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ONE HUNDRED YEARS IN THE MAKING: THE CARTWRIGHT ACT IN BROAD OUTLINE

John M. Landry★
Kirk A. Hornbeck

I. Introduction

The Cartwright Act serves as California's principal antitrust law.¹ Found within Business and Professions Code at Sections 16700-16770, it is a hodgepodge of loosely organized provisions, some having nothing at all to do with antitrust.² A series of provisions, however, lie at its core that together prohibit multi-firm conduct that unreasonably restrains trade.

This overview first explores the historical 1907 impetus for the Act. Next, it distills the Act's primary express and implied substantive provisions. It then addresses the Act's jurisdictional reach as well as the main features of public and private enforcement. It concludes with a brief discussion of the Act's current relationship with federal antitrust law.

II. The Impetus For The Legislation

In the period leading up to the Cartwright Act, combinations thrived within a number of California industries (lumber, baking, ice production, and electrical power), fixing prices and, to some degree, operating openly.³ Contemporary press reports state that the Cartwright Act took aim at these in-state cartels. Days before the law's effective date, one news account heralded the anticipated demise of the lumber trust to be "[t]he greatest triumph for the new law."⁴ California's legislature apparently viewed existing California common law prohibitions on restraints of trade as ineffective relative to the proposed

* John M. Landry is an attorney in the Los Angeles office of Sheppard, Mullen, Richter & Hampton LLP. He is also the Immediate Past Chair of the Executive Committee of the Antitrust and Unfair Business Practices Section of the Los Angeles Bar Association. Kirk A. Hornbeck is an attorney practicing in Los Angeles.

1 Other California competition statutes include the Unfair Practices Act (Cal. Bus. & Prof. Code § 17000 *et seq.*), and the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*). The passage of the Cartwright Act did not displace California's preexisting common law rules against restraints of trade. See Cal. Bus. & Prof. Code § 16700 (providing that the Cartwright Act is "cumulative . . . of any other provision of law"); *Speegle v. Bd. of Fire Underwriters*, 29 Cal. 2d 34, 46 (1946) (finding plaintiff stated cause of action under both the Cartwright Act and common law rules); *Widdows v. Koch*, 263 Cal. App. 2d 228, 235-36 (1968) (stating that the Cartwright Act "discloses an intent that the common law is not to be superseded").

2 The Cartwright Act has been amended more than twenty times. As a result, the sequence of sections within the code appears random. Some provisions prohibit business transactions that result from or further discrimination on the basis of sex, race, color, religion, ancestry or national origin. See Cal. Bus. & Prof. Code § 16721.

3 *Trusts Go "Bust" In Just One Week*, L.A. TIMES, May 16, 1907, at H/1 (discussing the Cartwright Act's effect on "[c]ombinations that have existed here for years for the purpose of fixing and maintaining prices"); see *Cartwright Law Goes Into Effect*, S.F. CALL, May 24, 1907, at 4 (identifying various wholesaler and retailer combinations); *Raisin Men Alter Rules*, L.A. TIMES, May 10, 1907, at I/3 (reporting raisin combination's reaction to the Cartwright Act).

4 *Trusts Go "Bust" In Just One Week*, L.A. TIMES, May 16, 1907, at H/1.

legislation.⁵ So did the cartels themselves: In the weeks leading up to the Act's effective date, the looming threat of criminal sanctions motivated a number of combinations to announce publicly their self-dissolution.⁶

California passed its own antitrust statute seventeen years after the federal Sherman Act and eighteen years after the passage of a number of other state antitrust statutes. The reason for that delay is not well understood. In the pre-Cartwright Act era, significant political opposition to more effective antitrust enforcement by industries operating within California existed, and may have, until 1907, presented too great an obstacle.⁷ Those seeking to end the cartels also may have waited for effective federal enforcement that never arrived.⁸ But as a jurisdictional matter, federal law could not reach purely intrastate cartel activity at the time.⁹ Moreover, the United States did not aggressively enforce the Sherman Act before 1907, and efforts to prosecute interstate cartels under that statute—most notably, the whiskey and sugar trusts—had failed.¹⁰ The federal government's efforts to enforce the Sherman Act in California may have been viewed as particularly ineffective.¹¹

In the end, California enacted the Cartwright Act with the following express enforcement purpose:

An act to define trust and to provide the criminal penalties and civil damages, and punishment for corporations, persons, firms, and associations, or persons connected with them, and to promote free competition in commerce and all classes of business in this state.¹²

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- 5 California's common law precedents on restraints of trade in fact countenanced some price fixing. See, e.g., *Herriman v. Menzies*, 115 Cal. 16, 23 (1896) (finding price fixing by competitors not unlawful because prices seemed reasonable and firms lacked monopoly power).
 - 6 *Cartwright Law Goes Into Effect*, S.F. CALL, May 24, 1907, at 4 (reporting the voluntary dissolution of more than 30 "combinations in wholesalers and retailers in various mercantile lines"); see *Trusts Go "Bust" In Just One Week*, L.A. TIMES, May 16, 1907, at H/1 (reporting that business men were "withdrawing from combinations of various sorts" with "remarkable alacrity").
 - 7 See *Gov. Gillett Rings True*, L.A. TIMES, Mar. 26, 1907, at H/4 (describing the opposition of the "corporate lobby" to the Cartwright Act and the lobby's "impotent" alternative legislation); Thomas Greene, *Senator Cartwright and His Antitrust Law*, COMPETITION, 1992, at 2 (discussing the Cartwright Act's passage and the opposition of corporate interests).
 - 8 One treatise, without citation, ascribes the 1907 passage "to the perceived ineffectiveness of the Sherman Act." 1 AMERICAN BAR ASS'N SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES 6-1 (3d ed. 2004).
 - 9 *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (holding that sugar refining was a local activity and therefore not subject to congressional regulation); see 21 Cong. Rec. 2457 (1890) (memorializing Senator Sherman's statement that "If the combination is confined to a state, the state should apply the remedy . . ."); Herbert Hovenkamp, *State Antitrust In The Federal Scheme*, 58 IND. L.J. 375, 379 (1984) (discussing the pervasive view that "if a restraint on trade was located entirely within a state, it was out of congressional reach").
 - 10 See Julian O. von Kalinowski, *et al.*, 1 ANTITRUST LAWS AND TRADE REGULATION § 9.03, at 9-18 to 9-20 (2d ed. 2005).
 - 11 Between 1890 and 1907, the Department of Justice brought only two criminal cases in California, achieving one conviction resulting in a \$1,000 fine. CCH, THE FEDERAL ANTITRUST LAWS WITH SUMMARY OF CASES INSTITUTED BY THE U.S.: 1890-1951 70-75 (1952). It filed only three civil/equity cases in California during that same period. *Id.*

III. The Express Liability Provisions

The Act's main prohibitions are set forth in Sections 16726, 16720, 16725, and 16727.

A. Section 16726: Prohibiting "Trusts"

This section declares that, unless exempted,¹³ "every trust is unlawful, against public policy and void."¹⁴

B. Section 16720: Defining "Trusts"

This Section defines the term "trust" to mean "a combination of capital, skill or acts by two or more persons" for any of the purposes listed in the statute.¹⁵

• The Definition of "Combination"

A "combination" is formed when two or more persons, each having a separate and independent existence, bring together "capital, skill or acts" into "any kind of union, association or cooperative action."¹⁶ This definition broadly captures almost any type of concerted activity. But because corporations and their agents lack separate existence, intracompany agreements are not covered.¹⁷ It is likely that agreements between corporate parents and their wholly-owned subsidiaries do not meet the definition either.¹⁸ In certain circumstances, a joint venture may also fall outside the definition.¹⁹ In addition, because corporate mergers extinguish the independent existence of the seller, they lack the continuing, cooperative action necessary to qualify as combinations within the meaning of

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- 12 Cal. Stat. 1907, ch. 530. But even the Act's tardy 1907 passage may have been premature. A 1909 amendment (since held invalid and repealed) would soon exempt restraints designed to secure reasonable profits, creating uncertainty and impeding the Act's enforcement until the mid-1940s. Greene, *supra* note 7, at 3; Note, *The Cartwright Act – California's Sleeping Beauty*, 2 STAN. L. REV. 200, 201 (1949).
 - 13 Statutory and common law exemptions include those addressing labor (Cal. Bus. & Prof. Code § 16703), municipalities (see, e.g., *Widdows*, 263 Cal. App. 2d at 235), agricultural and fish cooperative associations (Cal. Agric. Code § 54038), public utilities in certain circumstances (see Cal. Pub. Util. Code § 8107), interstate sports leagues (see *Partec v. San Diego Chargers Football Co.*, 34 Cal. 3d 378 (1983), *cert. denied*, 466 U.S. 904 (1984)), and certain petitioning activity such as lobbying (see *Osteopathic Physicians & Surgeons of Cal. v. Cal. Med. Ass'n*, 224 Cal. App. 2d 378 (1964)).
 - 14 Cal. Bus. & Prof. Code § 16726.
 - 15 Cal. Bus. & Prof. Code § 16720.
 - 16 *State ex rel. van de Kamp v. Texaco, Inc.*, 46 Cal. 3d 1147, 1157 (1988) (quoting *Gates v. Hooper*, 90 Tex. 563, 565 (Tex. 1897) and finding the meaning of the term "combination" as delineated in *Gates* to be the same as intended by California's legislature).
 - 17 *Roth v. Rhodes*, 25 Cal. App. 4th 530, 544 (1994); *Bondi v. Jewels by Eduar, Ltd.*, 267 Cal. App. 2d 672, 678 (1968).
 - 18 No California court has expressly so held. In the 2001-2002 legislative session, a bill was introduced containing language that would have amended the Cartwright Act to include parent/subsidiary agreements expressly within its ambit. See S.B. 1814, 2001-2002 Leg. Sess. (Cal. 2002). That language was later removed from the bill and was never acted upon by the California Assembly. 1 STATE ANTITRUST PRACTICE AND STATUTES, *supra* note 8, at 6-19 n.172.
 - 19 See *Freeman v. San Diego Ass'n of Realtors*, 77 Cal. App. 4th 171, 193 (1999) (finding rivals who created new product through joint venture did not "combine" within meaning of Section 16720).

the Act.²⁰ Consistent with the need for cooperative activity, single-firm monopolization conduct cannot serve as an offense under the Act, although a multi-firm conspiracy to monopolize likely would.²¹

There is no attempt offense under Section 16720: nothing less than a combination suffices. In some contexts, however, a combination can arise through minimal conduct and need not be entirely voluntary, such as when threats or other acts by one firm coerce another firm to adhere to a restraint. In vertical dealings between producers and distributors, otherwise non-coercive acts may be coercive due to unequal bargaining positions.²² Still, California recognizes the important right of a seller to deal or not with whomever it chooses.²³ In deference to this right, a seller can announce a policy designed to restrain trade, *i.e.*, resale price maintenance, and then refuse to sell to those who do not adhere to it. No combination is formed with those who then decide to adhere.²⁴ But even slight conduct beyond announcement of the policy that causes adherence can result in a combination under Section 16720.²⁵ Moreover, it is also well accepted in California that consciously parallel behavior by competing firms in an oligopoly, although resembling concerted activity, does not, without more, amount to a combination under the Cartwright Act.²⁶

• The Enumerated “Purposes”

A “combination” is only subject to Cartwright Act scrutiny as a “trust” when it is created for one of the purposes enumerated in subsections (a) through (e) of Section 16720. Those purposes are:

- (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.

20 *Texaco*, 46 Cal. 3d at 1163.

21 In *Texaco*, the California Attorney General claimed that the Cartwright Act regulated “monopolistic practices.” *See id.* at 1165 n.17. Although the California Supreme Court did not need to decide that precise question, the entire thrust of that decision emphasized that a “combination” requires the capital, skill or acts, of at least two independent entities and, as articulated by the court, could not possibly reach monopolization conduct. *See id.* at 1157.

22 *G.H.I.I. v. MTS, Inc.*, 147 Cal. App. 3d 256, 268 (1983); *Kolling v. Dow Jones & Co.*, 137 Cal. App. 3d 709, 722 (1982).

23 *G.H.I.I.*, 147 Cal. App. 3d at 267.

24 *Id.* at 268.

25 *See id.*

26 *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 862-63 (2001); *Eddins v. Redstone*, 134 Cal. App. 4th 290, 304 (2005) (“Conscious parallelism is a pattern of uniform business conduct, not in itself unlawful.”). California courts, like federal courts, are wary of the error in using the antitrust laws to condemn neutral or even pro-competitive unilateral conduct. *See Aguilar*, 25 Cal. 4th at 846. To reach a jury, evidence cannot be ambiguous, but must tend to exclude the possibility that the defendants acted independently. *See Eddins*, 134 Cal. App. 4th at 305 (stating that evidence of conscious parallelism does not permit an inference of conspiracy, absent showing that the defendants acted against their economic self-interest or other “plus factors”).

- (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 [agree to fix prices].²⁷

But the first listed “purpose”—“[t]o create or carry out restrictions in trade or commerce”—is a catch-all that subsumes and largely renders superfluous the other more specifically enumerated purposes. Thus, it is generally not useful to parse each purpose separately.²⁸

The Section 16720(a) catch-all functions like the spare but broad prohibitory language used in Section 1 of the Sherman Act.²⁹ Unless otherwise exempted, all combinations are potentially regulated, and all types of trade or commerce are protected, including trade or commerce that did not exist at the time of the Act’s passage. For example, although Section 16720 does not mention services, and speaks only of trade in “articles,” “merchandise” and “commodities,” sales of services are covered.³⁰ At least in this area of the statute, the California Supreme Court has endorsed a flexible approach: “Like many constitutional provisions written in general language, the provisions of the [Cartwright A]ct must be interpreted in light of their inductive policy and in the context of changing conditions of society.”³¹

C. Section 16725: Combinations for Pro-Competitive Purposes Are “Not Unlawful”

This section, added in 1941, states that “[i]t 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.”³² By declaring combinations formed for pro-competitive purposes as “not unlawful,” it serves as the converse of Section 16720(a) and adds nothing. To the extent it focuses on the restraint’s actual effects as a criterion of legality, it arguably injects a reasonableness

27 Cal. Bus. & Prof. Code § 16720(a)-(e).

28 See *People v. H. Jevne Co.*, 179 Cal. 621, 625 (1919) (finding that the agreement in question reflected “all, or, at least, some” of the prohibited purposes). Notably, the more particularized purposes address price-fixing conduct of some sort and suggest price fixing as the primary restraint targeted by the legislation.

29 See *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 927 (1976) (“[T]hat language is as broad as any found in the Sherman Act[.]”).

30 *Id.* at 927-28.

31 *Id.* at 928.

32 Cal. Bus. & Prof. Code § 16725.

standard into the Cartwright Act. There is, however, little case law discussing Section 16725, and it does not appear to play a role in antitrust analysis independent of the implied exception of reasonableness that courts have separately read into the Act.

D. A Brief Note on Section 16727

Section 16727 stands apart from the other liability provisions. It was added to the Cartwright Act in 1961 to prohibit certain exclusive dealing and tying arrangements “where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce.”³³ Its application is limited to “the sale of goods, merchandise, machinery, supplies, [or] commodities.”³⁴ Additionally, Section 16727’s statutory language prohibits tying services to goods, but not the reverse.³⁵ Because Section 16727 is patterned after Section 3 of the Clayton Act, federal cases apply when construing it.³⁶

IV. The Implied Exception Of Reasonableness

An implied exception to Sections 16720 and 16726, similar to that which validates reasonable restraints under Section 1 of the Sherman Act, moderates the Cartwright Act’s absolute ban on restraints of trade: only unreasonable restraints offend.³⁷ An assessment of the restraint’s reasonableness naturally shifts the focus of analysis from its purpose to its actual effects on competition in some defined market. There are two recognized Cartwright Act approaches: the rule of reason and the per se rule.³⁸

A. The Rule of Reason

The rule of reason is the typical form of judicial scrutiny applied in antitrust litigation. It assesses whether the defendant has sufficient market power to inflict marketwide injury. If so, it deems the restraint unreasonable only when any anticompetitive effects outweigh any pro-competitive effects or justifications.³⁹ An early California formulation of this rule expressed it as follows:

33 Cal. Bus. & Prof. Code § 16727.

34 See, e.g., *Morrison v. Viacom, Inc.*, 66 Cal. App. 4th 534, 541 (1998).

35 *Id.* at 546 (“The term ‘services’ is used to describe tied items and is not used to describe tying items.”).

36 *Id.* at 548.

37 See *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc.*, 4 Cal. 3d 842, 853 (1971); *People v. Santa Clara Valley Bowling Proprietors’ Ass’n*, 238 Cal. App. 2d 225, 233 (1965) (citing *People v. Bldg. Maint. Contractors’ Ass’n*, 41 Cal. 2d, 719, 727 (1953)).

38 While federal courts occasionally use a third approach called the “quick look,” which eliminates the need for the plaintiff to prove market power or define the relevant market, no California case has yet adopted this approach. See *Carter v. Variflex, Inc.*, 101 F. Supp. 2d 1261, 1266 (C.D. Cal. 2000) (finding the “quick look” analysis unwarranted in patent case arising under the Cartwright and Sherman Acts).

39 See, e.g., *Exxon Corp. v. Superior Court*, 51 Cal. App. 4th 1672, 1682 (1997).

[I]f the public welfare be not involved and the restraint upon one party be not greater than protection to the other requires, the contract will be sustained although it in some degree may be said to restrain trade.⁴⁰

As the prevailing standard, the rule of reason has wide application. Most notably, it is used to test the legality of vertical, non-price restraints, including exclusive distributorships, territory restrictions on distribution, dealer terminations, and vertical, concerted refusals to deal.⁴¹ Recent California intermediate appellate decisions, following modern Sherman Act jurisprudence, recognize that the market impact of these restraints is uncertain due to “their potential for a simultaneous reduction of intrabrand competition and a stimulation of interbrand competition.”⁴² Acknowledging that interbrand competition—not intrabrand competition—is antitrust’s “primary concern,” these decisions impose a rule of reason approach to assess the restraint’s actual net effects.⁴³

B. The Per Se Rule

California law reserves the per se rule for certain categories of restraints. When it applies, a harmful effect on competition is conclusively presumed.⁴⁴ Restraints currently subject to such treatment under the Cartwright Act include: price fixing, division of markets among competitors, and certain group boycotts and tying arrangements.⁴⁵

• Price fixing

Since the passage of the Cartwright Act, California courts have treated all price-fixing agreements—whether horizontal or vertical—as per se illegal.⁴⁶ Liability attaches regardless of whether the price is purportedly low or reasonable or whether defendants possess sufficient market power to control prices.⁴⁷ California’s per se ban relies on the notion that “[t]he public interest requires free competition so that prices be not dependent upon an

40 *Great W. Distillery Prods. v. John A. Wathen Distillery Co.*, 10 Cal. 2d 442, 448-49 (1937).

41 See, e.g., *Bert G. Gianelli Distrib. Co. v. Beck & Co.*, 172 Cal. App. 3d 1020, 1045 (1985) (exclusive distributorships and dealer terminations); *Exxon Corp.*, 51 Cal. App. 4th at 1681-82 (customer and territorial restrictions); *G.H.I.I.*, 147 Cal. App. 3d at 267-69 (vertical, concerted refusal to deal).

42 *Gianelli*, 172 Cal. App. 3d at 1045 (quotations and citations omitted). As the court in *Gianelli* explained, “[W]hile vertical restrictions may reduce intrabrand competition by limiting the number of sellers of a particular product, competing for a given group of buyers, they also promote interbrand competition by allowing a manufacturer to achieve certain efficiencies in the distribution of its products.” *Id.* at 1045 n.7.

43 *Exxon Corp.*, 51 Cal. App. 4th at 1680 (“Vertical non-price restraints are tested under the rule of reason . . .”); *Gianelli*, 172 Cal. App. 3d at 1045.

44 *Rosack v. Volvo of Am. Corp.*, 131 Cal. App. 3d 741, 751 (1982), *cert. denied*, 460 U.S. 1012 (1983).

45 See, e.g., *id.* at 751 (price fixing); *Guild Wineries & Distilleries v. J. Sosnick & Son*, 102 Cal. App. 3d 627, 635 (1980) (division of markets among competitors); *Oakland-Alameda County Builders’ Exch. v. F.P. Lathrop Constr. Co.*, 4 Cal. 3d 354, 365 (1971) (group boycotts); *Suburban Mobile Homes, Inc. v. Amfac Communities, Inc.*, 101 Cal. App. 3d 532, 539 (1980) (tying).

46 In 1985, the California legislature enacted Section 16770, which appears to require a rule of reason approach to health care providers and certain purchasing groups. Julian O. von Kalinowski, *et al.*, 6 ANTITRUST LAWS AND TRADE REGULATION § 105.02[1], at 105-09 (2d ed. 2005).

47 *Rosack*, 131 Cal. App. 3d at 751.

understanding among suppliers of any given commodity, but upon the interplay of economic forces of supply and demand.”⁴⁸ Section 16720’s effort to capture within the Act’s prohibited purposes all forms of price-fixing behavior arguably suggests that the California legislature viewed all forms of price fixing as anticompetitive.⁴⁹ These considerations may bear on whether California courts ultimately follow the United States Supreme Court’s refusal to condemn as per se illegal under the Sherman Act both maximum and minimum vertical price fixing.⁵⁰

- **Horizontal Market Division**

This type of restraint suppresses all vectors of competition, not just price, and thus has at least the same anticompetitive impact as price fixing.⁵¹ Although few courts have addressed the question under the Cartwright Act, this restraint would undoubtedly be treated as illegal per se.

- **Hybrid Restraints**

Vertically integrated manufacturers who impose non-price restraints on distributors with whom they also compete risk that a court will view the restraint as foremost a horizontal market allocation and therefore apply the per se rule. Although a California Court of Appeal panel has treated a hybrid restraint in this manner,⁵² the Ninth Circuit, sitting in diversity and ascertaining California law, rejected that panel’s decision and ruled that California’s highest court would instead apply the rule of reason to such restraints.⁵³

- **Group Boycott**

Joint efforts by firms to disadvantage competitors by directly denying relationships those competitors need to compete (or by indirectly causing suppliers and customers of the competitors to deny those relationships) are treated as per se violations.⁵⁴ But as the Ninth Circuit has observed, “California courts are reluctant to pigeonhole all concerted refusals to deal as boycotts and rather have applied the rule of reason where the economic impact of the challenged practice is not obvious.”⁵⁵ Trade associations that deny nonmembers the advantages of membership present such an instance. Because internal trade association rules may serve consumer interests, they do not suffer per se treatment.⁵⁶

48 *Speegle*, 29 Cal. 2d at 44.

49 *See Bldg. Maint.*, 41 Cal. 2d at 727 (stating that pre-Cartwright Act case allowing price fixing where defendants lacked power to impact market prices was “in view of the specific provisions of the act with respect to price fixing . . . no longer controlling”); *Mailand v. Burckle*, 20 Cal. 3d 367, 377 (1978) (“The per se illegality of [vertical] price restrictions has been established firmly for many years.”) (quotations and citations omitted).

50 *See* ANTITRUST AND UNFAIR COMPETITION SECTION, STATE BAR OF CALIFORNIA, CALIFORNIA ANTITRUST AND UNFAIR COMPETITION LAW § 5.05, at 104 (3d ed. 2003).

51 In *Guild Wineries*, the court found the efforts of a vertically integrated manufacturer to impose a territorial allocation agreement on a competing distributor sufficient to constitute a per se violation of the Cartwright Act. 102 Cal. App. 3d at 635.

52 *Id.*

53 *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986).

54 *Oakland-Alameda County*, 4 Cal. 3d at 365.

55 *Dimidowich*, 803 F.2d at 1480.

• Tying

Under Sections 16726 and 16720, per se rather than rule of reason treatment applies if the seller has sufficient power in the tying market and the tie affects a substantial volume of commerce in the tied market.⁵⁷ Some inquiry into market power in the tying market therefore must precede condemnation. But, like other per se offenses, no proof of actual anticompetitive effects is required. When, however, despite the presence of per se prerequisites, it appears that no competing sellers for the tied product exist, there can be no anticompetitive effects in the tied market and no violation of law.

V. Jurisdictional Reach

As an expression of California's police power, there is a presumption against the "extraterritorial application" of the Cartwright Act.⁵⁸ Out-of-state activity must produce some in-state effect to come within reach.⁵⁹ Surprisingly, one California court accepted as a sufficient in-state effect the lost profits a California corporation suffered while attempting to enter a market in the Midwest region of the United States.⁶⁰ A basis for reaching out-of-state conduct more properly exists where injury results from an actual impact on a California market.⁶¹ Because such conduct, however, by necessity, must involve interstate commerce, the dormant commerce clause may preclude application of the Cartwright Act when the application would unduly burden interstate commerce.⁶² In general, however, courts view the Cartwright Act as consistent with federal law and policy and find that it imposes little if any burden.⁶³ Aside from dormant commerce clause considerations, extraterritorial application of the Cartwright Act can conflict with the laws of other states and, unless a sufficient nexus to California exists, raise due process concerns.⁶⁴

56 *Marin County Bd. of Realtors*, 16 Cal. 3d at 934-35.

57 *Suburban Mobile Homes*, 101 Cal. App. 3d at 539.

58 *Churchill Vill., LLC v. General Elec. Co.*, 169 F. Supp. 2d 1119, 1126 (N.D. Cal. 2000), *aff'd* 361 F.3d 566 (9th Cir. 2004).

59 See *R.E. Spriggs Co. v. Adolph Coors Co.*, 37 Cal. App. 3d 653, 665 (1974) (applying the Cartwright Act where a Colorado company's distribution system resulted in alleged violations with "localized," in-state consequences).

60 *RLH Indus., Inc. v. SBC Commc'ns, Inc.*, 133 Cal. App. 4th 1277, 1289-90 (2005), *cert. denied sub. nom., AT&T Corp. v. RLH Indus.*, 127 S. Ct. 78 (2006).

61 See, e.g., *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 993-4 (9th Cir. 2000) (reaching Wisconsin price fixing that allegedly depressed prices in California).

62 See *Partee*, 34 Cal. 3d at 385 (finding burden of Cartwright Act unreasonable where there was need for national uniformity of regulation of subject matter).

63 See, e.g., *R.E. Spriggs Co.*, 37 Cal. App. 3d at 659 n.6 (1974) (finding Cartwright Act "wholly in conformity with the purposes sought be furthered by the Sherman Act").

64 See, e.g., *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1027 (N.D. Cal. 2007) (observing that "conflicts loom large" where some states, like California, allow indirect purchaser recovery and others do not); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. M: 07-CV-01819 CW, 2008 WL 426522, at *7 (N.D. Cal. Feb. 14, 2008) (identifying due process issue where plaintiffs sought to certify a class that included non-California residents but failed to allege specific in-state conduct giving rise to out-of-state residents' claims).

VI. Public Enforcement

The legislature has invested concurrent public enforcement authority for Cartwright Act violations in a variety of government agencies. These actors include the attorney general,⁶⁵ district attorneys of the respective counties,⁶⁶ political subdivisions such as the counties themselves,⁶⁷ and public agencies.⁶⁸ Public enforcement includes both civil and criminal actions,⁶⁹ as well as *parens patriae* suits on behalf of California residents.⁷⁰ Actions can be brought “in the superior court in and for the county where the offense or any part thereof is committed or where any of the offenders reside or where any corporate defendant does business.”⁷¹ A criminal violation is deemed “a conspiracy against trade.”⁷²

The attorney general plays a special role in public enforcement, particularly with respect to its oversight responsibilities. District attorneys intending to prosecute a civil action, for example, must submit the proposed complaint to the attorney general thirty days before filing “together with a confidential memorandum and report explaining the facts giving rise to the proposed prosecution.”⁷³ District attorneys also must follow the same procedure for all proposed settlements.⁷⁴ Moreover, the attorney general “may take full charge” of any Cartwright Act investigation or prosecution when it “deems it necessary and in the public interest.”⁷⁵ These notice and oversight provisions do not apply to criminal prosecutions.⁷⁶

Those charged with enforcing the Cartwright Act may seek a variety of remedies and penalties. On the civil side, treble damages as well as costs and fees are available.⁷⁷ Additionally, courts possess broad equitable powers by statute to issue any “injunctions as may be reasonably necessary to restore and preserve fair competition in the trade or commerce affected.”⁷⁸ The attorney general and district attorneys may also seek corporate dissolution or the revocation of licenses against domestic and foreign corporations that violate the Cartwright Act.⁷⁹ On the criminal side, corporations are subject to the greater

65 Cal. Bus. & Prof. Code §§ 16750(c), 16754, 16760.

66 Cal. Bus. & Prof. Code §§ 16750(g), 16754, 16759, 16760(g).

67 Cal. Bus. & Prof. Code § 16750(a) & (b).

68 *Id.* To prosecute a claim for damages, the “state and any of its political subdivisions and public agencies” must suffer injury to business or property.

69 Cal. Bus. & Prof. Code § 16754.

70 Cal. Bus. & Prof. Code § 16760.

71 Cal. Bus. & Prof. Code § 16754.

72 Cal. Bus. & Prof. Code § 16755.

73 Cal. Bus. & Prof. Code § 16750(g). Similarly, any party other than the district attorney must notify the attorney general of any appeal or writ. *Id.* § 16750.2.

74 Cal. Bus. & Prof. Code § 16750(g).

75 *Id.*

76 *See* Cal. Bus. & Prof. Code § 16755.

77 Cal. Bus. & Prof. Code § 16750(a)-(b).

78 Cal. Bus. & Prof. Code § 16754.5.

79 Cal. Bus. & Prof. Code §§ 16752, 16753.

of \$1 million in fines or twice the pecuniary gain obtained or loss suffered.⁸⁰ Individuals are subject to the greater of \$250,000 in fines or twice the gain or loss.⁸¹ Individuals are also subject to imprisonment in state prison for up to three years or up to one year in county prison,⁸² an alternative that provides prosecutors and courts with discretion in charging and sentencing.⁸³

VII. Private Enforcement

The Cartwright Act permits “[a]ny person who is injured in his or her business or property” to sue for a violation of the Act.⁸⁴ The statutory term “[a]ny person” extends to indirect purchasers.⁸⁵ All Cartwright Act plaintiffs must satisfy basic antitrust standing requirements.⁸⁶ Under those requirements, the plaintiff must show “fact of damage,” which requires a showing of “some damage” resulting from the conspiracy.⁸⁷ Additionally, the plaintiff must demonstrate that the Cartwright Act violation is the proximate cause of its injury.⁸⁸ The injury therefore cannot be “secondary,” “consequential,” or “remote,” but must be “the direct result of the allegedly illegal conduct.”⁸⁹ Finally, the plaintiff must establish antitrust injury, which is “the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants’ acts unlawful.”⁹⁰ While at least one court has concluded that the concept of antitrust injury is broader under the Cartwright Act than under federal law,⁹¹ the better view is that the concepts are identical.⁹² The limitations period is four years.⁹³

80 Cal. Bus. & Prof. Code § 16755(a)(1).

81 Cal. Bus. & Prof. Code § 16755(a)(2).

82 *Id.*

83 1 CALIFORNIA ANTITRUST AND UNFAIR COMPETITION, *supra* note 50, at 216.

84 Cal. Bus. & Prof. Code § 16750(a); *see, e.g., Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 717 (C.D. Cal. 1995) (“The plain language of the Cartwright Act demonstrates that the California legislature intended to vindicate *individual* rights through private causes of action.”) (emphasis in original).

85 Cal. Bus. & Prof. Code § 16750(a) (providing that “any person” may bring an action, “regardless of whether such injured person dealt directly or indirectly with the defendant.”).

86 *Morrison*, 66 Cal. App. 4th at 548 (discussing antitrust standing requirements).

87 *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341, 1350 n.7 (1987) (internal quotation marks and citation omitted; emphasis in original); *see Cal. Dental Ass’n v. California Dental Hygienists’ Ass’n*, 222 Cal. App. 3d 49, 61 (1990) (stating that fact of damage may be presumed or inferred in “some cases” such as price-fixing conspiracies).

88 *Morrison*, 66 Cal. App. 4th at 548.

89 *Saxer v. Philip Morris, Inc.*, 54 Cal. App. 3d 7, 26 (1975) (internal quotation marks omitted).

90 *Kolling*, 137 Cal. App. 3d at 723 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487–89 (1977)).

91 *Cellular Plus, Inc. v. Superior Court*, 14 Cal. App. 4th 1224, 1233 (1993) (concluding that the ability of indirect purchasers to recover shows that the federal definition of “antitrust injury” does not apply).

92 Carlton A. Varner & Thomas D. Nevins, CALIFORNIA ANTITRUST & UNFAIR COMPETITION LAW 30 (4th ed. 2005).

93 Cal. Bus. & Prof. Code § 16750.1.

The Cartwright Act provides a variety of remedies to private plaintiffs. Under Section 16722, any contract violating the act “is absolutely void and is not enforceable at law or in equity.”⁹⁴ Plaintiffs may also seek injunctive relief,⁹⁵ lost profits,⁹⁶ aggregate damages in price-fixing actions,⁹⁷ treble damages,⁹⁸ and prejudgment interest on actual damages where such a result is just.⁹⁹ With respect to price-fixing damages claims based on the amount of the alleged overcharge, one California Court of Appeal recently held that defendants enjoy a “pass-on” defense under the Cartwright Act.¹⁰⁰ Finally, a prevailing plaintiff may also recover costs and fees,¹⁰¹ although a prevailing defendant is not so entitled.¹⁰²

VIII. Conclusion And A Note About Federal Law

The Cartwright Act has enjoyed a complex and uncertain relationship with federal antitrust law. Earlier cases frequently asserted that the Cartwright Act was directly “patterned after” the Sherman Act and that federal cases were therefore “applicable” in construing it.¹⁰³ In 1988, however, the California Supreme Court, in *Texaco*, found that the California legislature based the Act on nineteenth century antitrust statutes from Texas and Michigan.¹⁰⁴ It concluded that the Sherman Act is not “directly probative” of the Cartwright Act’s proper construction.¹⁰⁵ Since *Texaco*, some courts have persisted in basing their decisions on the notion that the state and federal statutes share a common origin,¹⁰⁶ while others consider federal precedent useful, but not dispositive.¹⁰⁷ In the words of one

94 Cal. Bus. & Prof. Code § 16722.

95 Cal. Bus. & Prof. Code § 16750(a).

96 *E.g.*, *Suburban Mobile Homes*, 101 Cal. App. 3d at 545.

97 Cal. Bus. & Prof. Code § 16760(d) (providing that “damages may be proved and assessed in the aggregate by statistical or sampling methods . . . or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit”).

98 Cal. Bus. & Prof. Code § 16750(a); *see Unedus v. Cal. Shoppers, Inc.*, 86 Cal. App. 3d 932, 942 (1978) (finding treble damages mandatory once compensatory damages are established).

99 Cal. Bus. & Prof. Code § 16761.

100 *Clayworth v. Pfizer, Inc.*, Cal. Ct. App., 1st Dist., No. A116798 (July 25, 2008).

101 Cal. Bus. & Prof. Code § 16750(a).

102 *Carver v. Chevron U.S.A., Inc.*, 97 Cal. App. 4th 132, 155 (2002).

103 *E.g.*, *Marin County Bd. of Realtors*, 16 Cal. 3d at 925; *Chicago Title Ins. Co. v. Great W. Fin. Corp.*, 69 Cal. 2d 305, 315 (1968); *see Santa Clara Valley Bowling Proprietors’ Ass’n*, 238 Cal. App. 2d at 232 (stating that Sherman Act cases are “applicable” to Cartwright Act cases).

104 *Texaco*, 46 Cal. 3d at 1153-59. There is evidence that an Ohio statute actually served as the model. *See, e.g.*, 1 CALIFORNIA ANTITRUST AND UNFAIR COMPETITION, *supra* note 50, at 32 (citing contemporary newspaper articles).

105 *Texaco*, 46 Cal. 3d at 1168.

106 *E.g.*, *Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th 1224, 1235 (2007) (stating that the Cartwright Act was “patterned after” the Sherman Act); *County of Tiolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) (stating that the Cartwright Act was “modeled after the Sherman Act.”); *Roth*, 25 Cal. App. 4th at 541 (stating a “long line of California cases has concluded that the Cartwright Act is patterned after the Sherman Act”) (internal quotation marks omitted).

107 *E.g.*, *SC Manufactured Homes, Inc. v. Liebert*, 162 Cal. App. 4th 68, 86 n.9 (2008); *Morrison*, 66 Cal. App. 4th at 541 n.2.

commentator, the California judiciary, as a practical matter, is “free to follow the decisions under the Sherman Act and free to ignore them.”¹⁰⁸ It is now more difficult than ever to predict the future direction of Cartwright Act jurisprudence relative to the federal law’s present course.

108 Moses Lasky, *Folklore and Myth in Judicial Opinions: Some Reflections Inspired by Texaco-Getty*, 20 U.C. DAVIS L. REV. 591, 598 (1987) (discussing the judicial “fiction” that the Cartwright Act is “patterned after” the Sherman Act). Compare *In re Dynamic Random Access Memory Antitrust Litig.*, 516 F. Supp. 2d 1072, 1087 (N.D. Cal. 2007) (following federal authorities on question of indirect purchaser standing by relying on pre-*Texaco* statement that Sherman Act authorities are “applicable”) with *Macmanus v. A. E. Realty Partners*, 195 Cal. App. 3d 1106, 1112 n.4 (1987) (leaving open whether California will adopt the federal rule barring challenges to intra-enterprise conspiracies).