynegy Power Marketing*, 244 F.Supp. 2d 1072 (S.D. Cal. 2003), *aff'd*, 384 F.3d 756 (9<sup>th</sup> Cir. 2004), the court held that exclusive federal jurisdiction over wholesale electricity rates preempted Cartwright and UCL claims alleging anticompetitive practices with respect to such rates. *Accord*, *California v. Dynegy*, 375 F.3d 381 (9<sup>th</sup> Cir. 2004). Likewise, in *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 385 (1983), *cert. denied*, 466 U.S. 904 (1984), the Supreme Court held that the Cartwright Act does not apply to NFL rules governing the relationship between players, teams, and the NFL. It reasoned that, under the Commerce Clause, the burden imposed upon interstate commerce by applying state antitrust laws “outweighs the state interest in applying state antitrust laws to those relationships.” *Id.* at 372.

A California Court of Appeal recently dismissed state law antitrust and unfair competition claims based on the enforcement of allegedly invalid patents. It held that such claims presented substantial issues of patent law that are subject to exclusive federal jurisdiction. *Holiday Matinee v. Rambus Inc.*, 118 Cal. App. 4<sup>th</sup> 1413 (2004). The plaintiff alleged that Rambus persuaded a group of DRAM manufacturers to adopt certain features of DRAM as an industry standard while concealing the fact that it had secretly obtained patents covering the standard. Rambus then allegedly forced the

DRAM manufacturers to pay exorbitant royalties and filed “baseless” patent infringement lawsuits, all allegedly resulting in higher prices to consumers. Relying on *Hunter Douglas Inc. v. Harmonic Design*, 153 F. 3d 1318 (Fed Cir. 1998), the court concluded that issues of patent validity and infringement were central to the antitrust claims, and such issues were subject to exclusive federal jurisdiction.

The Unfair Competition Law was initially limited to acts of unfair competition “within this state.” The 1992 amendments to that statute deleted this phrase. Bus. & Prof. Code § 17203. While this expands the scope of the UCL to include some out of state activity, it does not reach claims of nonresidents based wholly on transactions occurring outside of California. *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214 (1999); *See generally Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906 (2001). Courts have likewise applied these principles to deny class certification on price fixing claims where the claims of the out of state class members do not have significant contacts with California. *J.P. Morgan & Co. v. Superior Court*, 113 Cal. App. 4th 195 (2003).

Other cases, however, show the reach of California law. In *Amarel v. Connell*, 202 Cal. App. 3d 137 (1988), the court applied California antitrust law to restraints imposed by rice trade with the Republic of Korea. It reversed a trial court ruling sustaining a demurrer on the ground that the application of state antitrust law in such circumstances would impermissibly intrude on the federal domain of foreign relations and foreign commerce. Where defendant’s only contacts with California, however, are through the Internet, this is not sufficient for jurisdiction in California even if defendant knows that its conduct may cause injury in California. *Pavlovich v. Superior Court*, 29 Cal. 4th 262 (2002).

### III. COMBINATION AND COLLUSION

Section 16720 of the Bus. & Prof. Code prohibits trusts, and is the Cartwright Act counterpart to Section 1 of the Sherman Act. Trusts are defined in Section 16720 as any “combination” of capital, skill or acts by two or more persons to, *inter alia*, carry out restrictions in commerce, prevent competition, or fix prices. Section 16720 applies to a wide variety of anticompetitive conduct, but applies only where there is proof of a “combination of resources of two or more independent entities for the purpose of restraining competition and preventing market competition.” *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256, 266 (1983); *see also Chavez v. Whirlpool Corp.* 93 Cal. App. 4th 363 (2001).

In some cases involving horizontal relationships (*e.g.*, competitors or potential competitors), the existence of a combination or conspiracy may be a fact issue. *Saxer v. Phillip Morris, Inc.*, 54 Cal. App. 2d 7, 19-22 (1975). In *Biljac Associates v. First Interstate Bank*, 218 Cal. App. 3d 1410 (1990), however, the court affirmed a summary adjudication of Cartwright Act and 17200 claims against banks which allegedly manipulated interest rates to middle market borrowers by tying them to the prime

rate. The key evidence upon which the court relied was declarations by defendants' own employees in which they denied sharing or receiving information from competitors *in advance* of announcing their own rates to the public. *See also Nova Designs, Inc. v. Scuba Retailers Ass'n.*, 202 F.3d 1088, 1092 (9th Cir. 2000) (granting summary judgment on conspiracy claims). By contrast, in *Cellular Plus, Inc. v. Superior Court*, 14 Cal. App. 4th 1224 (1993), the court concluded that meetings among defendants followed by uniform prices was sufficient to defeat a demurrer at the pleading stage. 14 Cal. App. 4th at 1239-40.

In *Aguilar v. Atlantic Richfield Corp.*, 25 Cal. 4th 826 (2001), the California Supreme Court affirmed a summary judgment in favor of defendants on a claim that defendant petroleum companies had conspired to raise the price of CARB gasoline in California. In doing so, the court embraced both the summary judgment and conspiracy standards from federal antitrust law as articulated in *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Under that standard, the plaintiff must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Ambiguous evidence that is as consistent with competition as conspiracy is not sufficient to prove a conspiracy or to defeat a summary judgment motion. In *Aguilar*, the defendants had submitted detailed declarations from their own officers that they made pricing decisions independently which shifted the burden to plaintiffs to show otherwise. The evidence offered by plaintiff—consisting of the dissemination of price information through a common independent company, use of common consultants to advise them with respect to pricing issues on CARB gasoline, and exchange agreements whereby they traded the same product among each other—was deemed ambiguous by the court and was not the type of evidence that excluded the possibility of independent action.

California courts also require a “high degree of particularity” in pleading conspiracy claims under the Cartwright Act. *Freeman v. San Diego Association of Realtors*, 77 Cal. App. 4th 171, 196 (1999). Where plaintiffs fail to do so, a demurrer may be sustained. *Id.* It is not sufficient for a plaintiff to merely parrot the words of the statute, but must make factual allegations of specific conduct and overt acts. *Chicago Title Ins. Co. v. Great Western Financial Corp.*, 69 Cal. 2d 305, 326-28 (1968); *Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d 93 (1969). *But see Quelimane v. Stewart Title*, 19 Cal. 4th 26 (1998) (allegation that title insurers combined to refuse to issue title insurance policies on tax defaulted properties sufficient to withstand demurrer).

With respect to vertical relationships (*e.g.*, parties at different levels of the distribution chain), the federal *Colgate* doctrine applies and California anti-trust laws do not generally prohibit a single trader from unilaterally determining with whom it will deal and the terms on which it will transact business. *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363 (2001) (no conspiracy where manufacturer announces a policy prescribing minimum resale prices for its products, monitors compliance, and simply terminates noncomplying dealers); *Gianelli v. Beck & Co.*, 172 Cal. App. 3d 1020

(1985) (unilateral termination of dealer for carrying competitive products did not violate § 16720). Where, however, the single trader pressures customers or dealers into adhering to resale price restrictions, territorial restraints, or unlawful exclusive dealing or tying arrangements, or reaches an actual agreement with them to do so, an unlawful combination may be established. *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256, 267 (1983); *See also Chavez v. Whirlpool Corp.*, 93 Cal. App. 4<sup>th</sup>, 363, 365-66 (2001). Although some *pre-Aguilar* and *Chavez* cases suggest that a combination may be found where a manufacturer terminates a dealer based on complaints from other dealers ( *See, e.g., R.E. Spriggs v. Adolph Coors Co.*, 94 Cal. App. 3d 419 (1979)), the validity of this authority is questionable in light of *Aguilar, supra*. *See also Nova Designs, Inc., supra*, 202 F. 3d at 1092 (cannot infer agreement from existence of complaints). Where the allegations of the Complaint show that the alleged conduct falls within the *Colgate* doctrine, a demurrer may be sustained to the complaint. *Chavez, supra*

As does Section 1 of the Sherman Act, Section 16720 requires two or more independent actors and does not reach single firm conduct. The federal courts have concluded that a corporation and its wholly owned subsidiaries, divisions, and agents are not separate entities for purposes of Section 1. *Copperweld v. Independence Tube Corp.*, 467 US 752 (1984). California courts now appear to have embraced the *Copperweld* rule, although courts may differ in its application to specific entities. *Compare Freeman v. San Diego Association of Realtors*, 77 Cal. App. 4th 171, 189-96 (1999), with *Freeman v. San Diego Association of Realtors*, 322 F. 3d. 1133 (9th Cir. 2003). *See also MacManus v. A.E. Realty Partners*, 195 Cal. App. 3d 1106, 1111-12 (1987) (tying case where court concluded that a Cartwright cause of action was stated regardless of whether defendants operated as separate entities). Other courts infer conspiracies only when there are individuals or entities “maintaining separate and independent interests.” *Bondi v. Jewels by Edward, Ltd.*, 267 Cal. App. 2d 672, 678 (1968); *Roth v. Rhodes*, 25 Cal. App. 4th 530, 544 (1994); *Kolling v. Dow Jones*, 137 Cal. App. 3d 709, 720 (1982).

#### **IV. PRICE FIXING**

Both horizontal and vertical price fixing are *per se* illegal under California law. Price fixing includes any tampering with prices or terms of sale. *Mailand v. Burckle*, 20 Cal. 3d 367, 376 (1978) (gasoline supplier fixed retail price in exchange for guaranteed profit to dealers). The *per se* rule also applies to buyer conspiracies where the defendants allegedly acted to depress the prices paid to sellers. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F. 3d 979, 987-88 (9th Cir. 2000). An exchange of current or future price information may also violate California antitrust law, with one court applying the rule of reason to such an exchange of price information. *People v. Nat'l Assn. of Realtors*, 120 Cal. App. 3d 459 (1981); *but see Aguilar, supra*, 25 Cal. 4th at 862-63 (noting that the dissemination of such information can sometimes be procompetitive).

Unlike federal law, no California court has yet re-examined the rule that maximum vertical price fixing is *per se* illegal. In *Kolling v. Dow Jones*, 137 Cal. App. 3d 709 (1982), the court affirmed a jury verdict of unlawful *maximum* price fixing based on evidence that a newspaper publisher pressured its distributors not to sell in excess of a suggested retail price, a practice called “overpricing.” See also *R.E. Spriggs v. Adolph Coors*, 94 Cal. App. 3d 419 (1979).

California has, however, adopted the federal *Colgate/Monsanto* standard for determining the existence of a conspiracy in a vertical price fixing case. *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363 (2001). In that case the defendant announced a policy prescribing minimum resale prices for its products, monitored compliance, and then terminated non-complying dealers. The court held such conduct fell within the *Colgate* doctrine, and affirmed judgment in favor of defendant.

In the intellectual property context, however, one federal court held that the Cartwright Act did not prohibit, under the *per se* rule or otherwise, a provision in a software licensing agreement which prohibited the licensee from selling the licensed program at less than a certain price to anyone other than the licensor. *LucasArts Entertainment Co. v. Humongous Entertainment Co.*, 870 F. Supp. 285 (N.D. Cal. 1993). The court relied on a federal decision, *United States v. General Electric*, 272 U.S. 476 (1926), which held that patent owners had the power to restrict prices at which licensees sold. Although the *General Electric* case has not been overruled, its continuing validity may be questionable, as the United States Supreme Court has twice split four to four on whether to overrule it and the federal enforcement authorities decline to follow it.

## V. TERRITORIAL AND CUSTOMER RESTRICTIONS

Agreements between competitors or potential competitors not to compete for customers or not to sell in designated territories are *per se* illegal. *Guild Wineries v. J. Sosnick & Son*, 102 Cal. App. 3d 627 (1980). The courts have viewed such agreements as invariably having the potential to restrict output and raise prices. By contrast, customer and territorial restrictions are analyzed under the rule of reason when they are imposed as vertical restraints by a manufacturer on its dealers. *Exxon Corp. v. Superior Court*, 51 Cal. App. 4th 1672, 1681-82 (1997). Thus, in the vertical context, such restraints may be upheld where the defendant lacks market power in the broader interbrand market (i.e., competing products from other manufacturers), and the restraints have a legitimate business purpose such as to prevent free riding or assure the manufacturer that its products will be sufficiently marketed. *Exxon v. Superior Court, supra*; *Gianelli v. Beck & Co.*, 172 Cal. App. 3d 1020, 1047-49 (1985); *Milton v. Hudson Sales Corp.*, 152 Cal. App. 2d 418, 443-45 (1957).

In *Exxon v. Superior Court, supra*, plaintiffs were franchisees of Exxon and alleged that Exxon compelled them to buy gasoline from Exxon at prices higher than Exxon sold to jobbers who in turn sold to stations competing with plaintiffs. The

Exxon jobbers were forbidden to sell to plaintiffs, and the plaintiffs were effectively precluded from buying other brands of gasoline since to do so they had to install separate tanks and pumps, an economically prohibitive arrangement. Nonetheless, noting that Exxon accounts for less than 10% of the gasoline market, the court reversed a lower court order denying summary judgment to Exxon. In doing so, it rejected plaintiffs' arguments that a single brand of gasoline could constitute a relevant antitrust market, and also held there was no "lock in" to Exxon gas from the perspective of consumers. 51 Cal. App. 4th at 1684-86. The court went on to state that plaintiffs' possible remedy was for oppressive conduct arising from a contractual relationship, not a claim under the antitrust laws.

In dual distribution situations—where the manufacturer also competes with its own wholesalers or distributors—one California case, contrary to federal law, treats territorial and customer restrictions as horizontal and thus *per se* illegal. In *Guild Wineries & Distilleries v. J. Sosnick & Son*, 102 Cal. App. 3d 627 (1980), the defendant manufacturer vertically integrated forward and took over the operations of one of its wholesalers. It then tried to persuade another wholesaler not to compete with it for the business of a single large customer. The court treated this as a *per se* illegal horizontal restraint, and held that the rule of reason applies only when the restriction is "purely vertical." 102 Cal. App. 3d at 635; compare *Dimidowich v. Bell & Howell*, 803 F. 2d 1473 (9th Cir. 1986), modified on other grounds, 810 F. 2d 1517 (9th Cir. 1987) (refusing to follow *Guild Wineries* in a Cartwright Act challenge to dual distribution). Although *Guild Wineries* has not been overruled, it is now likely that the federal rule would be adopted for Cartwright Act cases. See *Aguilar, supra*.

## VI. EXCLUSIVE DEALING AND TYING ARRANGEMENTS

Exclusive dealing and tying may be challenged under either Section 16720 or Section 16727 of the Business & Professions Code. Section 16720 is basically the counterpart of Section 1 of the Sherman Act and reaches all "unreasonable" restraints of trade among two or more persons. Section 16727 provides, *inter alia*, that it is unlawful to sell or lease goods, or give a rebate or price discount, on the condition that the purchaser not deal in goods of a competitor where the effect is to substantially lessen competition or tend to create a monopoly. Section 16727 is a carbon copy of Section 3 of the Clayton Act (15 USC § 14) and applies only to commodities, not services or intangibles. Like its federal counterpart, it does not prohibit all exclusive dealing contracts. Rather, California courts apply the rule of reason and invalidate only those with the requisite anticompetitive effects. *Gianelli Distributing Co. v. Beck & Co.*, 172 Cal. App. 3d 1020 (1985).

The key issues under the rule of reason in exclusive dealing cases are whether defendant has market power in the relevant market, and how much of the market is foreclosed by the exclusive arrangements. *Redwood Theatres v. Festival Enterprises*, 200 Cal. App. 3d 687 (1988). If defendant has a small market share, or otherwise lacks market power, then it is unlikely that the exclusivity requirement will violate the

Cartwright Act. *Kim v. Servosnax*, 10 Cal. App. 4th 1346 (1992). While 10 percent or less of the market is clearly not sufficient for market power (*Exxon Corp. v. Superior Court*, 51 Cal. App. 4th 1672, 1682-84 (1997); *Roth v. Rhodes*, 25 Cal. App. 4th 530 (1994)), one court found that 16 % was enough to raise a triable issue of fact in light of the specific factual situation presented. *Redwood Theatres, supra*, 200 Cal. App. 3d at 713. Another court vacated a summary judgment for defendant where the evidence showed it had a large market share and had written exclusive dealing contracts that foreclosed 20% of the market. *Fisherman's Wharf Bay Cruises v. Superior Court*, 114 Cal. App. 4th 309, 333 (2004).

Exclusive distributorships which prohibit only intrabrand competition (e.g., where manufacturer prohibits its dealers from selling its own products in competition with each other) are unlikely to violate California antitrust law. *R. E. Spriggs v. Adolph Coors*, 94 Cal. App. 3d 419 (1979); *Martikian v. Kyong Wan Hong*, 164 Cal. App. 3d 1130, 1134 (1985); *Great Western Distillery v. John A. Wathen Distillery*, 10 Cal. 2d 442 (1937).

One species of exclusive dealing is tying. This occurs when a seller sells one product on the condition that the purchaser also buy a second product from it. Tying may be *per se* illegal if the seller has market power over the first product and a substantial amount of commerce was affected in the sale of the second product. *Suburban Mobile Homes v. AMFAC Communities*, 101 Cal. App. 3d 532 (1980). Tying arrangements may be challenged under either Section 16720 or 16727 of the Cartwright Act. Section 16727, however, is limited to commodities. *Morrison v. Viacom*, 66 Cal. App. 4th 534, 546 (1998). Moreover, in *Morrison, supra*, the court stated in dicta that the *per se* rule is satisfied under § 16727 if *either* the market power *or* substantial commerce tests are satisfied. 66 Cal. App. 4th at 542. Under § 16720, both tests must be satisfied. *Id.*

For tying to exist, however, there must be two separate products. In *People v. National Association of Realtors*, 120 Cal. App. 3d 459 (1981), the court stated that the two product test is satisfied where the products are sold separately as well as together and buyers are, or can be, charged separate prices. *Id.* at 470-71. It thus concluded that a multiple listing service for real estate was a separate product from a real estate board membership for tying purposes. *But see Freeman v. San Diego Assn. of Realtors*, 77 Cal. App. 4th 171, 183-88 (1999) (multiple listing service and related services not separate products for tying purposes). In *Lloyd Design v. Mercedes Benz*, 66 Cal. App. 4th 716 (1998), the court held the floor mats placed in a car by the manufacturer or its distributor did not constitute a separate product from the car itself. It reasoned that such "standard equipment" on automobiles should not be considered a separate product itself for tying purposes. *See also Corwin v. Los Angeles Newspaper Service Bureau*, 4 Cal. 3d 842, 858-59 (1971) (identifies several factors to be evaluated to determine whether separate products for tying purposes exist).

California law is more unclear than federal law in determining what consti-

tutes market power for tying purposes. Under federal law, the common formulation is that the defendant must have at least 30% of the market to satisfy the market power test for tying purposes. *Jefferson Parish v. Hyde*, 466 U.S. 2, 26-27 (1984). In *Suburban Mobile Homes, supra*, 101 Cal. App. 3d at 544, the court stated that market power may exist even though it falls short of market dominance and exists only with respect to some buyers due to the desirability of that product to those buyers, or the uniqueness of its attributes. *Exxon Corp. v. Superior Court*, 51 Cal. App. 4th 1672, 1686 (1997) (10% market share not sufficient).

With respect to the second requirement that substantial commerce be affected, one California court found it was not affected where the second (tied) product could be obtained free of charge. In *Morrison v. Viacom*, 66 Cal. App. 4th 534 (1998), the plaintiff alleged that the requirement that it obtain broadcast channels from a cable operator as a condition to getting the premium channels was an illegal tying agreement. The court held that, under § 16720 which requires both market power and substantial commerce for *per se* illegality, the latter requirement could not be met because, absent the alleged tie, plaintiffs would not buy broadcast channels at all since they are available for free over the air. 66 Cal. App. 4th at 543-44. As to Bus. & Prof. Code § 16727, which requires either market power or substantial commerce, the court held that it did not apply because it was limited to commodities and the products at issue in *Viacom* were services. 66 Cal. App. 4th at 546-48. See also *Fisherman's Wharf Bay Cruise, supra*, 114 Cal. App. 4th at 339-40 (ticket purchased for cruise not a commodity).

Finally, the requirement that the sale of one product be conditioned on the sale of another may not be satisfied where the purchaser can easily obtain the second (tied) product from another source. In *Lloyd's Design v. Mercedes Benz*, 66 Cal. App. 4th 716 (1998), the court noted that the Mercedes dealers were free to use a different floor mat if requested by a customer. 66 Cal. App. 4th at 721-23. Citing the *Jefferson Parish* case, the court noted that a seller's decision to sell two products as a package does not restrain competition when customers still have the option to buy them separately and both markets are competitive. See also, *Kim v. Servosnax, Inc.*, 10 Cal. App. 4th 1346 (1992).

## **VII. GROUP BOYCOTTS AND REFUSALS TO DEAL**

When competitors combine to deny a competitor benefits enjoyed by members of the group, such horizontal boycotts may give rise to *per se* liability. This was the case in *Oakland-Alameda County Builders Exchange v. F.P. Lathrop Const. Co.*, 4 Cal. 3d 354 (1971), where contractors who participated in a bid depository agreed to boycott contractors who were not participants. See also *People v. Santa Clara Valley Bowling Assn.*, 238 Cal. App. 2d 225, 233-37 (1965) (bowling association rule designed to induce league bowlers not to bowl in nonmember houses was *per se* illegal).

In *Marin County Board of Realtors v. Palsson*, 16 Cal. 3d 920, 931 (1976),

however, the court refused to apply *per se* illegality to a real estate association rule that denied part-time agents access to a multiple listing service. It noted that, rather than attempting to coerce part-time agents to adopt anticompetitive practices, the rule may have a legitimate business reason in which the alleged boycott was only a by-product of that agreement. Nonetheless, since defendants had 75% of the market and the rule had serious anticompetitive effects without any business justification, the court invalidated the association rule under the rule of reason. *See also, Amarel v. Connell*, 202 Cal. App. 3d 137 (1988) (companies with 75% of the market engaged in boycotts and refusals to sell to those who purchased from competitors); *People v. National Association of Realtors*, 120 Cal. App. 3d 459 (1981) (rule restricting access to multiple listing service was a group boycott). In *Freeman v. San Diego Assn. of Realtors*, 77 Cal. App. 4th 171, 196-98 (1999), however, the court held that denial of access to ancillary services offered by a multiple listing service did not state a group boycott claim. Where defendants are not competitors, the *per se* rule does not apply. *Nova Designs, Inc. v. Scuba Retailers Ass'n.*, 202 F. 3d 1088, 1092 (9th Cir. 2000).

Vertical boycotts — those among entities at different levels of distribution — may violate the Cartwright Act under a rule of reason analysis. In *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256 (1983), the plaintiff was a record retailer that alleged that three of its larger competitors used their market power to coerce record wholesalers to grant discounts to them, but not plaintiff and other retailers. The court held that the plaintiff stated a claim against one of the large retailers who had used threats and coercion to induce wholesalers to boycott plaintiff, but not against the other two defendants because no coercive acts by them were alleged. 147 Cal. App. 3d at 267-69. *See also Redwood Theatres v. Festival Enterprises*, 200 Cal. App. 3d 687 (1988) (agreement between movie exhibitor and certain film distribution companies to boycott another exhibitor evaluated under the rule of reason).

As discussed *supra* in Section IV, a unilateral refusal to deal for a legitimate business reason does not violate California antitrust law. *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 365-67 (2001) (adopting *Colgate* doctrine to protect unilateral terminations of retailers who do not comply with minimum resale prices set by manufacturer). *Gianelli v. Beck & Co.*, 172 Cal. App. 3d 1020 (1985). The legality of the refusal to deal is also dependent on the legality of the underlying restraint. The refusal to deal is unlikely to trigger antitrust liability if it is done to enforce a restraint that is lawful under the rule of reason due to lack of market power. *Roth v. Rhodes*, 25 Cal. App. 4th 530 (1994); *Milton v. Hudson Sales*, 152 Cal. App. 2d 418, 443-45 (1957).

## VIII. MONOPOLIZATION

Monopolization and attempted monopolization consists of conduct by a single firm with market power to attain or maintain that power by exclusionary or predatory conduct. California has no monopolization statute analogous to Section 2 of the Sherman Act (15 U.S.C. § 2). One court of appeal has held that the prohibition of “trusts” in Section 16720 includes monopolization. *Lowell v. Mother’s Cake & Cookie Co.*, 79

Cal. App. 3d 13, 23 (1978). In 1988, however, the California Supreme Court held that Section 16720 only applies to combinations among multiple firms that continue as separate entities. *State ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1164 n. 17 (1988). While the court did not reach the issue of whether Section 16720 covers monopolization by individual firms, subsequent decisions have interpreted *Texaco* as holding that the Cartwright Act does not reach single firm conduct, such as monopolization. *Freeman v. San Diego Assn. of Realtors*, 77 Cal. App. 4th 171, 202 (2000). The Ninth Circuit has also held that Section 16720 does not reach monopolization or attempted monopolization, but does encompass conspiracies to monopolize among multiple firms. *Dimidowich v. Bell & Howell*, 803 F. 2d 1473, 1478 (9th Cir. 1986).

## IX. MERGERS AND ACQUISITIONS

In *State ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147 (1988), the California Supreme Court held that neither the Cartwright Act nor Section 17200 of the UCL reach mergers and acquisitions. The basic rationale of the court was that Section 16720 of the Cartwright Act applies only to combinations of entities that are ongoing. The Court held also that the Unfair Competition Law, Bus. & Prof. Code § 17200 (“UCL”) was limited to “business practices,” with that phrase envisioning something more than a single transaction. 46 Cal. 3d at 1169-70.

*Texaco* remains good law with respect to the Cartwright Act. After the *Texaco* decision, however, Section 17200 was amended to add the words “any” or “act” so that it now applies to “any unlawful, unfair, or fraudulent business act or practice.” Likewise, Section 17203 of the UCL was amended to provide that relief is available against any person who “is engaged, has engaged or proposes to engage” in unfair competition. The Supreme Court has indicated in dicta that the collective effect of these amendments may be to legislatively overrule the *Texaco* case as to Section 17200. *Stop Youth Addiction v. Lucky Stores*, 17 Cal. 4th 553, 570 (1998). The legislative history, however, raises some question about this interpretation of the Section 17200 amendments.

The California Attorney General sometimes challenges mergers in federal court under Section 7 of the Clayton Act, rather than invoke state remedies. In *State of California v. Sutter Health System*, 84 F. Supp. 2d 1057 (N.D. Cal. 2000), the California Attorney General challenged a merger between two hospitals. The court denied a preliminary injunction seeking to enjoin the merger, holding that plaintiff failed to prove a well-defined geographic market and that defendants successfully established their failing company defense.

The California Attorney General, either independently or through the National Association of Attorneys General (“NAAG”), of which it is a signatory, also sometimes conducts pre-filing merger investigations and requests data gathered from the federal premerger notification process. NAAG has its own merger guidelines, which vary in some respects from the federal merger guidelines. The NAAG Voluntary Pre-Merger Disclosure Compact allows parties to *voluntarily* file with a designated “liai-

son state” a copy of their initial Hart-Scott-Rodino filings, copies of any subsequent requests for information by the federal enforcement authorities and, upon the request of any member state, the additional materials provided in response to subsequent requests. The initial filing is often simultaneous with those of the Department of Justice and the FTC. The information so obtained is kept confidential, and NAAG signatories agree not to serve parties with requests for additional information during the HSR waiting period. For practical reasons, merging parties often consent to disclosure of their HSR data under the NAAG Compact since it helps avoid separate information requests from the state enforcement authorities during the HSR review process.

NAAG signatories do not, however, agree to be bound by the decisions of the federal enforcement agencies. A federal agency’s decision not to challenge a merger does not prevent a state attorney general from challenging a merger or acquisition in court. In fact, California is one of the few states to do so. *California v. American Stores Co.*, 495 U. S. 271 (1990). In that case, the Attorney General, as a private party under federal antitrust laws, challenged a merger that had gone through the HSR process and been subject to a consent decree approved by the FTC. The Attorney General obtained an injunction, including divestiture of certain assets, in the District Court but the Ninth Circuit vacated the injunction on the ground that private parties could not obtain divestiture under the antitrust laws. The Supreme Court reversed the Ninth Circuit, holding that, so long as the state could show threatened loss or damage to its own interests as required by Section 16 of the Clayton Act, it could obtain injunctive relief, including divestiture. It did note, however, that equitable defenses such as unclean hands and laches would apply, and the concurring opinion noted that failure to act until after the HSR waiting period has expired may constitute laches. California state enforcement authorities have often joined with the federal enforcement agencies and other states to challenge mergers based on information obtained in the HSR process.

## **X. UPA—BELOW COST PRICING AND PRICE DISCRIMINATION**

The California Unfair Practices Act (“UPA”) is found at Section 17000, *et seq.* of the Business & Professions Code. It deals with certain pricing practices, such as below cost pricing and charging different prices to competing customers. While analogous to federal price discrimination laws, there are some material differences. Thus, companies should proceed carefully in determining pricing, discount and rebate policies in California. A private plaintiff may obtain treble damages and injunctive relief for UPA violations. Bus. & Prof. Code §§ 17070,17082.

In general, the UPA prohibits three basic types of pricing practices in varying situations: 1) below cost pricing and loss leaders; 2) locality discrimination, *e.g.*, selling at lower prices in one area than another; and 3) giving secret, unearned discounts or rebates to some purchasers but not others. While the first two prohibitions apply only to competition at the seller level, the secret rebate/discount prohibition applies to competition at the buyer and seller level. In other words, actions can be filed against the seller and the favored purchasers.

One difference between the UPA and the federal price discrimination laws is that the UPA is *not* limited to commodities or physical goods. It applies to services and other intangibles, excluding motion picture licenses. Bus. & Prof. Code § 17024. Thus, unlike its federal counterpart, it may apply to patents, copyrights and other intellectual property. See *Paramount General Hospital v. National Medical Enterprises*, 42 Cal. App. 3d 496 (1974). Since intellectual property licenses may have differing royalty rates, and the negotiations and actual rates are often secret, one should carefully consider the UPA prohibitions during the negotiation of intellectual property licenses.

### A. Below Cost Pricing and Loss Leaders

Section 17043 prohibits selling a product below its cost for the purpose of injuring competitors or destroying competition. The California Supreme Court has held that this means that the defendant must act with “the desire of injuring competitors or destroying competition” as the defendant’s “conscious objective,” not merely the “knowledge that the injury or destruction will occur.” *Cel-Tech Communications v. L.A. Cellular*, 20 Cal. 4th 163, 175 (1999). There is also a statutory meeting competition defense. Bus. & Prof. Code § 17050(d).

In *Cel-Tech*, the defendant sold cell phones below cost hoping to make up its losses with increased sales of subscriber services. It adopted this strategy to compete with another company which likewise sold both cells and service. Plaintiff sold cell phones, but not service. Emphasizing that Section 17043 uses the word “purpose,” not intent, the Supreme Court held this required a mental culpability beyond mere knowledge that below cost prices may injure a competitor. Since the conscious objective of the defendant’s below cost pricing was done to gain business from its competitor that offered both phones and services rather than injure plaintiff, the below cost pricing did not violate Section 17043. *Cel-Tech* applied the same requirement to the loss leader statute, under Section 17044. As discussed *infra*, however, it did conclude plaintiff could possibly state a claim for unfair competition under Section 17200.

In *Western Union Financial Services, Inc. v. First Data Corporation*, 20 Cal. App. 4th 1530 (1993), the court held that a defendant did not violate Section 17043 by targeting its substantially larger competitor, and selling one of its products below cost and on a promotional basis for a five month period where, during the period covered, its sale on all products sold was profitable. In addition, the court held that it did not violate Section 17043 to target a larger rival with below cost sales, where the intent was not to injure or destroy the competitor, but simply to take market share and enhance its own business base. Section 17043 and Section 17044 require a specific intent to injure or destroy a competitor, and not just an intent to divert customers from a competitor. *Id.* at 1540, note 10. See also, *Hladek v. City of Merced*, 69 Cal. App. 3d 585, 591 (1977) (intent to injure competitors or destroy competition essential element). A persuasive argument can be made that harm to competition is an essential element of Section 17043 and 17044 violations. See, e.g., *Cel-Tech*, 20 Cal. 4th 163, 186 (citing, *inter alia*, Section 17001 of the Unfair Practices Act for the proposition that “[i]njury

to a competitor is not equivalent to injury to competition; only the latter is the proper focus of the antitrust laws”); *Turnbull & Turnbull v. ARA Transportation, Inc.*, 219 Cal. App. 3d 811, 826 (1990) (the Unfair Practices Act’s “purpose is basically the same as the Sherman Act”).

Loss leaders are defined as selling below cost where the purpose is either to induce the purchase of other merchandise, mislead purchasers, or divert business from competitors. Bus. & Prof. Code § 17030. Section 17044 then provides that it is unlawful to sell products as loss leaders. As discussed *supra*, *Cel-Tech* holds that Section 17044 also requires that the desire to destroy competitors must be defendant’s conscious objective. *Cel-Tech Communications*, 20 Cal. 4th at 177. See also, *Dooley’s Hardware Market v. Food Giant*, 21 Cal. App. 3d 513 (1971); *Ellis v. Dallas*, 113 Cal. App. 2d 234 (1952).

Unlike federal law, the “cost” standard for below cost pricing in California is fully allocated costs, including overhead. *Amarel v. Connell*, 202 Cal. App. 3d 137 (1988). Bus. & Prof. Code §§ 17026, 17029; *Western Union Financial Services, Inc. v. First Data Corp.*, 20 Cal. App. 4th 1530 (1993). Where a company sells multiple products, it should allocate overhead costs in a manner reasonably related to the burden imposed by the products on the firm’s overall cost of doing business. *Turnbull & Turnbull v. ARA Transportation, Inc.*, 219 Cal. App. 3d 811, 822 (1990). Otherwise, said the *Turnbull* court, such a seller could spread its fixed costs disproportionately across products to achieve an artificially low cost for some products that a single product competitor could not match.

In *Fisherman’s Wharf Bay Cruises Corp., v. Superior Court*, 114 Cal. App. 4th 409 (2004), the court granted a writ of mandate vacating a summary judgment in favor of defendant where its prices in the wholesale segment of the market were below cost even though its prices in the retail segment, and overall, were above cost. Defendant provided sightseeing cruises on San Francisco Bay, and plaintiff was its only competitor. Defendant conceded that the wholesale and retail bay cruise markets were separate. The court noted that, unlike federal predatory pricing law, Section 17043 unequivocally prohibits the sale of “any article or product” below cost. It disagreed with *Western Union* that price averaging across a line of products could be used to defeat a Section 17043 claim. 114 Cal. App. 4th at 330. It thus held there were triable issues of material fact on the cost and intent issues that precluded summary judgment.

The proper method to allocate costs among multiple products was also the subject of the court’s opinion in *Pan Asia Venture Capital Corp. v. Hearst Corp.*, 74 Cal. App. 4th 424 (1999). In *Pan Asia*, both parties sold newspapers with advertising, and plaintiff alleged that defendant had obtained a contract from the City and County of San Francisco to publish legal notices by submitting a bid below its cost. At the trial, the court ruled that defendant produced two relevant products — newspapers and advertising — and the plaintiff’s expert allocated costs based on the revenues generated by those two products. Using this “revenue method to allocate costs,” plaintiff’s expert

thus allocated nearly 85% of defendant's total costs to the advertising side. By contrast, the defendant's expert allocated costs based on the number of inches in the newspaper devoted to advertising and thus allocated only 45% to advertising. 74 Cal. App. at 437-38. While the *Pan Asia* court severely criticized plaintiff's revenue method, it was not barred as a matter of law under the UPA. Thus, the appropriate cost model was a fact issue for the jury. Since the trial court had refused to submit defendant's cost model to the jury, the Court of Appeal reversed the judgment in favor of plaintiff based on the flawed jury verdict.

California has not yet determined whether to adopt the recoupment requirement found in federal predatory pricing cases. *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Recoupment requires an analysis of market structure to determine whether it will permit a defendant to recoup the losses it initially sustains from below cost pricing by means of higher prices after competitors have been eliminated from the market. Given the fully allocated cost standard of the UPA, however, a reasonable argument can be made that a showing of recoupment should be required. Some support for such an argument can be found in *Cel-Tech* itself, where the California Supreme Court noted that low prices benefit consumers, and courts must be careful not to prohibit vigorous price competition. 20 Cal. 4th at 189-90.

## **B. Locality Price Discrimination**

Locality price discrimination in the UPA is defined as a price discrimination in which the seller sells an article or service at a lower price in one section of a city or community than in another section for the purpose of destroying competition. Bus. & Prof. Code §§ 17031,17040. Discrimination is simply a price difference, and such price differences may be justified on the basis of the quality and grade of the product, as well differing manufacturing or delivery costs. Bus. & Prof. Code § 17041. Other defenses include close out sales of perishable or seasonal goods, and price differences based on differing functional classifications such as wholesalers or brokers. Bus. & Prof. Code §§ 17042,17050. The meeting competition defense also applies to locality discrimination. Bus. & Prof. Code §§ 17040, 17050(d).

The scope of the locality discrimination law was severely reduced in *Harris v. Capitol Records Distributing Corp.*, 64 Cal. 2d 454 (1966). In *Harris*, the court held that an alleged violator must sell from two *different* locations and must sell at a lower price in one location than another. This effectively exempts single outlet sales at differing prices from the scope of the law. *Harris* also held that a plaintiff claiming locality discrimination must operate at the same level as the seller, thus eliminating claims by disfavored purchasers. Courts have also stated that Section 17040 requires proof of predatory pricing in plaintiff's geographic market while recovering those losses through sales of products at higher prices in different geographic markets. *Harris*, 64 Cal. 2d. at 461; *Plotkin v. Tanner's Vacuums*, 53 Cal. App. 3d. 454, 458 (1975). These limitations have operated to substantially reduce the scope of viable claims under the locality discrimination law.

### C. Secret Discounts and Rebates

Section 17045 of the UPA prohibits the “secret payment” of rebates and unearned discounts, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing on like terms and conditions, to the injury of a competitor and where such payment tends to destroy competition. This Section applies to competition at both the seller and the purchaser level. *ABC International Traders, Inc. v. Matsushita Electric Corp.*, 14 Cal. 4th 1247 (1997); *Diesel Electric Sales and Service, Inc. v. Marco Marine San Diego, Inc.*, 16 Cal. App. 4th 202 (1993). Although the statute itself is unclear, a court stated that the “like terms and conditions” clause applies to secret rebates and unearned discounts, as well as to special services and privileges. *G.H.I. I. v. MTS, Inc.*, 147 Cal. App. 3d 256, 272 (1983).

A key predicate for Section 17045 to apply, however, is that the discount or rebate must be *secret*. *Fisherman’s Wharf Bay Cruise v. Superior Court*, 114 Cal. App. 4th 309, 331-32 (2004). In *Diesel Electric*, this element was satisfied since the manufacturer had expressly told plaintiff that it was getting the “same pricing” as the favored distributor when this was not the case. 16 Cal. App. 4th at 121-23. Absent such misrepresentations, however, it is not necessary for the manufacturer to affirmatively disclose the terms of the favored deal to the disfavored purchaser to avoid a secrecy finding. So long as the discounts or rebates are contained in a generally available price list, there is no need to take further affirmative steps. *ABC International, supra*, 14 Cal. 4th at 1253. Thus a manufacturer may be able to avoid a secrecy finding by simply making its discount/rebate list available to all dealers or distributors. *Nicolosi Dist. Co. v. Finishmaster, Inc.*, 2000 WL 41222 at 3 (N.D. Cal. 2000); *California Wholesale Electric Co. v. MicroSwitch, Honeywell, Inc.*, 1983-1 CCH Trade Cas. ¶ 65,253 (C.D. Cal. 1984).

Section 17042 of the Business & Professions Code also exempts from Section 17045 a price differential between customers in different functional classes, such as retailers and distributors. See *Harris v. Capitol Records*, 64 Cal. 2d 454, 463-64 (1966). Thus, discounts to retailers may not need to be extended to distributors, and vice-versa.

A Section 17045 violation also requires an intent to injure competitors or destroy competition. *Ellis v. Dallas*, 113 Cal. App. 2d 234 (1952). The *Ellis* decision was cited with approval by the California Supreme Court in its 1999 *Cel-Tech* decision, and thus presumably the “conscious objective” standard of *Cel-Tech* also applies to Section 17045 actions.

### D. Meeting Competition

The UPA contains a statutory meeting competition defense. Bus. & Prof. Code §§ 17040, 17050. For example, Section 17050(d) exempts prices offered to meet the lawful prices of a competitor from the prohibitions of the Act. *People v. Pay Less*

*Drug Stores*, 25 Cal. 2d 108, 117 (1944) (defense established when “defendants shall have endeavored ‘in good faith’ to meet the legal prices of a competitor”).

The purpose of the meeting competition defense is to promote and encourage competition. *Harris v. Capitol Records Distributing Corp.*, 64 Cal. 2d 454, 461 (1966) (“Equally apparent is the Legislature’s concern to allow the seller to meet in good faith the prices of his competitors (§§ 17040, 17050), thereby fostering the competition promoted by § 17001”).

The meeting competition defense has sometimes been applied liberally in California. *Dooley’s Hardware Mart v. Food Giant Markets, Inc.*, 21 Cal. App. 3d 513, 518 (1971) (defense established where defendant’s purpose “was to meet the competition of supermarket competitors who advertised the same or substantially similar supermarket items below cost in limited quantity”); *Sandler v. Gordon*, 94 Cal. App. 2d 254, 257-58 (1940) (meeting competition defense established by testimony that seller merely sought new customers and did not act with malice toward any particular competitor); *compare, E&H Wholesale, Inc. v. Glaser Bros.*, 158 Cal. App. 3d 728, 737 (1984) (defense failed where seller beat, rather than met, the lower prices of a competitor); *People v. Gordon*, 105 Cal. App. 2d 711, 724 (1951) (defense not successful where “appellant wholly disregarded the question of the legality of the low prices of his competitors”). The meeting competition defense also may not apply if the competitor’s price is itself below cost and illegal. *Page v. Bakersfield Uniform & Towel Supply Co.*, 239 Cal. App. 2d 762 (1966).

The meeting competition defense in both Sections 17040 and 17050 expressly applies to locality discrimination, and Section 17050 applies to below cost pricing and loss leaders as well. The absence of a statutory reference to Section 17045 led one court to conclude there is no meeting competition defense in secret rebate or unearned discount claims. *Diesel Electric, supra*, 16 Cal. App. 4th at 217-18. *Diesel Electric* recognizes, however, that the *prima facie* element in Section 17045 of harm to competition may not exist if there is a legitimate meeting competition defense, as do other courts. *See, E&H Wholesale v. Glaser Bros.*, 158 Cal. App. 3d 728, 739 (1984) (secret rebates that “meet the demands of the marketplace” do not destroy competition). Given the recent pronouncements of the California Supreme Court in *Cel-Tech* and *ABC* on competitive injury, it is likely to conclude that the meeting competition defense applies to Section 17045 claims, as well as other UPA claims. *See, e.g., Kentmaster Manufacturing Co. v. Jarvis Products Corp.*, 146 F. 3d 691 (9th Cir. 1998).

## **XI. UNFAIR COMPETITION LAW**

The Unfair Competition Law (“UCL”) found at Section 17200, *et seq.* of the Bus. & Prof. Code, covers a wide range of conduct. It defines “unfair competition” as any “unlawful, unfair, or fraudulent act or business practices and any unfair, deceptive or misleading advertising plus any act prohibited by Section 17500 *et seq.* There is, however, some suggestion in the case law that the UCL should be used only for actions

in the public interest, and not to remedy private harm to sophisticated entities that directly contract with the alleged wrongdoer. *Rosenbluth v. Superior Court*, 101 Cal. App. 4<sup>th</sup> 1073 (2002). Moreover, although the primary purpose of Proposition 64 was to remedy procedural abuses of the UCL, its language that only private parties who “suffer injury in fact and have lost money or property” may be viewed by some as limiting its scope, particularly on the fraud prong.

The UCL applies to a single act of unfair competition, as well as past *and* ongoing conduct. The UCL does not reach claims of nonresidents based on transactions occurring outside of California. *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4<sup>th</sup> 214, 227 (1999). Where, however, California has sufficient interests in the transactions, a nationwide class may be permitted subject to the resolution of choice of law issues. See *Washington Mutual Bank v. Superior Court*, 24 Cal. 4<sup>th</sup> 906 (2001)

### **A. Unlawful, Unfair or Fraudulent Conduct**

The “unlawful, unfair *or* fraudulent” prongs of the UCL include a wide range of conduct. An unlawful business activity includes “anything that can properly be called a business practice and that at the same time is forbidden by law.” *Barquis v. Merchants Collection Ass’n*, 7 Cal. 3d 94, 113 (1972). To meet the “unlawful” prong, the person suing under Section 17200 “borrows” violations of other laws and treats them as unlawful practices independently actionable under the UCL. *Saunders v. Superior Court*, 27 Cal. App. 4<sup>th</sup> 832 (1994). It may be that any law, civil or criminal, state or federal, can serve as the predicate. *State Farm Fire and Casualty Co. v. Superior Court*, 45 Cal. App. 4<sup>th</sup> 1093, 1102-03 (1996); *Roskind v. Morgan Stanley Dean Witter & Co.*, 80 Cal. App. 4<sup>th</sup> 345, 352 (2000). See Business & Professional Code Section 17205 (UCL remedies “are cumulative to each other and to the remedies or penalties available under all other laws *of this state*”). The UCL has been held to provide a remedy even where the underlying statute has no private right of action. *Stop Youth Addiction v. Lucky Stores*, 17 Cal. 4<sup>th</sup> 553, 561-567 (1998).

The California Supreme Court has cautioned, however, that the UCL is not “an all purpose substitute for a tort or contract action.” *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4<sup>th</sup> 1134, 1150 (2003). Conduct which merely creates nonstatutory civil liability may not be sufficient to satisfy the unlawful prong of the UCL. *Klein v. Earth Elements*, 59 Cal. App. 4<sup>th</sup> 965 (1997). Likewise, a breach of contract involving only private harm may not be actionable. *Rosenbluth Int’l v. Superior Court*, 101 Cal. App. 4<sup>th</sup> 1073 (2002). The unlawful prong is not satisfied where the predicate statute does not define unlawful conduct but merely entrusts regulation of the conduct to a public agency. *Samura v. Kaiser Foundation Health Plan*, 17 Cal. App. 4<sup>th</sup> 1284, 1299-1302 (1993). If a statute does not have explicit language proscribing a particular act, then the unlawful prong cannot be satisfied. *California Medical Assn. v. Aetna Healthcare of California*, 94 Cal. App. 4<sup>th</sup> 151 (2002).

Under the UCL, however, lawful conduct may still be “unfair” and thereby

actionable. In *Cel-Tech Communications v. L.A. Cellular*, 20 Cal. 4th 163 (1999), the Supreme Court formulated some general standards as to the meaning of unfair under the UCL. In *Cel-Tech*, it held that below cost pricing not actionable under the UPA may nonetheless constitute “unfair” conduct under the UCL. The court, however, recognized a “safe harbor” from UCL claims for conduct permitted by the legislature or where it had considered a situation and concluded that no action should lie. 20 Cal. 4th at 182. The Supreme Court later held that the safe harbor barred claims even though the state law permitting the conduct was found itself to preempted by federal law. *Cimmaron Olszewski v. Scripps Health*, 30 Cal. 4th 798 (20003). See also *Schnall v. Hertz*, 78 Cal. App. 4th 1144 (2000) (avoidable refueling charge not “unfair” under UCL since the Civil Code specifically authorized the charges). If no statute provides such a “safe harbor,” then as is employed to determine whether the challenged conduct is unfair under the following test (20 Cal. 4th at 186):

When a plaintiff who claims to have suffered injury from a direct competitor’s ‘unfair’ act or practice under Section 17200, the word “unfair” in that Section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of law, or otherwise significantly threatens or harms competition.

In formulating this test, the court criticized as “amorphous” the formulation of unfair conduct in earlier decisions by courts of appeal, such as those in *State Farm & Casualty v. Superior Court*, 45 Cal. App. 4th 1093 (1996) and *People v. Casa Blanca Homes*, 159 Cal. App. 3d 509 (19854). *Casa Blanca*, for example, described “unfair” conduct as conduct that offends public policy, or is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

The *Cel-Tech* court, however, limited this standard for “unfair” conduct to actions by competitors alleging anticompetitive conduct. 20 Cal. 4th at 187 n. 12. Subsequent cases have used the *Cel-Tech* standard to dismiss competitor claims under the UCL. *Carter v. Variflex*, 101 F. Supp. 2d 1261,1270 (C.D. Cal. 2000). Logically, *Cel-Tech* should be applied to all UCL cases raising competition in antitrust issues. Some courts, however, have continued to apply the broader unfairness test to consumer actions. *Renne v. Servantes*, 86 Cal. App. 4th 1081 (2001); *Smith v. State Farm Auto Ins. Co.*, 93 Cal. App. 4th 700, 720 n. 23 (2001); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F. 3d 979, 993 (9th Cir. 2000) (*Cel-Tech* unfairness test does not apply to action by sellers alleging horizontal price-fixing); *Sun Microsystems v. Microsoft*, 87 F. Supp. 2d 992, 999 (N. D. Cal. 2000).

Other cases hold, however, that the *Cel-Tech* limitation on the unfair prong should extend to consumer cases. *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1166 (2000) (declining to apply *State Farm* or *Casa Blanca* test in consumer case in light of *Cel-Tech*). *Churchill Village v. General Electric Company*, 169 F. Supp. 2d 1119, 1130 n. 10 (N.D., Cal. 2000) (stating that the lack of distinction between competitor and

consumer actions in the language of the UCL renders *Cel-Tech's* definition equally valid in the consumer context).

In *Chavez v. Whirlpool Corporation*, 93 Cal. App. 4th 363 (2001), the court held that the unfair prong of the UCL did not reach conduct in a consumer action where the challenged conduct was permissible as a matter of law under the Cartwright Act. In *Chavez*, the plaintiff consumer alleged that the minimum resale price policy of defendant with respect to its retailers violated the Cartwright Act. The Court, citing *U. S. v. Colgate & Co.*, 250 U. S. 300 (1919) and *Monsanto v. Spray-Rite Service Corp.*, 465 U. S. 752 (1984), the court held that there was no unlawful combination under the Cartwright Act because the manufacturer only unilaterally announced its resale prices in advance and refused to deal with those who failed to comply. As to the claim that the conduct violated the “unfair” prong of 17200 even if it was not unlawful, the court held, although it did not decide whether *Cel-Tech* applied to consumer actions, that “conduct that is permissible under the *Colgate* doctrine is neither unlawful nor unfair under the unfair competition law.” 93 Cal. App. 4th at 368.

In *In re Firearms Cases*, 2005 Cal. App. LEXIS 211 (2005) the court affirmed a summary judgment for defendants based on the failure of plaintiffs to show a casual connection between defendants’ conduct and the alleged harm to the public. The defendants were gun manufacturers. Plaintiffs, who were cities and counties, alleged that defendants engaged in unfair conduct by failing to adopt and implement distribution policies that prevent the sale of guns to criminals. Plaintiffs argued that the *Cel-Tech* unfairness standard did not apply since it was a consumer case, and pre-*Cel-Tech* cases did not require causation. The Court rejected this contention, noting that the federal authorities on which *Cel-Tech* relies did require causation and none of the post-*Cel-Tech* cases have dispensed with causation. *Fd.* at 17-19.

Another limitation on the “unfair” prong of the UCL is that practices accepted as appropriate by regulatory agencies are not unfair under the UCL. *People v. Duz-Mor Diagnostic Lab*, 68 Cal. App. 4th 654 (1998). In *Duz-Mor*, the court found that defendant laboratory’s practice of offering discounts to physicians’ private pay patients was not unfair since the practice was known to and accepted as appropriate by federal and state agencies. Such a practice, concluded the court, could not be said to offend public policy, or be immoral or unethical, since it had agency approval. Likewise, where a business practice is implicitly authorized by a statute, it may not be deemed unfair under the UCL. *Leonte v. ACS State and Local Solutions*, 123 Cal. App. 4th 521 (2004).

The “fraudulent” prong of the UCL requires only a showing that the statement is likely to deceive the public from the standpoint of the reasonable consumer (*Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1398 (E.D. Cal. 1994)) although some suggest that Proposition 64’s “injury in fact” requirement may require a more stringent standard on deception and reliance. In *Lavie v. Proctor & Gamble*, 105 Cal. App. 4th 496 (2003), the court held that the reasonable consumer standard applied to UCL claims, and rejected an argument by the Attorney General, as *amicus curiae*, that the “least

sophisticated consumer” standard should apply. In doing so, the court held that FTC interpretations of the standards under Section 5 of the FTC Act were persuasive authority in deception claims brought under the UCL. 105 Cal. App. 4th at 505. *See also Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264 (UCL a “little FTC Act”); *see also People ex. rel. Mosk v. National Research Co. of Cal.*, 201 Cal. App. 2d 765, 763 (“In view of the similarity of language and obvious identity of purpose of the two statutes [FTC § 5 and UCL] decisions of a federal court on the subject are more than ordinarily persuasive”). *Searle v. Wyndham Int’l*, 102 Cal. App. 4th 1327 (2002) (failure of a hotel to tell its patrons that a 17% service charge was actually a gratuity paid to the server was neither unfair nor fraudulent). Unintentional or accidental conduct that is quickly remedied by the defendant also does not constitute unfair or fraudulent conduct. *Klein v. Earth Elements*, 59 Cal. App. 4th 965 (1997).

Absent an agency relationship, courts have refused to impose vicarious liability under the UCL. *Emery v. Visa Int’l Service Assn.*, 95 Cal. App. 4th 952 (2002) (Visa not liable for a scheme by lottery merchants using the Visa logo since it had no relationship with them). Likewise, a court held that an internet auction site could not be liable for wrongful activities of its users. *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (2002).

Despite the broad range of conduct covered by the UCL, however, courts do require a plaintiff alleging a UCL claim to state “with reasonable particularity the facts supporting the statutory elements of the violation.” *Khoury v. Maly’s of California, Inc.*, 14 Cal. App. 4th 612, 618 (1993): Failure to do so may result in summary dismissal. *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F. Supp. 1303, 1316 (N.D. Cal. 1997). Some courts have sustained demurrers to UCL claims and dismissed them at the pleading stage. *Korea Supply Co. v. Lockheed Martin*, 29 Cal. 4th 1134 (2003); *Searle v. Wyndham Int’l*, 102 Cal. App. 4th 1327 (2002).

## **B. Standing and Nonclass Representative Actions**

It is with respect to standing and representative actions that Proposition 64 has and will have its most dramatic impact. Prior to the passage of Proposition 64, private plaintiffs were permitted to pursue representative actions on behalf of the public even if they were uninjured and no class was or could be certified. Proposition 64 amended Sections 17203 and 17204 to limit private actions (Proposition 64 did not reach public prosecutor actions) to those who have suffered “injury in fact” and lost “money or property” as a result of the challenged conduct. Proposition 64 also eliminates representative actions by private parties on behalf of the general public, and plaintiffs will need to satisfy existing class action requirements – adequacy, typicality, predominance, etc. – in order to represent other parties. The class notice and other due process safeguards, largely absent in representative actions prior to Proposition 64, will now need to be followed in all such actions.

The major controversy now surrounding Proposition 64 is whether it applies

to pending actions, or only to those filed after its passage on November 2, 2004. Since it was a repeal of a statutory remedy, California law holds that it should apply to pending cases. *Younger v. Superior Court*, 21 Cal. 3d 102, 109-110 (1978). A Majority of the courts, including three Courts of Appeal, have held that it applies to actions pending at the time of its passage, whether on appeal or otherwise. *E.g.*, *Branick v. Downey Savings & Loan Assn.*, 126 Cal. App. 4th 828 (2005); *Benson v. Kwikset, Corp.* 126 Cal. App. 4th 887 (2005); *Bivens v. Corel Corp.*, Case No. 0043407 (4<sup>th</sup> App. Dist. February 18, 2005). Some courts, including a different panel of the Court of Appeal have held, however, that Proposition 64 does not apply to pending cases reasoning that a statute is presumed to operate prospectively absent a clear indication by voters to the contrary. *Californians for Disability Rights v. Mervyn's LLC*, 126 Cal. App. 4th 386 (2005). It is anticipated that the California Supreme Court will shortly grant review on one or more of these decisions, and resolve this issue.

Actions for injunctive relief, restitution and civil penalties can still be brought as representative actions on behalf of the general public by the Attorney General, district attorneys, and certain city attorneys. Injunctive relief is not a prerequisite to restitution. *ABC Int'l Traders*, 14 Cal. 4<sup>th</sup> at 1268-71. Such public prosecutor actions are not subject to Proposition 64, and thus do not require a showing of injury in compliance with class action procedures. The only impact Proposition 64 had on such cases was that it provided that the civil penalties collected in such actions can be used only to enforce consumer protection laws.

### **C. Monetary Relief Under The UCL**

The monetary remedies under the UCL are limited to restitution and, for public prosecutors, civil penalties. *Korea Supply v. Lockheed Martin*, 29 Cal. 4th at 1144 (2003). Traditional compensatory and punitive damages are not available to a private plaintiff. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1266 (1992); *Dean Witter Reynolds v. Superior Court*, 211 Cal. App. 3d 758 (1989). Recovery of attorney fees is also not permitted unless certain public interest standards are satisfied. *Baxter v. Salutary Sportclubs*, 122 Cal. App. 4th 941 (2004); *Notrica v. State Compensation Ins. Fund*, 70 Cal. App. 4th 911, 954-55 (1999) (permitting recovery of attorney fees as “private attorney general” under CCP Section 1021.5 if injunctive relief confers a significant benefit on the public). Public law enforcement officials may impose civil penalties of up to \$2,500 per violation, and up to \$6,000 per violation for certain intentional violations. Bus. & Prof. Code § 17206, 17207.

The distinction between permissible monetary relief under the UCL and impermissible compensatory damages is sometimes difficult to draw. In *Cortez v. Purolator Air Filter Prods.*, 23 Cal. 4th 163 (2000), the California Supreme Court held that the plaintiffs claims for failure to pay overtime wages was permissible restitutionary relief rather than compensatory damages because the plaintiff had an “ownership interest” in the unpaid wages. By contrast, in *Korea Supply Company v. Lockheed Martin*, 29 Cal. 4th 1134, 1149-50 (2003), the court stated that a claim for a lost sales commission

resembles a claim for damages not permitted by the UCL since it was not money taken from plaintiff by defendant or money in which plaintiff had an ownership interest since the lost commission was only a contingent expectancy of payment from a third party. Courts had previously found the monetary relief sought by plaintiffs, such as lost profits, to be impermissible compensatory damages. *MAI Systems Corp. v. UIPS*, 856 F. Supp. 538, 542 (N. D. Cal. 1994) (damages for lost business opportunity); *Baugh v. CBS*, 828 F. Supp. 745, 757-58 (N.D. Cal. 1994) (damages for embarrassment and emotional distress).

One remaining issue is whether the monetary relief in UCL class actions will be limited to restitution, or will include disgorgement of profits earned as a result of the unfair competition regardless of whether they were taken from persons who were victims. Section 17203 itself limits monetary relief to that necessary to “restore” funds to the victims. It makes no mention of disgorgement. Both *Kraus v. Trinity Management Services, Inc.*, 23 Cal. 4<sup>th</sup> 116 (2000) and *Cortez v. Purolator*, *supra*, held that nonrestitutionary disgorgement was not available in the now defunct representative actions under the UCL. *Korea Supply*, *supra*, held that disgorgement was not permitted in a private individual action under the UCL, but stated in a footnote that the availability of disgorgement into a fluid recovery fund in class actions was “not before us, and therefore we need not address them further.” 29 Cal. 4<sup>th</sup> at 1152 n. 6. California’s fluid recovery statute, Section 384 of the Code of Civil Procedure, however, just authorizes a court to distribute the “unpaid residuals” in a class action “in a manner designed either to further the purposes of the underlying causes of action or to promote justice for all Californians.” It says nothing about disgorgement, nor does it authorize any additional remedy beyond that which may be available in the underlying statute.

One California Supreme Court decision subsequent to *Korea Supply*, however, suggested in dicta that nonrestitutionary disgorgement into a fluid recovery fund may be allowed in UCL class actions. *Cruz v. Pacific Health Systems*, 30 Cal. 4<sup>th</sup> 303 (2003) (dicta states that disgorgement “may” be permitted in UCL class actions); *See also In re Vitamins Cases*, 107 Cal. App. 4<sup>th</sup> 820 (2003) (approving a cy pres fluid recovery settlement in a price fixing case under the Cartwright Act and the UCL in which none of the proceeds were to be distributed to class members, and all distributed via fluid recovery). *Cf. Corbett v. Superior Court*, 101 Cal. App. 4<sup>th</sup> 649 (2002) (a pre-*Korea Supply* decision allowing disgorgement in UCL class action); *But see Day v. AT&T*, 63 Cal. App. 4<sup>th</sup> 325, 338-39 (1998) (Section 17203 operates only to return to a person those measurable amounts wrongfully taken). In *Alch v. Superior Court*, 122 Cal. App. 4<sup>th</sup> 339 (2004), in the context of a class action, the court reiterated that, under *Korea Supply*, a court cannot award whatever form of monetary relief it believes may deter the unfair practices but is limited to restitution. In *Alch* the court denied class recovery of back pay for past age discrimination, but in dicta suggested that disgorgement may be available in class actions.

Nonetheless, much of the reasoning of *Kraus* and *Korea Supply* as to why disgorgement is not allowed in individual or representative UCL actions would apply

equally to class actions. The plain language of Section 17203, as well as its legislative history, cited and discussed in *Kraus* and *Korea Supply* as the main basis for denying disgorgement there, would apply equally to UCL class actions. The Supreme Court has held that a court should not use the class action device to expand the remedies available to a plaintiff. *City of San Jose v. Superior Court*, 12 Cal. 3d. 447 (1974). Other reasons cited by the *Kraus* and *Korea Supply* courts for denying the nonrestitutionary disgorgement in individual UCL actions – that deterrence through monetary penalties is not the main goal of the UCL, that the plaintiff must have an “ownership interest” in the money sought, and that the UCL should not become an “all-purpose substitute” for tort and contract actions – likewise would apply equally to class actions. Finally, the fluid recovery authorized by CCP Section 384 just deals with the proper use of unpaid residuals and does not create an additional monetary remedy for class actions. See generally, Varner, *The Korea Supply Decision: Monetary Relief Under the UCL*, 12 Competition Journal 53 (Summer 2003).

Proposition 64 did not deal directly with the nature of monetary relief available in a private action under the UCL when it created its injury in fact and loss of money or property standing requirement. This standing requirement would seem to reinforce the view that restitution is the only monetary remedy since it focuses on the loss of the victims rather than the gain by the wrongdoers. There may also be situations where a private party can meet the standing requirement—he or she did suffer injury in fact—but the monetary relief sought is damages rather than restitution. Where this is the case, it may be that only injunctive relief is available to a private party.

#### **D. Other UCL Defenses**

The UCL has a four year statute of limitations. (Section 17208). *Cortez* held this four year statute governs rather than any shorter limitation periods in the underlying statutes. 23 Cal. 4th at 178-79. In *Stutz Motor Car of America v. Reebok Int'l., Ltd.*, 909 F. Supp. 1353 (C.D. Cal. 1995), the court held that the UCL limitations statute begins to run when the cause of action accrues “irrespective of whether plaintiff knew of its accrual, unless plaintiff can successfully invoke the equitable tolling doctrine.” *Id.* at 1363.

The primary jurisdiction doctrine may be invoked to stay a UCL claim pending review and comment by an administrative agency. *Farmers Ins. Exchange v. Superior Court*, 2 Cal. 4th 377 (1992). The primary jurisdiction doctrine may apply whenever enforcement of a claim requires the resolution of issues which have been placed within the special competence of an administrative body. *Id.* at 390. The trial court has discretion to invoke the primary jurisdiction doctrine if it will benefit from administrative expertise and if such deference will promote the uniform application of regulatory laws. *Id.*

Many decisions hold that, where conduct that allegedly violates the UCL is subject to federal regulation, there is preemption. *California v. Dynegy, Inc.*, 375 F.3d.

831 (9<sup>th</sup> Cir. 2004) (UCL claims involving wholesale electricity preempted by federal law). In *Lopez v. Washington Mutual Bank, Inc.*, 302 F. 3d 900 (9<sup>th</sup> Cir. 2002), the court held that the Federal Home Owner's Loan Act preempted state claims for unfair competition. Likewise, in *Public Utility District No. 1 v. Snohomish County v. Dynege Power Marketing*, 384 F. 3d. 756 ((9<sup>th</sup> Cir. 2004), the court held that exclusive jurisdiction by a federal agency over wholesale electricity rates preempted UCL claims; *Kodadek v. MTV Network*, 152 F. 3d 1209, 1212 (9<sup>th</sup> Cir. 1998) (unfair competition claim preempted by copyright laws); *Bowen v. Ziasun Technologies*, 116 Cal. App. 4<sup>th</sup> 777 (2004) (Section 17200 does not apply to securities transactions); *Roskind v. Morgan Stanley Dean Witter & Co.*, 80 Cal. App. 4<sup>th</sup> 345, 353 (2000) (no preemption in securities law case).

For regulated industries, such as health, banking or insurance, the court may abuse its discretion by granting any relief under the UCL. See *People v. Duz-Mor Diagnostic Lab. Inc.*, 68 Cal. App. 4<sup>th</sup> 654, 662 (1998). Imposing injunctive relief may be “an inappropriate exercise of judicial authority” in cases involving economic policy or highly regulated industries. *California Grocers Ass’n. v. Bank of America*, 22 Cal. App. 4<sup>th</sup> 205 (1994); *Wolfe v. State Farm Fire & Casualty Ins. Co.*, 46 Cal. App. 4<sup>th</sup> 554 (1996). The courts cannot usurp legislative or regulatory oversight. *Samura v. Kaiser Foundation Health Plan*, 17 Cal. App. 1284, 1299-1302 (1993).

## **E. Advertising**

Section 17500 is the California statute designed to protect consumers from false or deceptive advertising. It makes it “unlawful for any person [or entity] . . . to make or disseminate . . . by . . . any . . . manner or means whatever, including over the Internet, any statement . . . which is untrue or misleading . . . and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading” in connection with the sale or disposition of goods or services. Both false affirmative misrepresentations and statements which mislead by omitting material facts are actionable. *Ford Dealers’ Ass’n. v. The DMV*, 32 Cal. 3d 347, 363-64 (1982). Any violation is a misdemeanor punishable by not more than six months’ imprisonment or a fine not exceeding \$2,500 or both. Bus. & Prof. Code § 17500. Injunctive relief and restitution are also available. Bus. & Prof. Code § 17535.

Prior to the passage of Proposition 64, several courts held that Section 17500 differs from common law fraud in that it did not require an intent to defraud, actual deception, reasonable reliance, and damage. See, e.g., *Committee on Children’s Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 211 (1983); *People v. Cappuccio, Inc.*, 204 Cal. App. 3d 750 (1988). The legal standard is the *tendency or likelihood* of the statement to deceive or confuse. *Fletcher v. Security Pac. Nat’l. Bank*, 23 Cal. 3d 442 (1979); *Committee on Children’s Television, Inc., supra*, 35 Cal. 3d at 211. A court has stated that negligent dissemination of a statement which is untrue or misleading is enough for the imposition of liability. See, e.g., *People v. Superior Court (Forest E. Olsen, Inc.)*, 96 Cal. App. 3d 181, 195 (1979). Whether the “injury in fact” and “loss of

money or property” requirements of Proposition 64 alters these standards remains to be seen. Some suggest that actual deception and reliance may now be required, but no court has addressed this issue.

Section 17500 has not been limited to traditional forms of advertising, but has been applied to all presentations related to products or services including product displays, pictures, packaging and oral sales representations made on a one-on-one basis. *See, e.g., Chern v. Bank of America*, 15 Cal. 3d 866 (1976); *People v. Superior Court*, 9 Cal. 3d 283 (1973). It has also been applied to advertising and solicitations for charitable causes. *People v. Orange County Charitable Services*, 73 Cal. App. 4th 1054 (1999). In *Keimer v. Buena Vista Books, Inc.*, 75 Cal. App. 4th 1220 (1999), the court reversed a lower court order sustaining a demurrer. The trial court had concluded that the alleged false advertising was protected by the First Amendment.

In *Kasky v. Nike*, 27 Cal. 4th 939 (2002) *cert. dismissed*, 123 S.Ct. 2554 (2003), the California Supreme Court held that defendant Nike’s media campaign in response to media reports that its workers overseas were exploited in substandard working conditions was commercial speech subject to regulation under the unfair competition law. It rejected Nike’s contention that its press releases and other public relations documents were entitled to full First Amendment protection, reasoning that it was enough that Nike was a business engaged in selling a product, the intended audience included customers who may purchase the product, and the content related to the product or to Nike’s business operations. The United States Supreme Court initially accepted review of this decision, but then dismissed the case without reading the merits.

In determining whether statements are false or misleading, California applies the “reasonable consumer” test derived from the FTC’s interpretation of Section 5 of the Federal Trade Commission Act. *Lavie v. Proctor & Gamble*, 105 Cal. App. 4th 496, 503-06 (2003). Thus, an advertising campaign that “Aleve is gentler to the stomach lining than aspirin” was found to be lawful since it was not likely to deceive reasonable consumers. *Id.* The plaintiff bears both the burden of production and the burden of proof to establish falsity. *National Council Against Health Care Fraud v. King Bio Pharmaceuticals*, 107 Cal. App. 4th 1336 (2003). An advertiser using terms like “crystal clear” or “CD quality” is engaged in mere “puffery” that does not violate Section 17500. *Consumer Advocates v. Echostar Satellite*, 113 Cal. App. 4th 1351 (2004). Where advertising targets a particularly vulnerable group, such as preschool children, its truthfulness will be measured by the impact it will likely have on members of that group, not others to whom it was not primarily directed. *See, e.g., Committee on Children’s Television*, 35 Cal. 3d 197 (defendant’s advertising for sugar-filled cereals was targeted at children).

Section 17500 applies to any person or entity directly engaged in making false or misleading statements or to any employee thereof. Bus. & Prof. Code §§ 17500, 17506. Liability also may be imposed upon those who direct and control the activities of others who make such statements. *People v. Toomey*, 157 Cal. App. 3d 1, 15 (1984).

Several appellate decisions had held that those corporate personnel with control over the advertising at issue have a duty of care to investigate claims made and may be liable even absent any direct knowledge of the misrepresentations. *See, e.g., People v. Dollar Rent-a-Car Systems*, 211 Cal. App. 3d 119, 132 (1989).

## **XII. GOVERNMENT ENFORCEMENT**

Section 16754, *et seq.* of the Business & Professions Code provides that the Attorney General or district attorney of any county may institute criminal or civil proceedings to enforce the Cartwright Act. This enforcement is ongoing and aggressive, as a substantial portion of the Attorney General’s office and part of the larger DA offices are assigned to antitrust enforcement.

Any violation of the Cartwright Act may be subject to criminal penalties. Bus. & Prof. Code § 16755(a). In addition to the business entity involved, criminal penalties may also be imposed on managers, directors, or other employees who knowingly participate in a violation. *Id.* The potential criminal penalties include fines of up to \$1 million for a corporation and up to \$250,000 for individuals and imprisonment up to 3 years. Bus. & Prof. Code § 16755(a)(1) and (2). Although criminal penalties are fairly rare and generally confined to horizontal collusive activities, they have been utilized in several cases.

The Attorney General may also bring *parens patriae* actions under Bus. & Prof. Code § 16760(a)(1) on behalf of natural persons for monetary damages sustained by such natural persons to their property by reason of a Cartwright Act violation. Treble damages are recoverable in these actions. Bus. & Prof. Code § 16760 (a)(2). Notice is given to members of the group by publication and any individual may opt out. Bus. & Prof. Code § 16760(b). Damages in *parens patriae* actions need not be proved with certainty, and aggregate proof by statistical or sampling methods is permitted. Bus. & Prof. Code § 16760(d).

Likewise, the Attorney General or district attorneys may bring civil actions to recover damages for injury to the state and its political subdivisions. Bus. & Prof. Code § 16750(c). The Attorney General may also serve as the class representative in a class action brought on behalf of political subdivisions, public agencies, or citizens of the state. Bus. & Prof. Code § 16750(d). As in private actions, damages are automatically trebled, and prejudgment interest may be recovered if the court finds it is “just in the circumstances.” *Unedus v. California Shoppers, Inc.*, 86 Cal. App. 3d 932 (1978); Bus. and Prof. Code § 16761. The state also may seek injunctive relief, including such mandatory injunction as may be necessary to restore competition. Bus. & Prof. Code § 16754.7; *People v. Mobile Magic Sales, Inc.*, 96 Cal. App. 3d 1 (1979).

The Attorney General also has civil investigative powers under the general provisions of the Government Code (§§ 11180, 11181) and need not first show that a violation has probably taken place. *Younger v. Jensen*, 26 Cal. 3d 397, 404(1980).

District attorneys have similar powers but must first show a reasonable belief that there has been a violation of the Cartwright Act, the UPA, or the UCL. Bus. & Prof. Code § 16759.

Finally, a corporation that violates the Cartwright Act runs the risk of forfeiture of corporate rights, and foreign corporations can be prohibited from doing business in the state. Bus. & Prof. Code §§ 16752, 16753. These sanctions, however, are rarely used.

### **XIII. PRIVATE ENFORCEMENT**

Under the Cartwright Act, “[a]ny person who is injured in his or her business or property by reason of anything forbidden or declared unlawful” by the Cartwright Act “may sue therefor . . .” Bus. & Prof. Code § 16750(a). Thus, “the Cartwright Act gives a private right to sue for damages and treble damages to each person who suffers harm.” *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 717 (C.D. Cal. 1995). The limitations period on Cartwright Act claims is four years. Bus. & Prof. Code § 16750.1.

Private plaintiffs may recover treble damages and may secure preliminary and permanent injunctive relief. Bus. & Prof. Code § 16750(a). Once a plaintiff proves actual damages, however, the award of treble damages is mandatory. *Unedus v. California Shoppers, Inc.*, 86 Cal. App. 3d 932, 942 (1978). Private plaintiffs may also recover prejudgment interest. Bus. & Prof. Code § 16761. Further, any contract in violation of the Cartwright Act “is absolutely void and is not enforceable at law or in equity.” Bus. & Prof. Code § 16722.

A defendant faced with a Cartwright Act or UCL claim filed in a California state court may successfully remove that claim to federal court when the state law claims raise issues subject to exclusive federal jurisdiction, by reason of a federal agency regulatory framework or otherwise. *California v. Dynegy et al.*, 375 F.3d. 831 (9<sup>th</sup> Cir. 2004); *T&E Pastorino Nursery v. Duke Energy, et al.*, 268 F. Supp. 2d 1240 (S.D. Cal. 2003); *Sparta Surgical Corp. v. National Association of Securities Dealers*, 159 F. 3d 1209, 1211 (9<sup>th</sup> Cir. 1998). The rationale of such cases is that removal is proper when the claim is necessarily federal in character, or the right to relief depends on the resolution of a substantial federal question. *But see Hendricks v. Dynegy, et al.*, 160 F.Supp. 2d 1155 (S.D. Cal. 2001) (removal of Cartwright and UCL claims denied despite overlapping federal regulatory scheme). The passage of the federal Class Action Fairness Act (“CAFA”) will also permit the removal to federal court of some class actions where the amount in controversy exceeds \$5 million. Removals based on the artful pleading doctrine have largely been unsuccessful. *Salveson v. Western Bankcard Ass’n*, 731 F.2d 1423 (9<sup>th</sup> Cir. 1984).

Arbitration may be a time-efficient and cost-effective way of resolving complex business disputes. While in the past the arbitrability of Cartwright Act claims was

in doubt, recent California authority squarely holds that private parties may agree to binding contractual arbitration of Cartwright Act claims. *Wolitarisky v. Blue Cross of California*, 53 Cal. App. 4th 338, 345 (1997); *Crown Homes, Inc. v. Landes*, 22 Cal. App. 4th 1273, 1283 (1994).

### A. Standing

The language of Bus. & Prof. Code § 16750(a) providing a private right of action to “[a]nyone who is injured in his or her business or property” is identical to the federal statute creating a private cause of action. Federal courts have concluded that standing is limited to those who suffer “antitrust injury,” *i.e.*, the injury must result from lessened competition, not heightened competition. *Associated Gen. Contractors of Cal. Inc. v. Cal State Council of Carpenters*, 459 U.S. 519 (1983), *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977). These injury and standing requirements have also been applied to claims under the Cartwright Act. *Morrison v. Viacom*, 66 Cal. App. 4th 534, 548 (1998); *Vinci v. Waste Management*, 36 Cal. App. 4th 1811,1814 (1995).

However, despite this close parallel to federal law, one court concluded that the standing required to assert a Cartwright Act violation is broader than that of federal law. *Cellular Plus*, 14 Cal. App. 4th at 1233. The better view is that the antitrust injury requirement is the same as federal law given the identical statutory language. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F. 3d 979, 991 (9th Cir. 2000) (noting that, except for indirect purchasers, California standing requirements are same as federal law); *see also B.W.I. Kitchen v. Owens Illinois*, 191 Cal. App. 3d. 1341 (1987) (injury from price fixing conspiracy inferred for indirect purchasers who purchased product in its original form).

Other courts have also applied the federal antitrust injury requirement and required that the injury to the plaintiff must flow from the “anticompetitive aspect” of the defendant’s conduct. In *Vinci v. Waste Management, Inc.*, 36 Cal. App. 4th 1811 (1995), the Court of Appeal held that a plaintiff employee could not sue his former employer under the Cartwright Act for firing him. *Id.* at 1816. Although the firing allegedly arose from a Cartwright Act conspiracy the court found that, as an employee “plaintiff was neither a consumer or competitor in the market in which trade was restrained.” The plaintiff’s corporate employer was the party injured, and the proper party to remedy any antitrust violation. *Id.* at 1816. Other cases have also applied federal law to reject Cartwright Act claims as a matter of law on standing grounds. *Dooley v. Crab Boat Owners, Assn.*, 2004 WL 902361 (N.D. Cal. 2004) (dismissing claims of plaintiffs who were not participants in the market and suffered only derivative injury). *MGM Studios v. Grokster, Inc.*, 269 F. Supp. 2d 1213 (C.D. Cal. 2003).

## **B. Indirect Purchasers**

In *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), the United States Supreme Court held that indirect purchasers who are not in direct privity with the defendant may not sue for violations of Section 1 of the Sherman Act. Reacting to the *Illinois Brick* decision, the California Legislature amended the Cartwright Act in 1978 to allow indirect purchasers to sue for Cartwright Act violations. Bus. & Prof. Code § 16750(a) now provides that a private action

may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter [the Cartwright Act], regardless of whether such injured person dealt directly or indirectly with the defendant.

The enactment of the indirect purchaser statute raises the issue of whether a defendant can, unlike federal court, assert as a defense that the plaintiff “passed-on” the overcharge to a subsequent purchaser. No reported California decision expressly addresses this issue, although in *B.W.I. Custom Kitchen v. Owen Illinois*, 191 Cal. App. 3d 1341, 1353-54 (1987) the court suggested that the pass-on defense may be available but found that absorption of the entire overcharge was not necessary for an indirect purchaser to show injury. It was careful, however, to distinguish the facts there – where the indirect purchasers bought glass containers in their original form from middlemen – from situations where the indirect purchaser buys the price fixed product in an altered form. 191 Cal. App. 3d at 1352. See also *J.P. Morgan v. Superior Court*, 113 Cal. App. 4th 195, 216 (2003); *Global Minerals & Metals Corp. v. Superior Court*, 113 Cal. App. 4th 836, 855 (2003) (finding that the greater difficulties of showing injury to indirect purchasers who buy product in altered form meant that issues of injury would be individual questions not suitable for classwide proof).

In 1989, the United States Supreme Court held that the federal antitrust laws do not preempt state laws that like Section 16750(a), permit indirect purchasers to recover for antitrust violations. *California v. ARC Am. Corp.*, 490 U.S. 93 (1989). Where, however, an indirect purchaser’s price fixing in federal court is dismissed on *Illinois Brick* grounds, such dismissal may operate as a bar to a similar state court action under principles of res judicata and collateral estoppel. *Boccardo v. Safeway Stores*, 134 Cal. App. 3d 1037 (1982).

## **C. Class Actions**

Private antitrust actions may also be brought as class actions pursuant to Section 382 of the California Code of Civil Procedure. Section 382 has been interpreted to require predominance of common questions, adequacy of representation, and other requirements for class certification similar to Rule 23 of the Federal Rules. *Lockheed Martin Corp. v. Superior Court*, 29 Cal. 4th 1096 (2003); *Rosack v. Volvo of America*,

131 Cal. App. 3d 741 (1982). Section 384 of the California Code of Civil Procedure authorizes fluid recovery, *i.e.*, the distribution of residual amounts from litigation not paid to class members to “further promote the purposes of the underlying causes of action, or to promote justice for all Californians.” *Id.* One case holds that Section 384 does not prohibit a settlement where none of the proceeds were distributed to class members, and all distributed via fluid recovery. *In re Vitamins Cases*, 107 Cal. App. 4<sup>th</sup> 820 (2003).

California courts have certified class actions by indirect purchasers asserting horizontal price fixing and monopolization claims. *BWI Custom Kitchen v. Owens-Illinois Inc.*, 191 Cal. App. 3d. 1341 (1987) (horizontal price fixing claims by indirect purchasers of glass containers); *Microsoft I-V Cases*, 2000-2 CCH Trade Cas. ¶ 73,013 (Calif. Supr. Ct. 2000) (monopolization claims). In *Cipro Cases I & II*, 121 Cal. App. 4<sup>th</sup> 402 (2004) the court certified a class of indirect purchasers of an antibiotic drug. The Complaint there alleged that an agreement between a patent holder and a generic competitor whereby the latter stayed off the market for a period of time had the effect of raising the price of the antibiotic above competitive levels. Relying heavily on plaintiffs’ expert testimony, the court rejected defendants arguments that individual questions predominated with respect to injury and damages.

In two cases, however, California courts rejected class certification for indirect purchasers in horizontal price fixing cases. *J.P. Morgan v. Superior Court*, 113 Cal. App. 4<sup>th</sup> 195 (2003); *Global Minerals & Metals Corp. v. Superior Court*, 113 Cal. App. 4<sup>th</sup> 836 (2003). In both cases plaintiffs attempted to certify a class of not only California purchasers of copper products, but also purchasers in other states that had indirect purchaser statutes. The courts found that the trial court had failed to conduct the requisite analysis under *Washington Mutual Bank v. Superior Court*, 24 Cal. 4<sup>th</sup> 906 (2001) for determining choice of law issues raised by the inclusion of nonresidents in the class, that there were key differences in the state indirect purchaser statutes, and that California law should not apply to nonresident class members unless they have significant contacts with California. Both courts also found that the structure of the copper market, where class members could be both buyers and sellers, and the fact that the copper purchased was often substantially altered from its original form, created conflicts and individual issues such that certification was not appropriate.

With the enactment of the Class Action Fairness Act (CAFA) by Congress in 2005, the ability of plaintiffs to bring nonresident class actions in state court may be severely circumscribed. Subject to some exceptions and limitations, the CAFA provides that federal courts will have original and removal jurisdiction over class actions where any class member is a citizen of a different state than any defendant and the total amount in controversy exceeds \$5 million. Unlike current law, the CAFA aggregates all claim member claims to satisfy the amount in controversy requirement. The overall effect of the CAFA, and consistent with its purposes, may be to limit state court to purely intra-state class actions.

## **XIV. DEFENSES TO ANTITRUST LIABILITY**

Various affirmative defenses exist to claims under California’s antitrust laws. These defenses can be roughly divided into two categories: those derived from statutes, and those arising from traditional common law principles.

### **A. Statutory Defenses**

#### **1. Public Entities**

The prohibitions imposed by the Cartwright Act apply only to “persons.” Bus. & Prof. Code § 16720. A “person” is defined to include corporations, firms, partnerships and associations. Bus. & Prof. Code § 16702. “Person” does not include municipalities and other political subdivisions. California courts have therefore held that the Cartwright Act does not apply to actions by government bodies. *Penn v. City of San Diego*, 188 Cal. App. 3d 636, 643 (1987); *People ex rel. Freitas v. City and County of San Francisco*, 92 Cal. App. 3d 913, 921 (1979); *Widdows v. Koch*, 263 Cal. App. 2d 228, 235 (1968). Yet, while municipalities and political subdivisions cannot be sued as defendants under the Cartwright Act, they may sue as plaintiffs to enforce the Cartwright Act. Bus. & Prof. Code § 16750; *Pacific Gas & Electric Co. v. County of Stanislaus*, 16 Cal. 4th 1143, 1150 (1997); *Freitas*, 92 Cal. App. 3d at 920.

Counties and, by analogy, other political subdivisions are not subject to the Unfair Practices Act. Bus. & Prof. Code § 17021; *Community Memorial Hospital v. County of Ventura*, 50 Cal. App. 4th 199, 209-210 (1996).

Several decisions have held that Section 17200 does not apply to government entities. *People for the Ethical Treatment of Animals v. California Milk Producers Advisory Board*, 125 Cal. App. 4th 871 (2005). In *Trinkle v. California State Lottery*, 71 Cal. App. 4th 1198 (1999), the court held it did not apply to the California State Lottery. In *Notrica v. State Compensation Insurance Fund*, 70 Cal. App. 4th 1198 (1999), however, the court held that Section 17200 applied to the defendant since, even though it was a public entity, it functioned as a private insurance company. 70 Cal. App. 4th at 944.

#### **2. Filed Rate Doctrine**

The federal “filed rate” doctrine precludes damage recoveries when rates filed or approved with government agencies are challenged as unreasonable. *Wegoland, Ltd. v. NYNEX Corp.*, 27 F. 3d 17 (2d Cir. 1994). California courts are virtually unanimous in following the doctrine where federal agencies are involved, although one court did reject it where only a state agency was involved. *Cellular Plus, Inc. v. Superior Court*, 14 Cal. App. 4th 1224, 1240-44 (1993). See generally *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F. 3d 979, 991-92 (9th Cir. 2000).

The Ninth Circuit has also reaffirmed that rates filed with federal administrative agencies may not be challenged under the Cartwright Act or the UCL. *County of Stanislaus v. Pacific Gas & Electric Co.*, 114 F.3d 858, 866 (9th Cir. 1997). In *California v. Dynegy Power Marketing*, 375 F.3d 831 (9th Cir. 2004), the Attorney General sought to impose monetary penalties under the UCL on several electricity generators based on their alleged violations of tariffs promulgated by the Federal Energy Regulatory Commission (“FERC”). The court affirmed dismissal based on both preemption and filed rate grounds.

Several courts have also dealt with the filed rate doctrine in connection with false advertising claims under the UCL. In *Day v. AT&T*, 63 Cal. App. 4th 325 (1998), the court held that UCL claims seeking disgorgement or other monetary recovery based on the practice of “rounding up” telephone charges to the next highest minute were barred by the filed rate doctrine although an injunction barring the false advertising itself was permissible. In *Spielhotz v. Superior Court*, 86 Cal. App. 4th (2001), the court held that the filed rate doctrine did not bar false advertising claims which allegedly failed to disclose gaps or “dead zones” where wireless telephone users are unable to connect calls. It declined to give the broad interpretation of the filed rate doctrine that defendant derived from *Day v. AT&T*, emphasizing that the doctrine should be limited to claims that directly challenge the reasonableness of the approved rates. 86 Cal. App. 4th at 206.

### 3. *Labor Activities*

The Cartwright Act specifically exempts labor from coverage under the Act. Bus. & Prof. Code § 16703. Accordingly, labor union activities will be exempt from Cartwright Act scrutiny to the extent that the “primary purpose” of the activity is to obtain a valid labor objective, e.g., collective bargaining, honoring picket lines, or picketing non-union businesses. See, *Los Angeles Pie Bakers Ass’n v. Bakery Drivers, Local 276*, 122 Cal. App. 2d 237, 238 (1953) (collective bargaining does not violate the Cartwright Act); *Schweizer v. Local Joint Executive Board*, 121 Cal. App. 2d 45, 53 (1953) (agreement not to cross picket lines does not violate the Cartwright Act); *Messner v. Journeymen Barbers, Local 256*, 53 Cal. 2d 873, 886 (1960) (agreement to picket non-union business does not violate the Cartwright Act).

The labor exception to the Cartwright Act has also been held to apply to non-unionized groups of workers who are seeking higher wages. *California Dental Ass’n v. California Dental Hygienists’ Ass’n*, 222 Cal. App. 3d 49, 68-69 (1990). In *California Dental Ass’n*, the court found that an alleged conspiracy among an informal association of dental hygienists to fix the compensation paid by dentists to hygienists for their services did not violate the Cartwright Act because the purpose of the association’s activities was to promote higher overall wages for the hygienists.

#### 4. *The Business of Insurance*

While the business of insurance in California is subject to its own regulatory scheme administered by the Insurance Commissioner, it enjoys no general exemption from the California antitrust laws. Ins. Code § 1861.03(a); *Manufacturer's Life Insurance Co. v. Superior Court*, 10 Cal. 4th 257 (1995). California's Unfair Insurance Practices Act ("UIPA"), set forth at Section 790, *et seq.* of the Insurance Code, prohibits certain unfair methods of competition and deceptive trade practices. Ins. Code § 790.03. There is no private right of action under the UIPA, and it is administered by the Insurance Commissioner. *Moradi-Shalal v. Fireman's Fund Companies, Inc.*, 46 Cal. 3d 287 (1988).

In *Manufacturer's Life*, *supra*, the California Supreme analyzed the history and relationship between the UIPA and the antitrust statutes. It held that the regulatory scheme of the UIPA did not exempt insurers from liability or claims under either the Cartwright Act, the Unfair Practices Act, or the Unfair Competition Act. Moreover, the *Antitrust Guidelines for the Insurance Industry* published by the California Attorney General in 1990 to implement Proposition 103 (which is now codified at § 1861, *et seq.* of the Insurance Code) made it clear that the state enforcement authorities will vigorously apply state antitrust laws to the insurers. In *Farmer's Insurance Exchange v. Superior Court*, 2 Cal. 4th 377 (1992), the Supreme Court, however, applied the primary jurisdiction doctrine to *stay* a UCL claim against an insurer which involved underlying statutes subject to administrative regulatory enforcement.

Both the statutes and the *Guidelines*, however, permit and encourage some collaborative activities by insurers, both with respect to exchanging rate and claim data, as well as joint ventures necessary to offer coverage where it would otherwise not exist. Ins. Code § 1861.3(b). While they prohibit price fixing, they do permit the exchange of historical data on paid claims and reserves. Pooling arrangements to insure the availability of assigned risk coverage are permitted. Ins. Code § 1861.03(b)(2). Joint underwriting when a single insurer is unable or unwilling to cover a particular risk is also permissible. The standardization of policies, however, is subject to the usual antitrust rules, although legislation now provides that it is encouraged so long as it is approved by the commissioner. Ins. Code §§ 1855.4, 1855.5. Finally, the *Guidelines* appear to treat each type of coverage as a separate product for purposes of tying analysis.

The filed rate doctrine discussed *supra* may operate to preclude damage claims when premium rates have been approved by the Insurance Commissioner. The doctrine has been applied in other jurisdictions to preclude damage claims based on approved insurance rates even where the regulated party is alleged to have defrauded the regulator in connection with the filing or approval of the filed rate. *Uniforce Temp. Personnel, Inc. v. National Council on Compensation Insurance, Inc.*, 892 F. Supp. 1503, 1512 n. 10 (S.D. Fla. 1995); *Wegoland Ltd. v. NYNEX Corp.*, 27 F. 3d 17, 21 (2d Cir. 1994).

## **5. *Agriculture***

Agricultural cooperative associations organized under California law enjoy statutory antitrust exemptions. Food & Agri. Code § 54038 provides that such associations are not considered:

- (a) A conspiracy, a combination in restraint of trade, or an illegal monopoly.
- (b) An attempt to lessen competition, to fix prices arbitrarily, or to create a combination or pool in violation of any law of this state.

Similarly, marketing contracts between an agricultural cooperative association and its members, or any other agreement authorized by the statutory scheme governing agricultural cooperative associations, “are not illegal, in restraint of trade, or contrary to any statute which is enacted against pooling or combinations.” Food & Agri. Code § 54039.

Acts done in compliance with the California Marketing Act of 1937, or marketing orders issued pursuant to the Act, cannot be challenged under the Cartwright Act, the Unfair Practices Act, or under “any rule of statutory or common law against monopolies or combinations in restraint of trade.” Food & Agri. Code § 58655. Anti-trust immunity also applies to acts done in compliance with orders of California’s various agricultural commissions, such as the Table Grape Commission (Food & Agri. Code § 65671), the Iceberg Lettuce Commission (Food & Agri. Code § 66682), and the Winegrowers Commission (Food & Agri. Code § 74005).

## **6. *Electric Utility Service Areas***

Public Utilities Code § 8107 provides a defense against Cartwright Act claims and any other claims based on statutory or common law rules against monopolies or combinations in restraint of trade. Under Section 8107, the defense applies upon proof that the act complained of was done in compliance with the provisions of the Public Utilities Code establishing electric utility service areas, or orders of the CPUC regarding electric utility service areas.

## **7. *Natural Gas Producers***

Like activities sanctioned by California agricultural marketing commissions, acts done by a natural gas producers association organized under California law do not restrain trade or constitute price fixing. Pub. Util. Code §§ 3028 and 3029.

## **8. *Professional Associations and Charities***

While prior precedent held that the Cartwright Act does not apply to the pro-

fessions, in *Cianci v. Superior Court*, 40 Cal. 3d 903, 925 (1980), the California Supreme Court overruled that prior precedent, and specifically held that the Cartwright Act applies to all businesses, including the professions. In *Cianci*, the California Supreme Court also held that the Cartwright Act applies to nonprofit occupations that have a “public service aspect.” This suggests that charitable institutions and associations may also be subject to the Cartwright Act.

## **9. Health Care**

While there is no exemption for health care entities, Section 16770 of the Business & Professions Code provides that the formation of groups of providers (e.g., doctors and hospitals) and purchasing groups for the purpose of creating efficient-sized contracting units should be subject to “only those antitrust prohibitions applicable to the conduct of other presumptively legitimate enterprises.” Bus. & Prof. Code § 16770(g). *See also*, Health & Safety Code § 1342.6. Where such groups are at least partially integrated and risk sharing occurs, this has been interpreted to mean that the rule of reason applies. *Reynolds v. California Dental Service*, 200 Cal. App. 3d 590 (1988) (court held that dental plan requirements of copayments and refusal to pay dentists more than “usual fee” for any given service were permissible and affirmed grant of summary judgment to defendant).

## **10. Statute Of Limitations**

The UPA does not have a specific statute of limitations. In *G.H.I.I. vs. MTS, Inc.*, 147 Cal. App. 3d. 256, 277-78 (1983), the court held that the three year statute from C.C.P. § 338(1) applied to UPA claims, except that the one year statute of C.C.P. 340(1) applied to the recovery of treble damages.

The Cartwright Act has a four year statute of limitations for both civil and criminal actions. Bus. & Prof. Code §§ 16750.1, 16755(b). If the violation is a continuing one, the statute does not run. *Union Carbide Corp. v. Superior Court*, 36 Cal. 3d 15, 24-25 (1984). Fraudulent concealment of the violation also tolls the running of the statute. *Id.*

### **B. Common Law Defenses**

#### **1. The Noerr-Pennington Doctrine**

The federal *Noerr-Pennington* doctrine provides that there is no antitrust liability under the Sherman Act for efforts to influence government which are protected by the First Amendment right to petition the government for redress of grievances, even if the motive behind the efforts is anticompetitive. In *Blank v. Kirwan*, 39 Cal. 3d 311, 320 (1985), the California Supreme Court held that the *Noerr-Pennington* doctrine applies to Cartwright Act claims and that federal decisions applying it are persuasive authority under California law.

In *Blank*, the plaintiff alleged that defendants had conspired to monopolize the poker industry and exclude plaintiff by persuading the city council to first legalize the industry and then pass zoning ordinances that made it impossible for plaintiffs to compete. The California Supreme Court affirmed a lower court ruling sustaining demurrers to claims under both the Cartwright Act and the UCL. The Supreme Court held that the *Noerr-Pennington* doctrine barred such claims regardless of the motive or tactics used by defendants to obtain government action. The court reasoned that the First Amendment right to petition applied equally to state law claims, and that efforts to influence the government cannot properly be called a “business” act or practice within the meaning of Section 17200 of the Business & Professions Code. *Accord, Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 21-23 (1995).

An exception to the *Noerr-Pennington* doctrine arises when efforts to influence government are merely a “sham;” such efforts are not protected by the *Noerr-Pennington* doctrine and are subject to antitrust liability. *Blank*, 39 Cal. 3d at 321. In *Hi-Top Steel Corp. v. Lehrer*, 24 Cal. App. 4th 570, 580-81 (1994), the Court of Appeal held that the “sham” exception is applicable under California law and the California Constitution.

In *Ludwig*, 37 Cal. App. 4th at 21-22, the Court of Appeal adopted the test articulated by the United States Supreme Court in *Professional Real Estate Investors v. Columbia Pictures*, 508 U.S. 49 (1993), to determine whether a particular lawsuit is a “sham.” *PRE* held that the sham exception did not apply unless the action was objectively baseless and the subjective motive of defendant was to suppress competition. The objectively baseless standard is analogous to that necessary to prevail in a malicious prosecution action. If the two prong test of *PRE* is not satisfied, then the lawsuit is immune under the *Noerr-Pennington* doctrine.

## **2. Primary Jurisdiction**

Primary jurisdiction is a judicially created doctrine whereby a court may dismiss or stay an action pending resolution of some portion of the action by an administrative agency. *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973). In *Farmers Ins. Exchange v. Superior Court*, 2 Cal. 4th 377 (1992), the court applied the doctrine to stay a UCL claim pending insurance administrative proceedings, and indicated that a trial court has discretion to invoke the doctrine if the court will benefit from administrative expertise and it would promote uniform application of regulatory laws. In *Cellular Plus*, however, the Court of Appeal rejected the application of the doctrine of “primary jurisdiction” to a Cartwright Act claim involving a regulated industry, holding that antitrust claims need not first be brought before the administrative agency charged with regulating that industry. *Cellular Plus*, 14 Cal. App. 4th at 1246-47.

## **3. In Pari Delicto**

Under the doctrine of *in pari delicto*, or “equal fault,” a plaintiff may be barred

from recovery if the plaintiff participated in and reaped the benefits of the defendant's alleged wrong. The California Supreme Court has held that, in the context of a Cartwright Act violation, *in pari delicto* is not a defense, *provided* that the plaintiff "does not bear equal responsibility for establishing the illegal scheme, or . . . is compelled by economic pressures to accept such an agreement." *Mailand v. Burckle*, 20 Cal. 3d 367, 381 (1978). Although it appears no California court has considered the issue, *in pari delicto* might apply if the plaintiff did, in fact, bear "equal responsibility" for setting up the scheme which constitutes the Cartwright Act violation.

#### 4. *Unclean Hands*

A court stated that the equitable doctrine of "unclean hands" is not a defense to an injunction brought to restrain violations of the Cartwright Act. *Jomrica, Inc. v. California Mobile Home Dealers Ass'n*, 12 Cal. App. 3d 396, 402 (1970).

### XV. COVENANTS NOT TO COMPETE

The enforceability of covenants not to compete in California is governed by Sections 16600-16602.5 of the Business & Professions Code. The basic rule is that, in the absence of a statutory exception, "*every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.*" Bus. & Prof. Code § 16600. The statutory exceptions are:

- The sale of goodwill of a business by a person who agrees not to compete. Bus. & Prof. Code § 16601.
- The sale or disposition of *all* the covenantor's shares in a corporation. Bus. & Prof. Code § 16601.
- The sale of all or *substantially* all the operating assets, together with the goodwill of a corporation or its subsidiary or division. Bus. & Prof. Code § 16601.
- Dissolution of a partnership. Bus. & Prof. Code § 16602.
- Dissolution of a limited liability company or sale of an individual's interest in a limited liability company. Bus. & Prof. Code § 16602.5.

If the covenant falls within one of these statutory exceptions, it is enforceable but only if it is limited to all or part of specified counties or cities in which the business has been carried on, and only during the time the seller continues to do business there. Bus. & Prof. Code §§ 16601-16602.5.

This statutory scheme is viewed as creating a strong public policy against

covenants not to compete. California courts are generally hostile to covenants not to compete and hold them unenforceable unless they literally fall within one of the statutory exceptions. *Radiant Industries v. Skirvin*, 33 Cal. App. 3d 401 (1973); *but see, Fleming v. Ray Suzuki*, 225 Cal. App. 3d 574 (1990). Where a covenant not to compete is over broad, courts will not sever the objectionable portions and rewrite the covenants so as to render them enforceable. *Armendariz v. Foundation Health Psychare Serv., Inc.*, 24 Cal. 4th 83 (2000); *Kolani v. Gluska*, 64 Cal. App. 4th 402 (1998).

California courts also do not apply a rule of reason balancing approach in interpreting Bus. & Prof. Code § 16600. *Scott v. Snelling & Snelling, Inc.*, 732 F. Supp. 1034, 1041 (N.D. Cal. 1990). A California employer may not terminate an employee for refusing to sign a confidentiality agreement that contains an unlawful agreement not to compete. *D'SA v. Playhut, Inc.*, 85 Cal. App. 4th 927 (2000). Neither do the courts tolerate sham arrangements to avoid application of Bus. & Prof. Code § 16600. *Bosley Medical Group v. Abramson*, 161 Cal. App. 3d 284 (1984); *see also, Vacco Ind. v. Van Den Berg*, 5 Cal. App. 4th 34 (1992) (limited *Bosley* to its factual context but held Bus. & Prof. Code § 16601 exception applicable even though defendant owned less than 3% of Vacco's stock); *Hill Medical Corp. v. Wyckoff*, 86 Cal. App. 4th 895 (2001) (covenant unenforceable where stock transferred was only small portion of the corporation). California law also applies to covenants with nonresidents where the employment is in California. *Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal. App. 4th 881 (1998).

In *Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697 (2002), however, the California Supreme Court held that, under the principles of judicial restraint and comity, a California court could not enjoin a party to a California lawsuit from taking action in another jurisdiction involving the same dispute. In *Advanced Bionics*, an employee of a Minnesota company signed a noncompete with that company but later left to join a California company. The latter and the employee filed suit in California seeking to enjoin the Minnesota company from enforcing the covenant, and a day later the Minnesota company filed suit in Minnesota to enforce the covenant. The California court enjoined the Minnesota Corporation from pursuing its suit in Minnesota. The Supreme Court reversed. While the Supreme Court acknowledged that California has a strong public policy against noncompete covenants, this was not sufficient to override the principles of judicial restraint and comity. The noncompete agreement provided that its validity "shall be governed by the laws of the state in which the employee was last employed by Medtronic", i.e., Minnesota. Thus, at least where the law of another state applies, and that state has significant contacts with the underlying dispute, one cannot seek to enjoin a party from taking action to enforce the covenant in another state.

In determining what constitutes a "profession, trade or business" within the meaning of Bus. & Prof. Code § 16600, however, some courts have concluded it does not apply where one is barred from pursuing only a small or limited part of the business, trade, or profession. *Boughton v. Socony Mobil Oil Co.*, 231 Cal. App. 2d 188

(1964). In *General Commercial Packaging, Inc. v. TPS Package Eng.*, 126 F. 3d 1131 (9th Cir. 1997), the court held that Bus. & Prof. Code § 16600 did not invalidate a contract provision that barred a party from courting a specific named customer. *See also, King v. Gerold*, 109 Cal. App. 2d 316 (1952). In *Campbell v. Board of Trustees*, 817 F. 2d 499 (9th Cir. 1987), the court concluded that a covenant which precluded a psychologist from preparing aptitude tests for universities other than Stanford may be unenforceable due to Bus. & Prof. Code § 16600 even though he was free to practice all other aspects of his profession.

Subject to the statutory limitations as to time and geographical scope, a merger between two companies permits the execution of a valid covenant not to compete, in a related employment contract or otherwise. *Hilb, Rogal & Hamilton Ins. Servs. v. Robb*, 33 Cal. App. 4th 1812 (1995). Likewise, a reasonable payment by departing partners who compete with their former law firm has been found to be enforceable. *Howard v. Babcock*, 6 Cal. 4th 409 (1993). Finally, at least absent a showing of an adverse effect on competition, a covenant in a franchise agreement which prohibited the franchisee from engaging in competition with the franchisor during the life of the franchise has been upheld. *Dayton Time Lock Serv. Inc. v. Silent Watchman Corp.*, 52 Cal. App. 3d 1 (1975). *See also Monogram Industries v. Sar Indus.*, 64 Cal. App. 3d 692 (1976) (covenant enforceable against selling shareholders by both the corporation that purchased the shares and the corporation from whom the shares were purchased since they were engaged in almost identical businesses.)

Finally, in some cases California courts may enforce covenants not to compete against departing employee if necessary to protect the employer's trade secrets. *See, Metro Traffic Control, Inc. v. Shadow Traffic Network*, 22 Cal. App. 4th 853, 859 (1994). California has also adopted the Uniform Trade Secrets Act ("UTSA"). Civil Code § 3426 *et seq.* This may permit enforcement of covenants not to compete under the "inevitable disclosure" doctrine. *PepsiCo., Inc. v. Redmond*, 54 F. 3d 1262 (7th Cir. 1995). This doctrine allows a court to enjoin a defecting employee from working for a competitor for a period of time where his new position has similar duties and responsibilities as his former position.

## KEY STATUTES

### **I. Cartwright Act (§ 16720 et seq. Business & Professions Code)**

**16720.** A trust is 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.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article of trade, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

**16722.** Any contract or agreement in violation of this chapter is absolutely void and is not enforceable at law or in equity.

**16725.** It is not unlawful to enter into agreements or form associations or combinations, the purpose and effect of which is to promote, encourage or increase competition in any trade or industry, or which are in furtherance of trade.

**16726.** Except as provided in this chapter, every trust is unlawful, against public policy and void.

**16727.** It shall be unlawful for any person to lease or make a sale or contract for the sale of goods, merchandise, machinery, supplies, commodities for use within the State, or to fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of the State.

**16750.** (a) Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him or her, interest on his or her actual damages pursuant to Section 16761, and preliminary or permanent injunctive relief when and under the same conditions and principles as injunctive relief is granted by courts generally under the laws of this state and the rules governing these proceedings, and shall be awarded a reasonable attorneys' fee together with the costs of the suit.

This action may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant.

The amendments to this section adopted at the 1959 Regular Session of the Legislature do not apply to any action commenced prior to September 18, 1959.

(b) The state and any of its political subdivisions and public agencies shall be deemed a person within the meaning of this section.

(c) The Attorney General may bring an action on behalf of the state or of any of its political subdivisions or public agencies to recover the damages provided for by this section, or by any comparable provision of federal law, provided that the Attorney General shall notify in writing any political subdivision or public agency of his or her intention to bring any such action on its behalf, and at any time within 30 days thereafter, such political subdivision or public agency may, by formal resolution of its governing body or as otherwise specifically provided by applicable law, withdraw the authority of the Attorney General to bring the intended action. In any action brought pursuant to this section on behalf of any political subdivision or public agency of the state, the state shall retain for deposit in the Attorney General antitrust account within the General Fund, out of the proceeds, if any, resulting from such action, an amount equal to the expense incurred by the Attorney General in the investigation and prosecution of such action or an amount equal to 10 percent of the total recovery obtained by the Attorney General, whichever is greater.

(d) In any antitrust action brought on behalf of the state in which the Attorney General is the class representative of political subdivisions, public agencies, or citizens of the state who have been affected by the matters set forth in the complaint, the state shall retain for deposit in the Attorney General antitrust account within the General Fund, the proceeds, if any, of any attorneys' fees awarded by the court in which such case is located, to the Attorney General, resulting from such class representation.

(e) In any action brought by the Attorney General pursuant to either state or federal antitrust laws for the recovery of damages by the state or any of its political subdivisions or public agencies, in addition to his or her other powers and authority, the Attorney General may enter into contracts relating to the investigation and the prosecution of such action with any other party plaintiff who has brought a similar action for the recovery of damages and with whom the Attorney General finds it advantageous to act jointly, or to share common expenses or to cooperate in any manner relative to such action. In any such action, notwithstanding the provisions of Section 12520 of the Government Code, the Attorney General may undertake, among other things, either to render legal services as special counsel to, or to obtain the legal services of special counsel from any department or agency of the United States, of this state or any other state or any department or agency thereof, any county, city, public corporation or public district of this state or of any other state, that has brought or intends to bring a similar action for the recovery of damages, or their duly authorized legal representatives in such action. The Attorney General may also enter into any

agreement authorized by Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code with any governmental entity enumerated in this subdivision, notwithstanding any provision to the contrary contained in Section 6500 of the Government Code. Every contract or agreement entered into pursuant to this subdivision (e) shall be approved by the Department of General Services.

(f) The amounts paid into the Attorney General antitrust account within the General Fund pursuant to subdivisions (c), (d) and (e) arising from the same action or companion actions shall not cumulatively exceed the greater of ten percent (10%) of the total recovery in all actions resulting from the Attorney General's representation or an amount equal to the expenses incurred by the Attorney General in the investigation and prosecution of such actions. Any excess shall be paid into the General Fund.

(g) The district attorney of any county may prosecute any action on behalf of such county or any city or public agency or political subdivision located wholly within such county which the Attorney General is authorized to bring pursuant to subdivision (c) of this section, whenever it appears that the activities giving rise to such prosecution or the effects of such activities occur primarily within such county. The district attorney shall file with the Attorney General at least 30 days prior to the filing of any such action a copy of the proposed complaint together with a confidential memorandum and report explaining the facts giving rise to the proposed prosecution and supporting the filing of the new complaint. Prior to entering into any stipulated or consent judgment or other settlement of any such action, the district attorney shall file with the Attorney General at least 30 days prior to the execution thereof a copy of the proposed settlement together with a memorandum of explanation of the settlement. The Attorney General may waive any time requirements provided in this subdivision. In any investigation or action undertaken or brought by a district attorney pursuant to this section, if the Attorney General deems it necessary and in the public interest, the Attorney General may take full charge of any such investigation or prosecution, and the Attorney General shall have all the powers granted by Section 12550 of the Government Code in respect thereto.

(h) In any action prosecuted pursuant to the provisions of subdivision (g) a district attorney may exercise all of the powers conferred on the Attorney General by subdivision (e) provided that every contract or agreement entered into pursuant to this subdivision by a district attorney shall first be approved by the governing authority of the agency in his or her county.

(i) In any action brought pursuant to subdivision (g) a district attorney may represent any political subdivision located within his or her county directly, in which case he or she shall notify in writing such political subdivision of his or her intention to bring any such action on its behalf, and at any time within 30 days thereafter, that political subdivision may, by formal resolution of its governing body or as otherwise specifically provided by applicable law, withdraw the authority of the district attorney to bring the intended action. In any action in which a district attorney directly represents any political subdivision located within his county, the district attorney shall retain out of the proceeds, if any, resulting from such action, an amount equal to the expense incurred by the district attorney in the investigation and prosecution of such action or an amount equal to 10 percent of the total recovery obtained by the district attorney, whichever is greater. In any action brought pursuant to subdivision (g) in which the county, through the district attorney, is the class representative of political subdivisions located within such county, the district attorney shall retain the proceeds, if any, of any attorneys' fees awarded by the court in which such action is pending to the district attorney, resulting from such class representation. All proceeds retained by

a district attorney pursuant to this subdivision shall be deposited in the appropriate account as provided by law.

(j) Nothing in this section shall be construed to authorize any district attorney to exercise the powers conferred upon the Attorney General by an act of Congress of September 30, 1976, (P.L. 94-905; 90 Stat. 1983) also known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976, except at the direction of the Attorney General.

**16750.1.** Any civil action to enforce any cause of action for a violation of this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of the amendment of this section at the 1977-78 Regular Session of the Legislature shall be revived by such amendment.

**16750.2.** Any person, other than the Attorney General or a district attorney, who commences, by writ or appeal, any proceeding in the Supreme Court of California or a state court of appeal in which a violation of this chapter is alleged or any application of this chapter is in issue shall serve notice thereof upon the Attorney General within three days after the commencement of the proceeding, provided that such time may be extended by the Chief Justice or presiding justice for good cause shown. No relief, temporary or permanent, shall be granted until proof of service of this notice is filed with the court.

**16751.** Whenever it appears to the court before which any proceedings under this chapter are pending that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether or not they reside in the county where such action is pending.

**16752.** Upon a violation of this chapter by any corporation or association the Attorney General or the district attorney of the proper county may institute proper proceedings in a court of competent jurisdiction for the forfeiture of charter rights, franchises or privileges and powers exercised by such corporation or association, and for the dissolution of the corporation or association.

**16753.** Every foreign corporation or association, exercising any of the powers, franchises or functions of a corporation in this state, which violates this chapter, is subject to revocation of those powers, franchises or functions and upon such revocation is prohibited from doing any business in this state. The Attorney General, or a district attorney of a county where the offense or any part thereof is committed, may enforce this provision by bringing proper proceedings by injunction or otherwise. Upon receipt of a certified copy of the judgment and decree of any court of competent jurisdiction finding any foreign corporation or association guilty of violating this chapter and ordering a revocation of its powers, franchises or functions of a corporation in this state, the Secretary of State shall revoke the license of any such corporation or association heretofore authorized to do business in this state.

**16754.** The Attorney General, or the district attorney of any county, subject to the notice requirements of subdivision (g) of Section 16750, shall initiate civil actions or criminal proceedings for violation of this chapter. Civil actions and criminal proceedings for violation of this chapter initiated by the Attorney General or district attorney may be brought in the superior court in and for any county where the offense or any part thereof is committed or where any of the offenders reside or where any corporate defendant does business. In any

civil action or criminal proceeding brought by a district attorney pursuant to this section, the Attorney General shall have all of the powers set forth in Section 12550 of the Government Code.

**16754.5.** In any civil action brought by the Attorney General or a district attorney under this chapter, the court may, in addition to granting such prohibitory injunctions and other restraints as it may deem expedient to deter the defendant from, and insure against, his committing a future violation of this chapter, grant such mandatory injunctions as may be reasonably necessary to restore and preserve fair competition in the trade or commerce affected by the violation.

**16755.** (a) Any violation of this chapter is a conspiracy against trade, and any person who engages in any such conspiracy or takes part therein, or aids or advises in its commission, or who as principal, manager, director, agent, servant or employee, or in any other capacity, knowingly carries out any of the stipulations, purposes, prices, rates, or furnishes any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, is punishable, as follows:

(1) If the violator is a corporation, by a fine of not more than one million dollars (\$1,000,000) or the applicable amount under paragraph (3), whichever is greater.

(2) If the violator is an individual, by imprisonment in a state prison for one, two, or three years, by imprisonment for not more than one year in a county jail, by a fine of not more than the greater of two hundred fifty thousand dollars (\$250,000), a fine of the applicable amount under paragraph (3), or by both a fine and imprisonment.

(3) If any person derives pecuniary gain from a violation of this chapter, or the violation results in pecuniary loss to a person other than the violator, the violator may be fined not more than an amount equal to the amount of the gross gain multiplied by two or an amount equal to the amount of the gross loss multiplied by two, whichever is applicable.

(b) Any action pursuant to this section may be commenced at any time within four years after the commission of the last act comprising a part of any violation. No cause of action barred under existing law on the effective date of the amendment of this section at the 1977-78 Regular Session of the Legislature shall be revived by such amendment.

(c) Subject to Section 13521 of the Penal Code, all moneys received by any court in payment of any fine or civil penalty imposed pursuant to this section shall, as soon as practicable after receipt thereof, be deposited with the county treasurer of the county in which the court is situated. Amounts so deposited shall be paid as soon as practicable as follows: 100 percent to the Treasurer by warrant of the county auditor drawn upon the requisition of the clerk or judge of said court to be deposited in the State Treasury on order of the Controller if the moneys received resulted from an action initiated and prosecuted by the Attorney General. If the action was initiated and prosecuted by a district attorney then 100 percent shall be paid as soon as practicable to the treasurer of the county in which the prosecution is conducted. If the action was initiated and prosecuted jointly by the Attorney General and a district attorney or jointly by more than one district attorney, such amounts shall be paid to the State Treasurer and to the treasurer(s) of the county or counties participating in the prosecution in a proportion agreed upon by the agencies jointly prosecuting such case and as approved by the court.

**16756.** In any indictment, information or complaint for any offense named in this chapter, it is sufficient to state the purpose or effects of the trust or combination, and that the accused is a member of, acted with, or in pursuance of it, or aided or assisted in carrying out its

purposes, without giving its name or description, or how, when and where it was created.

**16757.** (a) In prosecutions under this chapter, it is sufficient to prove that a trust or combination exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all the members belonging to it, or proving or producing any article of agreement, or any written instrument on which it may have been based, or that it was evidenced by any written instrument at all.

(b) The character of the trust or combination alleged may be established by proof of its general reputation as such.

**16758.** In any action or proceeding brought by the Attorney General or any district attorney for the violation of this chapter no person shall be excused from attending, testifying or producing books, papers, or documents in obedience to subpoena or under order of court on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to any penalty.

No individual shall be prosecuted or subjected to any penalty for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence in any action or proceeding brought by the Attorney General or a district attorney under this chapter.

**16759.** All those powers granted to the Attorney General as a head of a department under Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code shall be granted to the district attorney of any county when that district attorney reasonably believes that there may have been a violation of Article 2 (commencing with Section 16720) or Article 3 (commencing with Section 16750) of this chapter, or a violation of Chapter 4 (commencing with Section 17000) of this part, or a violation of Chapter 5 (commencing with Section 17200) of this part, and shall be subject to the provisions of Chapter 20 (commencing with Section 7460) of Division 7 of Title 1 of the Government Code. Any investigations pursuant to these powers shall be conducted in accordance with the procedures set forth in Article 2 (commencing with Section 11180) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code, including all principles relating to immunity from self-incrimination applicable thereto. However, nothing in Section 16758 shall be construed as providing automatic immunity with respect to the subject of a subpoena issued in connection with that investigation. Court orders sought pursuant to this section shall be sought in the superior court of the county where the district attorney seeking the order holds office.

**16760.** (a) (1) The Attorney General may bring a civil action in the name of the people of the State of California, as *parens patriae* on behalf of natural persons residing in the state, in the superior court of any county which has jurisdiction of a defendant, to secure monetary relief as provided in this section for injury sustained by those natural persons to their property by reason of any violation of this chapter. The court shall exclude from the amount of monetary relief awarded in the action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to paragraph (2) of subdivision (b), and (ii) any business entity.

(2) The court shall award the state as monetary relief three times the total damage sustained as described in paragraph (1), the interest on the total damages pursuant to Section 16761, and the costs of suit, including a reasonable attorney's fee.

(3) The court may, in its discretion, award a reasonable attorney's fee to a prevailing defendant upon a finding that the Attorney General or district attorney has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

(b) (1) In any action brought under this section, the Attorney General shall, at any time, in any manner, and with any content as the court may direct, cause notice thereof to be given by publication. If the court finds that notice given solely by publication would deny due process of law to any person or persons, the court may direct further notice to the person or persons according to the circumstances of the case.

(2) Any person on whose behalf an action is brought under paragraph (1) of subdivision (a) may elect to exclude from adjudication the portion of the claim for monetary relief attributable to him or her by filing notice of that election with the court within the time as specified in the notice given pursuant to paragraph (1).

(3) The final judgment in an action under paragraph (1) of subdivision (a) shall be res judicata as to any claim under this section by any person on behalf of whom the action was brought and who fails to give notice within the period specified in the notice given pursuant to paragraph (1).

(c) An action under paragraph (1) of subdivision (a) shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in any manner as the court directs.

(d) In any action under this chapter, where there has been a determination that a defendant agreed to fix prices, damages may be proved and assessed in the aggregate by statistical or sampling methods, by the pro rata allocation of illegal overcharges or of excess profits, or by any other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

(e) Monetary relief recovered by the Attorney General under this section shall be distributed as follows:

(1) In any manner as the superior court having jurisdiction over the action in its discretion may authorize to insure, to the extent possible, that each person be afforded a reasonable opportunity to secure his or her appropriate portion of the monetary relief. In exercising its discretion, the court may employ cy pres or fluid recovery mechanisms as a way of providing value to persons injured as a result of a violation of this chapter.

(2) The Attorney General shall retain that portion of the monetary relief awarded by the court as costs of suit and attorney's fee for deposit in the Attorney General Antitrust Account within the General Fund.

(3) To the extent that the monetary relief awarded by the court is not exhausted by distribution under paragraphs (1) and (2), the remaining funds shall be treated under the provisions of Article 3 (commencing with Section 1530) and Article 4 (commencing with Section 1540) of Chapter 7 of Title 10 of Part 3 of the Code of Civil Procedure as if it were unclaimed property, as defined in Section 1300 of the Code of Civil Procedure.

(f) The powers granted in this section are in addition to and not in derogation of the powers granted to the Attorney General by common law in respect to bringing actions *parens patriae*.

(g) The district attorney of any county may prosecute any action on behalf of the natural persons residing in the county which the Attorney General is authorized to bring pursuant to subdivision (a), whenever it appears that the activities giving rise to the prosecution or the effects of the activities occur primarily within that county. Prior to bringing the action, a district attorney shall comply with the notice requirements provided in subdivision (g) of Section 16750. In any action brought pursuant to this subdivision, the provisions of

subdivisions (a) to (e), inclusive, shall be applicable, except that the portion of monetary relief awarded by the court as attorney's fee and costs shall be retained by the district attorney for deposit in the appropriate account as provided by law.

**16761.** The court may award, pursuant to a motion by a person who has recovered damages pursuant to Section 16750, or by the Attorney General who has secured monetary relief pursuant to Section 16760, interest on actual damages at the rate of 10 percent per annum for the period beginning on the date of service of such person's or the Attorney General's complaint setting forth a claim for violation of this chapter and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only the following:

(a) Whether the person, the Attorney General, or the opposing party, or the representative of any of those parties, made motions or asserted claims or defenses so lacking in merit as to show that the party or representative acted intentionally for delay, or otherwise acted in bad faith.

(b) Whether, in the course of the action involved, the person, the Attorney General, or the opposing party, or the representative of any of those parties, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings.

(c) Whether the person, the Attorney General, or the opposing party, or the representative of any of those parties, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

## **II. Unfair Practices Act (§ 17000 et seq. Business & Professions Code)**

**17000.** This chapter may be cited as the Unfair Practices Act.

**17001.** The Legislature declares that the purpose of this chapter is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.

**17002.** This chapter shall be liberally construed that its beneficial purposes may be subserved.

**17020.** The definitions in this article shall be used in construing this chapter.

**17021.** "Person" includes any person, firm, association, organization, partnership, business trust, company, corporation or municipal or other public corporation.

**17022.** "Sell" includes selling, offering for sale or advertising for sale.

**17023.** "Give" includes giving, offering to give or advertising the intent to give.

**17024.** "Article or product" includes any article, product, commodity, thing of value, service or output of a service trade.

Motion picture films when licensed for exhibition to motion picture houses are not articles or products under this chapter.

Nothing in this chapter applies:

(1) To any service, article or product for which rates are established under the jurisdiction of the Public Utilities Commission of this State and sold or furnished by any public utility corporation, or installation and repair services rendered in connection with any services, articles or products.

(2) To any service, article or product sold or furnished by a publicly owned public utility and upon which the rates would have been established under the jurisdiction of the Public Utilities Commission of this State if such service, article or product had been sold or furnished by a public utility corporation, or installation and repair services rendered in connection with any services, articles or products.

**17025.** “Vendor” includes any person who performs work upon, renovates, alters or improves any personal property belonging to another person.

**17026.** “Cost” as applied to production includes the cost of raw materials, labor, and all overhead expenses of the producer.

“Cost” as applied to distribution means the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor, plus the cost of doing business by the distributor and vendor and in the absence of proof of cost of doing business a markup of 6 percent on such invoice or replacement cost shall be prima facie proof of such cost of doing business.

“Cost” as applied to warranty service agreements includes the cost of parts, transporting the parts, labor, and all overhead expenses of the service agency.

Discounts granted for cash payments shall not be used to reduce costs.

**17027.** In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of the article or product purchased at a forced, bankrupt, closeout sale, or other sale outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of the date of the sale of the article or product replaced through the ordinary channels of trade, unless the article or product is kept separate from goods purchased in the ordinary channels of trade and unless the article or product is advertised and sold as merchandise purchased at a forced, bankrupt, closeout sale, or by means other than through the ordinary channels of trade.

Such advertising shall state the conditions under which the goods were purchased, and the quantity of the merchandise to be sold or offered for sale.

**17028.** “Ordinary channels of trade” means those ordinary, regular and daily transactions in the mercantile trade whereby title to an article or product, in no way damaged or deteriorated, is transferred from one person to another.

“Ordinary channels of trade” does not include sales of bankrupt stocks, closeout goods, dents, sales of goods bought from a business or merchant retiring from business, fire sales and sales of damaged or deteriorated goods, which damage or deterioration results from any cause whatsoever. This listing is not all inclusive but as example only.

**17029.** “Cost of doing business” or “overhead expense” means all costs of doing business incurred in the conduct of the business and shall include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising.

**17030.** “Loss leader” means any article or product sold at less than cost:

(a) Where the purpose is to induce, promote or encourage the purchase of other merchandise; or

(b) Where the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers; or

(c) Where the effect is to divert trade from or otherwise injure competitors.

**17031.** Locality discrimination means a discrimination between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this State, by selling or furnishing an article or product, at a lower price in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another.

**17040.** It is unlawful for any person engaged in the production, manufacture, distribution or sale of any article or product of general use or consumption, with intent to destroy the competition of any regular established dealer in such article or product, or to prevent the competition of any person who in good faith, intends and attempts to become such dealer, to create locality discriminations.

Nothing in this section prohibits the meeting in good faith of a competitive price.

**17041.** Nothing in this chapter prohibits locality discriminations which make allowances for differences, if any, in the grade, quality or quantity when based and justified in the cost of manufacture, sale or delivery, or the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture if a manufactured product or commodity, or from the point of shipment to the point of destination.

**17042.** Nothing in this chapter prohibits any of the following:

(a) A selection of customers.

(b) A functional classification by any person of any customer as broker, jobber, wholesaler or retailer.

(c) A differential in price for any article or product as between any customers in different functional classifications.

**17043.** It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition.

**17044.** It is unlawful for any person engaged in business within this State to sell or use any article or product as a “loss leader” as defined in Section 17030 of this chapter.

**17045.** The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful.

**17046.** It is unlawful for any person to use any threat, intimidation, or boycott, to effectuate any violation of this chapter.

**17047.** It is unlawful for any manufacturer, wholesaler, distributor, jobber, contractor, broker, retailer, or other vendor, or any agent of any such person, to solicit any violation of this chapter.

**17048.** It is unlawful for any manufacturer, wholesaler, distributor, jobber, contractor, broker, retailer, or other vendor, or any agent of any such person, jointly to participate or collude with any other such person in the violation of this chapter.

**17048.5.** It is unlawful for any manufacturer, wholesaler, distributor, jobber, contractor, broker, retailer, or other vendor, or any agent of any such person, to enter into a contract with any service or repair agency for the performance of warranty service and repair for products manufactured, distributed, or sold by such person, below the cost to such service or repair agency of performing the warranty service or repair.

**17049.** The prohibitions of this chapter against locality discrimination and sales below cost embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination or sale below cost is in substance or fact effected in violation of the spirit and intent of this chapter.

**17050.** The prohibitions of this chapter against locality discriminations, sales below cost, and loss leaders do not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such article or product and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation; provided, notice is given to the public thereof.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(c) By an officer acting under the orders of any court.

(d) In an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product, in the same locality or trade area and in the ordinary channels of trade.

(e) In an endeavor made in good faith by a manufacturer, selling an article or product of his own manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product, in the same locality or trade area and in the ordinary channels of trade.

The notice required to be given under this section shall not be sufficient unless the subject of such sales is kept separate from other stocks and clearly and legibly marked with the reason for such sales, and any advertisement of such goods must indicate the same facts and the number of items to be sold.

**17051.** Any contract, express or implied, made by any person, firm, or corporation in violation of this chapter is an illegal contract and no recovery thereon shall be had.

**17070.** Any person or trade association may bring an action to enjoin and restrain any violation of this chapter and, in addition thereto, for the recovery of damages.

**17071.** In all actions brought under this chapter proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition.

**17071.5.** In all actions brought under this chapter proof of limitation of the quantity of any article or product sold or offered for sale to any one customer to a quantity less than the entire supply thereof owned or possessed by the seller or which he is otherwise authorized to sell at the place of such sale or offering for sale, together with proof that the price at which the article or product is so sold or offered for sale is in fact below its invoice or replacement cost, whichever is lower, raises a presumption of the purpose or intent to injure competitors or destroy competition. This section applies only to sales by persons conducting a retail business the principal part of which involves the resale to consumers of commodities purchased or acquired for that purpose, as distinguished from persons principally engaged in the sale to consumers of commodities of their own production or manufacture.

**17072.** Where a particular trade or industry, of which a person complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, that cost survey is competent evidence to be used in proving the costs of such person.

**17073.** Proof of average overall cost of doing business for any particular inventory period when added to the cost of production of each article or product, as to a producer, or invoice or replacement cost, whichever is lower, of each article or product, as to a distributor, is presumptive evidence of cost of each such article or product involved in any action brought under this chapter.

**17074.** Proof of transportation tariffs when fixed and approved by the Public Utilities Commission of the State of California is presumptive evidence of delivery cost.

**17075.** In any action where it is alleged and shown that the person complained against is selling below his cost of doing business, and such person is including labor at less than the prevailing wage scale in the trade in which such person is engaged for the locality or vicinity in which he is doing business, evidence of such prevailing wage scale shall be admissible to prove the intent or purpose of such person to violate this chapter.

**17076.** In any action brought under this chapter, where persons are employed or performing services for any person or in the conduct of the business wherein such person is charged with a violation of this chapter, and are so employed or performing such services without compensation or at a wage lower than that prevailing at the time and place of the service for the particular services performed, such services shall be charged as an expense of the business in which rendered and at the rate of the wage for the services rendered prevailing at the time of the service at the place where rendered.

**17077.** In any action or prosecution for sales below cost in violation of this chapter, if the defendant acquires his raw materials for a consideration not wholly or definitely computable in money, the cost of the raw materials shall be presumed to be the prevailing market price for similar raw materials in the ordinary channels of trade in the locality or vicinity in which such raw materials were acquired, at the time of the acquisition.

**17078.** If it appears to the court upon any application for a temporary restraining order, or upon the hearing of any order to show cause why a preliminary injunction should not be issued, or upon the hearing of any motion for a preliminary injunction, or if the court shall find, in any such action, that any defendant therein is violating, or has violated, this chapter,

then the court shall enjoin the defendant from doing all acts which are prohibited by the section, or sections, of which any provision thereof is being violated, or has been violated, by the defendant.

**17079.** The court may, in its discretion, include in any injunction against a violation of this chapter such other restraint as it may deem expedient in order to deter the defendant from, and insure against, his committing a future violation of this chapter.

**17080.** Any injunction against a violation of this chapter, whether interim or final, shall cover every article or product and not merely the particular article or product involved in the action.

**17081.** It is not necessary for the plaintiff, in any action under this chapter, to provide or file any undertaking or bond for the issuance of any interim or final injunction.

**17082.** In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter.

In any action under this chapter in which judgment is entered against the defendant the plaintiff shall be awarded a reasonable attorney's fee together with the costs of suit.

The amendments to this section adopted at the 1959 Regular Session of the Legislature do not apply to any action commenced prior to September 18, 1959.

**17083.** The testimony of any witness in any action brought under this chapter may be taken by deposition even though the case is not one specified in Section 2021 of the Code of Civil Procedure, but otherwise the provisions of Part 4, Title 3, Chapter 3 of the Code of Civil Procedure are applicable to the witness, his testimony and deposition.

In addition, the books and records of any party, or of any such witness, may be subpoenaed into court and introduced into evidence, or introduced, by reference, into evidence, and may be required to be produced at the taking of the deposition of any party or of any such witness and there inquired into.

**17083.** The testimony of any witness in any action brought under this chapter may be taken by deposition. The provisions of Chapter 3 (commencing with Section 2002) of Title 3 of Part 4 of, and the provisions of Title 4 (commencing with Section 2016.010) of Part 4 of, the Code of Civil Procedure are applicable to the witness, the testimony and the deposition.

In addition, the books and records of any party, or of any such witness, may be subpoenaed into court and introduced into evidence, or introduced, by reference, into evidence, and may be required to be produced at the taking of the deposition of any party or of any such witness and there inquired into.

**17084.** Any party to any action brought under this chapter may, upon notice, apply to the court in which the action is pending, or to any judge thereof, for an order requiring any other party to give to the applicant, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any documents, papers, or memoranda in such party's possession or under his control containing evidence relating to the

merits of any such action or any defense therein.

If a compliance with the order is refused, the court shall exclude the entries of accounts in any such book, or any such document, paper, or memorandum from being given in evidence by the other party, or if wanted as evidence by the applicant the court shall presume them to be as the applicant alleges.

**17085.** If, at any time while any action for a violation of this chapter is pending, it appears to the court that an extensive examination of books, papers, records, or documents is or may become material or relevant to the issues in the action, the court may, in its discretion, upon the application of any party to the action, or upon its own motion, order a reference to be had in the manner and form provided in Part 2, Title 8, Chapter 6 of the Code of Civil Procedure.

**17086.** No information obtained under any provision of this article, or under Part 4, Title 6, Chapter 2 of the Code of Civil Procedure, may be used against any such party, or any such witness, as a basis for a misdemeanor or felony prosecution in any court of this State.

**17087.** In any action or proceeding, civil or criminal, brought by the Attorney General or any district attorney for the violation of this chapter, no person shall be excused from attending, testifying or producing books, papers, or documents in obedience to subpoena or under order of court on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to any penalty.

No individual shall be prosecuted or subjected to any penalty for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence in any action or proceeding brought by the Attorney General or district attorney under this chapter.

**17095.** Any person, who, either as director, officer or agent of any firm or corporation or as agent of any person, violating the provisions of this chapter, assists or aids, directly or indirectly, in such violation is responsible therefor equally with the person, firm or corporation for which he acts.

**17096.** In any injunction proceeding against any person as officer, director or agent, it is sufficient to allege and prove the unlawful intent of the person, firm or corporation for which he acts.

**17100.** Any person, whether as principal, agent, officer or director, for himself, or for another person, or for any firm or corporation, or any corporation, who or which violates this chapter is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) or by imprisonment not exceeding six months or by both such fine and imprisonment, in the discretion of the court.

**17101.** In the prosecution of any person as officer, director or agent, it is sufficient to allege and prove the unlawful intent of the person, firm or corporation for which he acts.

### **III. Unfair Competition Law**

**17200.** As used in this chapter, unfair competition shall 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.

**17201.** As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons.

**17201.5.** As used in this chapter:

(a) “Board within the Department of Consumer Affairs” includes any commission, bureau, division, or other similarly constituted agency within the Department of Consumer Affairs.

(b) “Local consumer affairs agency” means and includes any city or county body which primarily provides consumer protection services.

**17202.** Notwithstanding Section 3369 of the Civil Code, specific or preventive relief may be granted to enforce a penalty, forfeiture, or penal law in a case of unfair competition.

#### **17203. Injunctive Relief—Court Orders**

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, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, 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. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

#### **17204. Actions for Injunctions by Attorney General, District Attorney, County Counsel, and City Attorneys**

Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition.

**17204.5.** In addition to the persons authorized to bring an action pursuant to Section 17204, the City Attorney of the City of San Jose, with the annual consent of the Santa Clara County

District Attorney, is authorized to prosecute those actions.

This section shall remain in effect until such time as the population of the City of San Jose exceeds 750,000, as determined by the Population Research Unit of the Department of Finance, and at that time shall be repealed.

**17205.** Unless otherwise expressly provided, the remedies or penalties provided by this chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

**17206. Civil Penalty for Violation of Chapter**

(a) Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by any city attorney of a city, or city and county, having a population in excess of 750,000, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor, or, with the consent of the district attorney, by a city attorney in any city and county, in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State General Fund. If the action is brought by a district attorney or county counsel, the penalty collected shall be paid to the treasurer of the county in which the judgment was entered. Except as provided in subdivision (d), if the action is brought by a city attorney or city prosecutor, one-half of the penalty collected shall be paid to the treasurer of the city in which the judgment was entered, and one-half to the treasurer of the county in which the judgment was entered. The aforementioned funds shall be for the exclusive use by the Attorney General, the district attorney, the county counsel, and the city attorney for the enforcement of consumer protection laws.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of any reasonable expenses incurred by the board shall be paid to the state Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the state Treasurer. The amount of any reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county that funds the local agency.

(e) If the action is brought by a city attorney of a city and county, the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which

the judgment was entered for the exclusive use by the city attorney for the enforcement of consumer protection laws. However, if the action is brought by a city attorney of a city and county for the purposes of civil enforcement pursuant to Section 17980 of the Health and Safety Code or Article 3 (commencing with Section 11570) of Chapter 10 of Division 10 of the Health and Safety Code, either the penalty collected shall be paid entirely to the treasurer of the city and county in which the judgment was entered or, upon the request of the city attorney, the court may order that up to one-half of the penalty, under court supervision and approval, be paid for the purpose of restoring, maintaining, or enhancing the premises that were the subject of the action, and that the balance of the penalty be paid to the treasurer of the city and county.

**17207.** (a) Any person who intentionally violates any injunction prohibiting unfair competition issued pursuant to Section 17203 shall be liable for a civil penalty not to exceed six thousand dollars (\$6,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of that conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of that conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant.

(b) The civil penalty prescribed by this section shall be assessed and recovered in a civil action brought in any county in which the violation occurs or where the injunction was issued in the name of the people of the State of California by the Attorney General or by any district attorney, any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney in any court of competent jurisdiction within his or her jurisdiction without regard to the county from which the original injunction was issued. An action brought pursuant to this section to recover civil penalties shall take precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

(c) If such an action is brought by the Attorney General, one-half of the penalty collected pursuant to this section shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel the entire amount of the penalty collected shall be paid to the treasurer of the county in which the judgment is entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county in which the judgment was entered and one-half to the city, except that if the action was brought by a city attorney of a city and county the entire amount of the penalty collected shall be paid to the treasurer of the city and county in which the judgment is entered.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of the reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the State Treasurer. The amount of the reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county which funds the local agency.

**17208.** Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.

**17209.** If a violation of this chapter is alleged or the application or construction of this chapter is in issue in any proceeding in the Supreme Court of California, a state court of appeal, or the appellate division of a superior court, each person filing any brief or petition with the court in that proceeding shall serve, within three days of filing with the court, a copy of that brief or petition on the Attorney General, directed to the attention of the Consumer Law Section at a service address designated on the Attorney General's official Web site for service of papers under this section or, if no service address is designated, at the Attorney General's office in San Francisco, California, and on the district attorney of the county in which the lower court action or proceeding was originally filed. Upon the Attorney General's or district attorney's request, each person who has filed any other document, including all or a portion of the appellate record, with the court in addition to a brief or petition shall provide a copy of that document without charge to the Attorney General or the district attorney within five days of the request. The time for service may be extended by the Chief Justice or presiding justice or judge for good cause shown. No judgment or relief, temporary or permanent, shall be granted or opinion issued until proof of service of the brief or petition on the Attorney General and district attorney is filed with the court.

**17500.** It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or by both that imprisonment and fine.

**17501.** For the purpose of this article the worth or value of any thing advertised is the prevailing market price, wholesale if the offer is at wholesale, retail if the offer is at retail, at the time of publication of such advertisement in the locality wherein the advertisement is published.

No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.

**17502.** This article does not apply to any visual or sound radio broadcasting station, to any internet service provider or commercial online service, or to any publisher of a newspaper, magazine, or other publication, who broadcasts or publishes, including over the Internet, an advertisement in good faith, without knowledge of its false, deceptive, or misleading character.

**17504.** (a) Any person, partnership, corporation, firm, joint stock company, association, or organization engaged in business in this state as a retail seller who sells any consumer good or service which is sold only in multiple units and which is advertised by price shall advertise those goods or services at the price of the minimum multiple unit in which they are offered.

(b) Nothing contained in subdivision (a) shall prohibit a retail seller from advertising any consumer good or service for sale at a single unit price where the goods or services are sold only in multiple units and not in single units as long as the advertisement also discloses, at least as prominently, the price of the minimum multiple unit in which they are offered.

(c) For purposes of subdivisions (a) and (b), “consumer good” means any article which is used or bought for use primarily for personal, family, or household purposes, but does not include any food item.

(d) For the purposes of subdivisions (a) and (b), “consumer service” means any service which is obtained for use primarily for personal, family, or household purposes.

(e) For purposes of subdivisions (a) and (b), “retail seller” means an individual, firm, partnership, corporation, joint stock company, association, organization, or other legal relationship which engages in the business of selling consumer goods or services to retail buyers.

**17505.** No person shall state, in an advertisement of his goods, that he is a producer, manufacturer, processor, wholesaler, or importer, or that he owns or controls a factory or other source of supply of goods when such is not the fact, and no person shall in any other manner misrepresent the character, extent, volume, or type of his business.

**17506.** As used in this chapter, “person” includes any individual, partnership, firm, association, or corporation.

**17506.5.** As used in this chapter:

(a) “Board within the Department of Consumer Affairs” includes any commission, bureau, division, or other similarly constituted agency within the Department of Consumer Affairs.

(b) “Local consumer affairs agency” means and includes any city or county body which primarily provides consumer protection services.

**17507.** It is unlawful for any person, firm, corporation or association to make an advertising claim or representation pertaining to more than one article of merchandise or type of service, within the same class of merchandise or service, if any price set forth in such claim or representation does not clearly and conspicuously identify the article of merchandise or type of service to which it relates. Disclosure of the relationship between the price and particular article of merchandise or type of service by means of an asterisk or other symbol, and corresponding footnote, does not meet the

requirement of clear and conspicuous identification when the particular article of merchandise or type of service is not represented pictorially.

**17508.** (a) It shall be unlawful for any person doing business in California and advertising to consumers in California to make any false or misleading advertising claim, including claims that (1) purport to be based on factual, objective, or clinical evidence, that (2) compare the product's effectiveness or safety to that of other brands or products, or that (3) purport to be based on any fact.

(b) Upon written request of the Director of Consumer Affairs, the Attorney General, any city attorney, or any district attorney any person doing business in California and in whose behalf advertising claims are made to consumers in California, including claims that (1) purport to be based on factual, objective, or clinical evidence, that (2) compare the product's effectiveness or safety to that of other brands or products, or that (3) purport to be based on any fact, shall provide to the department or official making the request evidence of the facts on which such advertising claims are based. Any such request shall be made within one year of the last day on which such advertising claims were made.

Any city attorney or district attorney who makes a request pursuant to this subdivision shall give prior notice of such request to the Attorney General.

(c) The Director of Consumer Affairs, Attorney General, any city attorney, or any district attorney may, upon failure of an advertiser to respond by adequately substantiating the claim within a reasonable time, or if such Director of Consumer Affairs, Attorney General, city attorney, or district attorney shall have reason to believe that any such advertising claim is false or misleading, do either or both of the following: (1) seek an immediate termination or modification of the claim by the person in accordance with Section 17535, (2) disseminate information, taking due care to protect legitimate trade secrets, concerning the veracity of such claims, or why such claims are misleading, to the consumers of this state.

(d) The relief provided for in subdivision (c) is in addition to any other relief which may be sought for a violation of this chapter. Section 17534 shall not apply to violations of this section.

(e) Nothing in this section shall be construed to hold any newspaper publisher or radio or television broadcaster liable for publishing or broadcasting any advertising claims referred to in subdivision (a), unless such publisher or broadcaster is the person making such claims.

(f) The plaintiff shall have the burden of proof in establishing any violation of this section.

(g) If an advertisement is in violation of subdivision (a) and Section 17500, the court shall not impose a separate civil penalty pursuant to Section 17536 for the violation of subdivision (a) and the violation of Section 17500 but shall impose a civil penalty for the violation of either subdivision (a) or Section 17500.

**17509.** (a) Any advertisement, including any advertisement over the Internet, soliciting the purchase or lease of a product or service, or any combination thereof, that requires, as a condition of sale, the purchase or lease of a different product or service, or any combination thereof, shall conspicuously disclose in the advertisement the price of all those products or services. This requirement shall not in any way affect the provisions of Sections 16726 and 16727, with respect to unlawful buying arrangements.

(b) Subdivision (a) does not apply to any of the following:

(1) Contractual plans or arrangements complying with this paragraph under which

the seller periodically provides the consumer with a form or announcement card which the consumer may use to instruct the seller not to ship the offered merchandise. Any instructions not to ship merchandise included on the form or card shall be printed in type as large as all other instructions and terms stated on the form or card. The form or card shall specify a date by which it shall be mailed by the consumer (the "mailing date") or received by the seller (the "return date") to prevent shipment of the offered merchandise. The seller shall mail the form or card either at least 25 days prior to the return date or at least 20 days prior to the mailing date, or provide a mailing date of at least 10 days after receipt by the consumer, except that whichever system the seller chooses for mailing the form or card, shall be calculated to afford the consumer at least 10 days in which to mail his or her form or card. The form or card shall be preaddressed to the seller so that it may serve as a postal reply card or, alternatively, the form or card shall be accompanied by a return envelope addressed to seller. Upon the membership contract or application form or on the same page and immediately adjacent to the contract or form, and in clear and conspicuous language, there shall be disclosed the material terms of the plan or arrangement including all of the following:

(A) That aspect of the plan under which the subscriber shall notify the seller, in the manner provided for by the seller, if the seller does not wish to purchase or receive the selection.

(B) Any obligation assumed by the subscriber to purchase a minimum quantity of merchandise.

(C) The right of a contract-complete subscriber to cancel his or her membership at any time.

(D) Whether billing charges will include an amount for postage and handling.

(2) Other contractual plans or arrangements not covered under subdivision (a), such as continuity plans, subscription arrangements, standing order arrangements, supplements, and series arrangements under which the seller periodically ships merchandise to a consumer who has consented in advance to receive that merchandise on a periodic basis.

(c) This section shall not apply to the publisher of any newspaper, periodical, or other publication, or any radio or television broadcaster, or the owner or operator of any cable, satellite, or other medium of communication who broadcasts or publishes, including over the Internet, an advertisement or offer in good faith, without knowledge of its violation of subdivision (a).

### **17535. Obtaining Injunctive Relief**

Any person, corporation, firm, partnership, joint stock company, or any other association or organization which violates or proposes to violate this chapter may be enjoined by any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person, corporation, firm, partnership, joint stock company, or any other association or organization of any practices which violate this chapter, or which 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 any practice in this chapter declared to be unlawful.

Actions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in this state in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by any person who has suffered injury in fact and has lost money or property as a result of a violation of this

chapter. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of this section and complies with Section 382 of the Code of Civil Procedure, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

**17535.5.** (a) Any person who intentionally violates any injunction issued pursuant to Section 17535 shall be liable for a civil penalty not to exceed six thousand dollars (\$6,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of such conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of harm caused by the conduct constituting a violation, the nature and persistence of such conduct, the length of time over which the conduct occurred, the assets, liabilities and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant.

(b) The civil penalty prescribed by this section shall be assessed and recovered in a civil action brought in any county in which the violation occurs or where the injunction was issued in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction within his jurisdiction without regard to the county from which the original injunction was issued. An action brought pursuant to this section to recover such civil penalties shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

(c) If such an action is brought by the Attorney General, one-half of the penalty collected pursuant to this section shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel, the entire amount of the penalty collected shall be paid to the treasurer of the county in which the judgment is entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county in which the judgment was entered and one-half to the city.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of such reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund, the moneys shall be paid to the State Treasurer. The amount of such reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality or county which funds the local agency.

**17536. Penalty for Violations of Chapter; Proceedings; Disposition of Proceeds**

(a) Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

(b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the

relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

(c) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer.

If brought by a district attorney or county counsel, the entire amount of penalty collected shall be paid to the treasurer of the county in which the judgment was entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county and one-half to the city. The aforementioned funds shall be for the exclusive use by the Attorney General, district attorney, county counsel, and city attorney for the enforcement of consumer protection laws.

(d) If the action is brought at the request of a board within the Department of Consumer Affairs or a local consumer affairs agency, the court shall determine the reasonable expenses incurred by the board or local agency in the investigation and prosecution of the action.

Before any penalty collected is paid out pursuant to subdivision (c), the amount of such reasonable expenses incurred by the board shall be paid to the State Treasurer for deposit in the special fund of the board described in Section 205. If the board has no such special fund the moneys shall be paid to the State Treasurer. The amount of such reasonable expenses incurred by a local consumer affairs agency shall be paid to the general fund of the municipality which funds the local agency.

(e) As applied to the penalties for acts in violation of Section 17530, the remedies provided by this section and Section 17534 are mutually exclusive.

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