



Date and Time: Thursday, December 14, 2023 12:07:00 PM CST

Job Number: 212634056

Documents (30)

1. [People v. Sacramento Butchers' Protective Asso., 12 Cal. App. 471](#)

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Practice Areas & Topics: Antitrust & Trade Law; Court: California > Appeals Court

2. [Munter v. Eastman Kodak Co., 28 Cal. App. 660](#)

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3. [Overland Publishing Co. v. Union Lithograph Co., 57 Cal. App. 366](#)

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4. [People v. Bldg. Maint. Contractors Ass'n, 253 P.2d 983](#)

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5. [A. B. C. Distributing Co. v. Distillers Distributing Corp., 154 Cal. App. 2d 175](#)

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6. [Heavy, Highway Bldg. & Constr. Teamsters Committee v. Superior Court of San Francisco, 203 Cal. App. 2d 591](#)

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7. [Futurecraft Corp. v. Clary Corp., 205 Cal. App. 2d 279](#)

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8. [Shasta Douglas Oil Co. v. Work, 212 Cal. App. 2d 618](#)

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9. [De Martini v. Department of Alcoholic Beverage Control, 215 Cal. App. 2d 787](#)

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10. [Cohon v. Department of Alcoholic Beverage Control, 218 Cal. App. 2d 332](#)

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11. [Osteopathic Physicians & Surgeons v. California Medical Asso., 224 Cal. App. 2d 378](#)

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12. [People v. Santa Clara Valley Bowling Proprietors' Ass'n, 238 Cal. App. 2d 225](#)

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13. [Reimel v. Alcoholic Beverage Control Appeals Board, 256 Cal. App. 2d 158](#)

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14. [Carl N. Swenson Co. v. E. C. Braun Co., 272 Cal. App. 2d 366](#)

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15. [Oakland-Alameda County Builders' Exch. v. F. P. Lathrop Constr. Co., 8 Cal. App. 3d 75](#)

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16. [La Fortune v. Ebie, 26 Cal. App. 3d 72](#)

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17. [Greenberg v. Equitable Life Assur. Society, 34 Cal. App. 3d 994](#)

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18. [Dayton Time Lock Service, Inc. v. Silent Watchman Corp., 52 Cal. App. 3d 1](#)

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19. [Saxer v. Philip Morris, Inc., 54 Cal. App. 3d 7](#)

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20. [Lowell v. Mother's Cake & Cookie Co., 79 Cal. App. 3d 13](#)

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21. [Scheuch v. Western World Ins. Co., 82 Cal. App. 3d 31](#)

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22. [Younger v. Jensen, 82 Cal. App. 3d 689](#)

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23. [Uneedus v. California Shoppers, Inc., 86 Cal. App. 3d 932](#)

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24. [People ex rel. Freitas v. City and County of San Francisco, 92 Cal. App. 3d 913](#)

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25. [People v. Mobile Magic Sales, Inc., 96 Cal. App. 3d 1](#)

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26. [Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc., 97 Cal. App. 3d 932](#)

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27. [Guild Wineries & Distilleries v. J. Sosnick & Sons, 99 Cal. App. 3d 205](#)

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28. [Guild Wineries & Distilleries v. J. Sosnick & Son, 102 Cal. App. 3d 627](#)

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29. [Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc., 101 Cal. App. 3d 532](#)

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30. [Coldwell Banker & Co. v. Department of Insurance, 102 Cal. App. 3d 381](#)

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People v. Sacramento Butchers' Protective Asso.

Court of Appeal of California, Third Appellate District

January 22, 1910, Decided

Crim. No. 96

Reporter

12 Cal. App. 471 *; 107 P. 712 **; 1910 Cal. App. LEXIS 332 ***

THE PEOPLE, Respondent, v. SACRAMENTO BUTCHERS' PROTECTIVE ASSOCIATION, WESTERN MEAT COMPANY et al., Defendants; J. O'KEEFE, Appellant

Subsequent History: [***1] A Petition to have the Cause Heard in the Supreme Court, after Judgment in the District Court of Appeal, was Denied by the Supreme Court on March 23, 1910.

Prior History: APPEAL from a judgment of the Superior Court of Sacramento County, and from an order denying a new trial. C. N. Post, Judge.

Core Terms

meats, conspiracy, Butchers', imprisonment, misdemeanor, courts, meat company, police court, superior court, depositions, retail, fine, member of the association, provisions, words, anti-trust, designate, prices, free competition, accomplish, charges, confer, felony, cases, jail, commitment order, constituting, exceeding, disclose, selling

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

HN1[] Accusatory Instruments, Informations

Upon the filing of an information corresponding with the terms of the commitment as to the nature of the offense indicated in the latter, the presumption at once arises that the evidence of which said commitment is predicated was in all respects sufficient to justify the magistrate in making the order.

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

HN2[] Accusatory Instruments, Informations

If the evidence taken before the magistrate was not sufficient to warrant the order of commitment, that question should be inquired into and determined through some other proceeding than a motion to set aside the information.

Criminal Law & Procedure > ... > Accusatory Instruments > Informations > General Overview

12 Cal. App. 471, *471 107 P. 712, **712 1910 Cal. App. LEXIS 332, ***1

HN3 Accusatory Instruments, Informations

When, as a result of an examination, an order has in fact been made and entered upon the docket of the justice, no further action upon his part is necessary in order to authorize the district attorney to file an information against a defendant for the offense named in the order.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN4 Monopolies & Monopolization, Conspiracy to Monopolize

The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. If agreements and combinations to prevent competition in prices are, or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN5 Monopolies & Monopolization, Actual Monopolization

In order to vitiate a contract or combination, it is not essential that its result shall be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN6 Conspiracy, Elements

It is equally true that all the conspirators, whether known or unknown, need not be prosecuted at the same time, but an indictment charging a person known with having a conspiracy with other persons unknown or with other persons whose names are given, but who are not joined as defendants, is good.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN7 Inchoate Crimes, Conspiracy

Independent of statute, upon principle and in furtherance of sound public policy, both corporations and their officers and agents, who engage in the conspiracy, must be held to be parties to it, and be counted in computing the necessary number to constitute it.

Headnotes/Summary

Headnotes

Criminal Law--Violation of "Anti-trust Law"--Motion to Set Aside Information.--An information charging the violation of the anti-trust law (Stats. 1907, p. 294), cannot be set aside on the ground of an immaterial variance between the

information and the offense charged in the complaint before the magistrate, nor on the ground that the complaint and evidence before the magistrate was insufficient to warrant the commitment.

Id.--Construction of Penal Code--Grounds for Setting Aside Information.--Under the familiar rule of construction, *expressio unius est exclusio alterius*, a trial court cannot set aside an information on any other grounds than those specified in [section 995 of the Penal Code](#), viz.: "1. That before the filing thereof the defendant had not been legally committed; 2. That it was not subscribed by the district attorney."

Id.--Insufficiency of Evidence--Presumption.--Assuming that the evidence before the magistrate was altogether insufficient to establish probable cause for believing that the offense for which the defendant moving to set aside the information was examined and held had been committed or that he committed it, that question cannot be urged and decided on such motion. But upon the filing of the information corresponding to the commitment, the presumption arises that the evidence on which the commitment was predicated was in all respects sufficient to justify the magistrate in making the order.

Id.--Commitment Based upon Depositions--Nature of Complaint.--The complaint is in the nature of a deposition on which the warrant of arrest is based, and not a complaint in the sense that it is a pleading. The commitment is based upon the depositions as such, and not upon the complaint only. If the commitment does not of itself describe the offense, but refers to the depositions, they must describe the commission of the offense to which the commitment refers, though the finding of the magistrate as to the sufficiency of the evidence to sustain the offense is conclusive.

Id.--Complaint not a Part of Order of Commitment.--The complaint upon which the warrant of arrest is based cannot properly be deemed a part of the order of commitment which is based upon the depositions taken at the preliminary examination.

Id.--Absence of Variance Between Complaint and Information.--If the complaint be deemed a deposition to which the commitment refers, there is no material variance between the offense charged in the information and that stated in the complaint. That deposition states an offense under the provisions of the anti-trust law against the personal defendant. While the offense is more fully and clearly stated in the information--a requisite strictly applied to criminal pleading, but not to depositions taken before a magistrate--the offense charged in both documents is one and the same, and for the violation of precisely the same provisions of the law.

Id.--Order of Commitment--Indorsement upon Depositions not Essential to Information.--The order of commitment is not required to be indorsed upon the depositions, as a condition of the authority of the district attorney to file an information.

Id.--Entry of Order upon Docket Sufficient.--The order holding a defendant to answer is in fact and in law made when it is entered upon the docket of the justice, and the failure to indorse the same upon the complaint or depositions in no manner deprives the order of its validity or affects any substantial right of the defendant.

Id.--Sufficiency of Information--Violation of Anti-trust Law--Combination to Enhance Price of Meat.--An information substantially charging a violation of the anti-trust law in the language of the statute, and accusing the personal defendant and the Western Meat Company, of which he is the managing agent, of having entered into a combination and conspiracy with the Sacramento Butchers' Protective Association and other persons, for the purpose of destroying free and full competition in the meat business, and in requiring a meat dealer named to pay a higher price for meat than was charged to members of the combination, states an offense under that law.

Id.--Averment and Proof of Control of Market not Essential.--It is not necessary either to allege or prove that the defendants or either of them, or any of the persons referred to in the information as being connected with the alleged combination, were in a position to control the market in the sale and purchase of the commodity to which the charge relates.

Id.--Purpose of Anti-trust Law.--The purpose of the anti-trust law is to prevent such business combinations as will result in restrictions in trade or commerce, or will prevent competition in the manufacture or sale of merchandise and other commodities for domestic use.

Id.--Identity of Members of Butchers' Protective Association.--Where the Sacramento Butchers' Protective Association, as such, is made a defendant in the information without reference to the members composing it, the information is not rendered defective by describing them as "certain and divers persons, firms, partnerships, corporations and associations of persons constituting and comprising the Sacramento Butchers' Protective Association, whose names are unknown, with whom it is alleged that the personal defendant entered into an unlawful combination and conspiracy. This was sufficient so to identify such persons as to apprise defendant appealing of the particular persons with whom he is charged with having been in league in the maintenance of an unlawful conspiracy.

Id.--Parties to Conspiracy.--Where conspiracy is charged, it is not necessary to make all the alleged conspirators defendants in order to maintain a prosecution against one.

Id.--Gist of Offense--Combination with Others--Persons Unknown.--The gist of the offense is in the formation of the combination with others to do some unlawful act, and where the information charges a party with having entered into a conspiracy with others not made defendants, it is sufficient to refer to the latter in the accusatory pleading as "persons unknown."

Id.--Pleading--Action of Manager and of Meat Company--Defense. Where the information with clearness charges that appellant, as manager and agent of the Western Meat Company, and said company itself entered into the alleged combination and conspiracy with the Butchers' Protective Association and the members thereof, for the purposes of the information, the showing therein is sufficient to connect both the company and its manager therewith. The alleged act of the agent must be deemed that of the company, and cannot be presumed to be without its knowledge or assent. If he in fact exceeded his authority in entering into the conspiracy, that would be matter of defense for the meat company.

Id.--Proper Joinder of Corporation and Manager.--Upon principle, and in furtherance of sound policy, both corporations and their officers and agents who engage in the conspiracy must be held to be parties thereto, and it was proper to join both the Western Meat Company and its manager in the information.

Id.--Dates of Execution of Conspiracy not Fixed--Probative Facts--Surplusage.--The information is not rendered insufficient because the dates upon which the acts of the alleged conspirators committed in the prosecution of such conspiracy occurred are not definitely stated and fixed in the information. The acts constituting the actual accomplishment of the object or purpose of the combination and conspiracy constitute mere probative facts of its existence, the dates of which would be matter of surplusage, and need not be alleged.

Id.--Nature of Offense Under Anti-trust Law--Misdemeanor--Limit of Penalty--Exclusive Jurisdiction of Superior Court.--If the nature of an offense under the anti-trust law be deemed a misdemeanor, the limit of imprisonment being one year, without prescribing the place of imprisonment, and the limits of the fine being not more than \$ 5,000 and not less than fifty dollars in all county seats in which the police court has no jurisdiction of such maximum fine, the jurisdiction of the superior court under the constitution of all misdemeanors not otherwise provided for is exclusive under the anti-trust law.

Id.--Test of Character of Crime.--The test of the nature of a crime as a felony or misdemeanor is not the characterization of it as one or the other, but the nature and mode of punishment of the crime is the sole test. The question is not decided whether the superior court has power to imprison the defendant in the state prison for the year provided for in the statute, the supreme court having expressly limited its penalty to that of a misdemeanor.

Id.--Jurisdiction of Justices' Courts Excluded.--All justices' courts being expressly limited in their jurisdiction to misdemeanors not exceeding \$ 500 or imprisonment not exceeding six months in the county jail, their jurisdiction under the anti-trust law is excluded.

Id.--Support of Verdict--Conflicting Evidence.--Where the evidence is conflicting, the verdict of the jury adjudging the appellant guilty of the crime charged against him cannot be disturbed where there was evidence tending to establish the truth of the charges against him.

Id.--Evidence--Absence of Discrimination as to Smoked Meats Harmless Ruling.--Where the sole charge was discrimination as to fresh meats against the Butchers' Protective Association, evidence that they made no discrimination as to smoked meats not under their control, if its object and purpose was to corroborate the charge, was not erroneous, but if such was not its object and its admission was erroneous, the error was not prejudicial.

Id.--By-laws of Butchers' Protective Association.--The court properly admitted the by-laws of the Butchers' Protective Association not only to disclose the identity of its members, but also to show the nature and purposes of the association, and the object of its connection with the Western Meat Company, and so far as tending to show the criminal conspiracy, and if there was no relevancy in either of these respects, their admission was harmless.

Id.--Proper Cross-examination of Members of Association--Contribution of Money for Counsel for Appellant.--The court properly allowed members of the association who testified for the defendant to answer questions by the cross-examiner as to whether they contributed money toward counsel for the defendant appealing.

Id.--Instructions--Circumstantial Evidence of Conspiracy.--Instructions by which the jury were told that the crime of conspiracy could be proved by circumstantial as well as by direct evidence were perfectly proper.

Id.--Formation of Conspiracy.--*Held*, that an instruction in regard to the formation of a conspiracy, which, in effect, and with reasonable clearness, declared to the jury that it is immaterial how or in what manner it is formed, so long as it sufficiently appears from the evidence to be formed for an unlawful purpose, is not erroneous.

Id.--Instruction as to Conviction Based on Evidence.--An instruction as to conviction based on evidence of discrimination in sale of fresh meats, to the effect that if the jury should find from the evidence in the case that there was a discrimination in the price charged for fresh meats, so as to charge a higher price to those not members of the combination, to which the defendant was a party, they should convict the defendant, was proper.

Id.--Untenable Objections to Anti-Trust Law.--The anti-trust law is not incompatible as to any provision of the constitution, nor with [section 182 of the Penal Code](#) relative to the subject of conspiracies. The unlawful combination here involved is made to apply to a different object from any mentioned in the code.

Syllabus

The facts are stated in the opinion of the court.

Counsel: L. T. Hatfield, James B. Devine, and Jesse W. Lilienthal, for Appellant.

U. S. Webb, Attorney General, J. Charles Jones, Eugene S. Wachhorst, District Attorney of Sacramento County, and Frank F. Atkinson, Assistant District Attorney, for Respondent.

Judges: HART, J. Chipman, P. J., and Burnett, J., concurred.

Opinion by: HART

Opinion

[*475] [**715] HART, J. The defendant, O'Keefe, was convicted of violating certain provisions of an act of the legislature of 1907 (Stats. 1907, p. 984, c. 530), entitled: "An act to define trust and to provide criminal penalties and civil damages, and punishment of corporations, persons, firms and associations, or persons connected with them, and to promote full competition in commerce and all classes of business in the state."

This appeal is by O'Keefe from the judgment and the order of the trial court [***2] denying him a new trial.

The information charges that the appellant, as the managing agent of the Western Meat Company, and said company, in pursuance of a combination and conspiracy into which they had previously entered with the Sacramento Butchers' Protective [*476] Association and the individual members thereof, to execute and carry out certain contracts and agreements, the effect of the execution of which would be to destroy free competition in the retail meat business in said city of Sacramento, required and compelled one Albert Robinson, who was engaged in carrying on the retail meat business in said city, to pay to the appellant and said Western Meat Company higher prices for meats than the appellant and said company required the members of said Butchers' Protective Association, each of whom was likewise engaged in the retail meat business, to pay for the same class or character of meats.

The refusal of the court to grant appellant's motion to set aside the information, the order overruling the demurrer to the information, insufficiency of the evidence to justify the verdict, alleged errors in admitting and rejecting certain evidence, alleged erroneous instructions given [***3] to the jury, and want of jurisdiction in the superior courts of criminal prosecutions under the act upon the provisions of which the information here is based, are the general reasons upon which a reversal of the judgment and the order is urged.

The act concerned here is what is commonly known as the "Cartwright Anti-Trust Law," and, as its title and provisions clearly indicate, its purpose is to prevent such business combinations as will result in restrictions in trade or commerce, or, in other words, in the destruction of free competition in the manufacture, sale and purchase of merchandise and other commodities for domestic use.

Section 1 of said act reads, in part, as follows:

"Section 1. A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons, or by any two or more of them for either, any or all of the following purposes: 1. To create or carry out restrictions in trade or commerce. . . . 3. To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity. . . ."

1. The order denying the motion to set aside the information was proper.

The [***4] grounds of the motion, stated in general language, are: That the defendant had not been legally committed by a magistrate; that the alleged offense set forth in the information [*477] is not the offense stated in the "complaint" filed in the magistrate's court, in that the offense sought to be charged in said complaint is a misdemeanor, while the information purports to charge a felony, and further, that the "complaint" does not charge the alleged offense to have been committed against any particular person, while the information charges that the purported offense alleged therein was against one Albert Robinson; "that no order has been indorsed on the complaint holding defendant, O'Keefe, to answer to the charge contained in said complaint"; that no evidence was adduced before the magistrate authorizing the order holding O'Keefe to answer to the charge alleged in the "complaint." In addition to these, the motion advances some other grounds upon which it is claimed the information should be set aside, but they are not, in our judgment, of sufficient importance to require special notice.

The only grounds specified by the code upon which, upon a proper showing, a trial court is [***5] authorized to set aside an information are the following: "1. That before the filing thereof the defendant had not been legally committed by a magistrate; 2. That it was not subscribed by the district attorney of the county." ([Pen. Code, sec. 995.](#))

Under the familiar rule of construction, *expressio unius est exclusio alterius*, a trial court is without jurisdiction to entertain or to grant a motion to set aside the information upon any ground other than those expressly specified in the designated section of the Penal Code. Assuming, therefore, that the evidence presented to the magistrate was altogether insufficient to establish probable cause for believing that the offense for which the defendant was examined and held had been committed, and that he committed it, that question could not properly be urged and decided on a motion of the character of the one under consideration. [HN1](#)[¹] Upon the filing of an information corresponding with the terms of the commitment as to the nature of the offense indicated in the latter, the presumption at once arises that the evidence of which said commitment is predicated was in all respects sufficient to justify the magistrate [***6] in making the order ([Western Meat Co. v. Superior Court, 9 Cal. App. 538, 199 Pac. 976](#)), and, as the attorney general has very clearly pointed out in his brief, [HN2](#)[²] if the evidence taken before the magistrate [*478] was not sufficient [**716] to warrant the order of commitment, that question should have been inquired into and determined through some other proceeding than a motion to set aside the information. ([People v. Beach, 122 Cal. 37, 54 Pac. 369](#); [People v. Lee Look, 143 Cal. 216, 76 Pac. 1028](#); [Redmond v. State, 12 Kan. 172](#); [People v. Cole, 127 Cal. 545, 59 Pac. 984](#); [Ex parte Dimmig, 74 Cal. 164, 15 Pac. 619](#).)

The point sought to be made by the appellant that there is a variance between the allegations of the "complaint," so-called, and those of the information, cannot be maintained. The instrument upon which the warrant of arrest is authorized to be issued by a magistrate in the case of an indictable offense is not a "complaint" in the sense that it is a pleading, but is practically a deposition only, setting forth the facts stated [***7] by the informant, sufficiently showing the commission of an offense and its perpetration by the defendant to justify the issuance of a warrant of arrest by the magistrate. ([Pen. Code, secs. 811, 812](#).) The commitment is based upon all the depositions and not alone upon the so-called complaint, and the information is in turn founded upon the order of commitment. It is true that the order of commitment in the case at bar does not itself specifically designate or describe the offense for which the defendant was held, declaring only "that the offense in the within depositions mentioned has been committed," and it is, of course, also true, in the absence of a specific description in the order of commitment itself of some offense of which the superior court has jurisdiction, referring therein to the alleged crime for which the accused is ordered held under its generic description only, that if the depositions do not show the commission of the offense to which the commitment refers, or, showing it, do not disclose probable reason for the defendant's connection with its commission, then the commitment is without a prop to uphold it. But, as stated, [***8] the presumption prevails, on a motion to set aside an information, that the evidence or depositions taken by the magistrate sufficiently show that the offense mentioned in the commitment was committed by the defendant. In other words, as we have shown, upon such a motion as the one now under examination, the superior court cannot review and overrule [*479] the finding of the magistrate that the evidence taken before him was sufficient. ([People v. Beach, 122 Cal. 37, 54 Pac. 369](#); [People v. Lee Look, 143 Cal. 216, 76 Pac. 1028](#); [People v. Sehorn, 116 Cal. 503, 48 Pac. 495](#); [People v. Cole, 127 Cal. 545, 59 Pac. 984](#).)

If, however, the contention is that the so-called "complaint" or the deposition upon which the warrant was issued is necessarily made a part of the order of commitment by appropriate and sufficient words of reference, and, as thus viewed, the commitment designates or describes a distinctly different offense from that alleged in the information, thereby vitiating the latter ([People v. Nogiri, 142 Cal. 596, 76 Pac. 490](#)), it is clear that the point [***9] is not well taken. Said deposition, in our opinion, states an offense under the provisions of the anti-trust law against the defendant, and, while perhaps such offense is more fully and clearly stated in the information--a requisite strictly applied to criminal pleadings but not to depositions before a magistrate--the offense charged in both documents is one and the same and for the violation of precisely the same provisions of the law. ([Redmond v. State, 12 Kan. 172](#); [People v. Lee Look, 143 Cal. 216, 76 Pac. 1028](#).) No authority has been cited, and, indeed, none can be found, holding, even where the commitment itself undertakes to describe the offense for which a defendant is held for trial upon a felony charge, that such offense must be stated therein with the technical nicety and precision required in an indictment or an information, and if the deposition upon which the warrant of arrest was issued in this case is to be treated as a part of the order of commitment (and certainly it cannot be so regarded), the inartificiality of its allegations or its insufficiency in stating with technical accuracy the offense for which the defendant [***10] was ordered committed (if these shortcomings could truly be attributed to it), cannot be the basis of a motion to set aside the information, if the latter charges the same offense.

It is further claimed that the district attorney was without authority to file the information because the order of commitment was not indorsed on the "complaint" or upon any of the other depositions taken by the magistrate. But the point is without merit. ([People v. Wilson, 93 Cal. 377, \[28 Pac. 1061\]](#); [People v. Wallace, 94 Cal. 497, \[29 Pac. 950\]](#); [People v. Tarbox, 115 Cal. 57, \[46 Pac. 896\]](#).)

[*480] In [People v. Wallace, supra](#), the court says: "**HN3** [↑] When, as a result of an examination, such an order has in fact been made and entered upon the docket of the justice, it would seem that no further action upon his part is necessary in order to authorize the district attorney to file an information against a defendant for the offense named in the order; citing [People v. Wilson, 93 Cal. 377, \[28 Pac. 1061\]](#). The law requires the justice to keep a docket in which must be entered each action, and all [***11] proceedings therein ([Pen. Code, sec. 1428](#)); and we are of opinion that an order holding a defendant to answer is in fact and in law made when it is entered upon the docket of the justice, and the failure to indorse upon the complaint or the depositions taken in no manner deprives the order of its validity, or affects any substantial right of a defendant."

2. The information substantially follows the language of the statute, and clearly states an offense under said statute. Briefly stated, the information accuses the defendant and the Western Meat Company (a corporation), of which he is the managing agent in the city of Sacramento, of having entered into [**717] a combination and conspiracy with the Sacramento Butchers' Protective Association and other persons, whose names are alleged to be unknown, for the purpose of destroying full and free competition in the retail meat business, by entering into and carrying out "contracts and understandings" made in furtherance of such combination and conspiracy, and as the result thereof, and in the execution of said combination and conspiracy, sold to one Albert Robinson, a dealer in meats in said city of Sacramento, [***12] certain meat at a higher price than said O'Keefe, as agent of and for said company, sold the same class of meat to other persons, composing said association, and that by reason of said "compacts and understandings, plans and schemes," so carried out by said alleged conspirators, said Robinson was compelled to, and did, pay to said company a higher price for meat purchased by him of the company than was paid by said other persons, constituting the said Butchers' Protective Association; that because of said agreement, compacts, plans and schemes, so executed and carried out by said company, said O'Keefe and said association, and the members of said association, said alleged conspirators did then and there create [*481] and carry out "restrictions in trade, and directly and indirectly preclude a free and unrestricted competition among the persons, firms, partnerships and associations of persons constituting and composing the said Sacramento Butchers' Protective Association and other persons, purchasers, consumers and dealers in the buying and selling of such article and commodity of merchandise, produce and commerce, to wit, meat," etc.

It will thus be observed that the information [***13] is, as we have already stated, substantially in the language of the statute, and, while the rule that an offense may properly be stated in the language of the statute defining such offense cannot be uniformly followed, it is in our opinion applicable in this case. We cannot conceive of any other elements which could be required to be alleged in order to state an offense under the first and third subdivisions of section 1 of the anti-trust law than those involved in the allegations of the information here. If the evidence shows, as the information clearly charges, that the defendants had entered into and formed a combination by the terms of which members of the Sacramento Butchers' Protective Association were privileged to purchase meat from the Western Meat Company at prices lower than those at which other persons engaged in the retail meat business were to be allowed to purchase such meat, thus practically confining the business of selling meat at retail to those only who were fortunate members of said association, then a plain and palpable violation of not only the spirit, but of the letter, of the statute is disclosed. It was not necessary, as counsel for appellant contend, to [***14] allege in the information that the meat company, the defendant O'Keefe and the Butchers' Protective Association were in a position to control the market with respect to meat. As we have stated, the object of the statute is to prevent such combinations or conspiracies between persons engaged in a particular line of business as will destroy free competition therein, and if the purpose of such combination is to restrict trade or destroy competition in the sale and purchase of "merchandise, produce, or any commodity," or if such combination tends to restrict trade or to prevent free competition therein, such combination is against the letter and paramount object of the law. It is, [*482] therefore, not necessary to prove, and much less to allege in the information in order to state the offense denounced by the statute, that the defendants or any of the persons referred to in the information as being

connected with the alleged combination were in a position to control the market in the sale and purchase of the commodity to which the charge relates.

As is said by the supreme court of Missouri, in the case of *State v. Armour Packing Co., 173 Mo. 356, [96 Am. St. Rep. 515, 73 S.W. 645]*, [***15] "HN4"[↑] the gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. . . . If agreements and combinations to prevent competition in prices are, or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character."

In *United States v. E. C. Knight Co., 156 U.S. 1, [15 S. Ct. 249]*, Chief Justice Fuller, speaking for the court, says: "Again, all the authorities agree that, HN5"[↑] in order to vitiate a contract or combination, it is not essential that its result shall be a complete monopoly. It is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition." (See *State v. Slutz, 106 La. 182, [30 South. 298]*; *State v. Thompson, 69 Conn. 720, [38 Atl. 868]*; *United States v. MacAndrews, 149 Fed. 836; Bailey v. State, 42 Tex. Cr. 289, [59 S.W. 900]*.)

It is further objected that the information is deficient in that it fails to disclose the identity of the persons referred [***16] to therein as "certain and divers persons, firms, partnerships, corporations and associations of persons constituting and composing said Sacramento Butchers' Protective Association, the names of whom are unknown except as herein stated," etc. The further contention is made that it does not appear from the information but that O'Keefe acted in the transactions with Robinson independently and without the knowledge and sanction of the Western Meat Company.

Neither of these propositions can be sustained. We have seen that the rule of criminal [**718] pleading is that the offense may be stated in the language of the statute if the latter fully and clearly describes the offense denounced as such by [*483] its provisions. There is nothing wanting in the language of the law under which the appellant was prosecuted and convicted to fully and accurately define the offense sought to be described therein. The information directly charges that the "persons, firms, partnerships," etc., whose names are alleged to be unknown, are members of the Sacramento Butchers' Protective Association, with which, it is further alleged, the appellant was connected in the inauguration and prosecution of [***17] the combination and conspiracy which the statute declares that it is unlawful to maintain. This was sufficient to so identify such persons as to apprise the appellant of the particular persons with whom he is charged with having been in league in the maintenance of an unlawful conspiracy.

In *State v. Slutz, 106 La. 182, [30 South. 298]*, it is said: "HN6"[↑] It is equally true that all the conspirators, whether known or unknown, need not be prosecuted at the same time, but an indictment charging a person known with having a conspiracy with other persons unknown or with other persons whose names are given, but who are not joined as defendants, is good." (See 4 Ency. of Pl. & Pr., 709, 710; 8 Cyc., p. 663, note 99; *State v. Thompson, 69 Conn. 720, [38 Atl. 868]*.)

In other words, where conspiracy is charged, it is manifestly not necessary to make all the alleged conspirators defendants in order to maintain a prosecution against one. The gist of the offense is in the formation of the combination with others to do some unlawful act, and where the information, as here, charges a party with having entered into such a conspiracy with others, not made [***18] defendants, it is sufficient to refer to the latter in the accusatory pleading as "persons unknown." The "persons, firms, partnerships," etc., thus referred to in the information in the present case are not made defendants as individual persons, but only so in so far as they constitute in the aggregate the Sacramento Butchers' Protective Association.

The information with clearness charges that O'Keefe, as manager and agent of the Western Meat Company, and said company itself, entered into the alleged combination and conspiracy with the Butchers' Protective Association and the members of said association. There is, therefore, no merit [*484] in the contention that, for aught that appears to the contrary from the allegations of the information, O'Keefe's alleged part in the conspiracy charged was without the knowledge or indorsement or assent of the company of which he was agent. If, as agent of the company, he joined the conspiracy, then certainly his act was that of the company, for the company acted through

him, and his act attached to and became that of the company, as the act of a person actually committing a murder necessarily attaches to another who had been in the conspiracy [***19] to commit the murder, but who himself did no physical act toward the consummation of the object of the conspiracy. For the purposes of the information, the showing therein was sufficient to connect both the company and O'Keefe. But if, by becoming a member of the conspiracy, O'Keefe acted in excess of his authority as such agent, it then became a matter of defense for the meat company that he had thus exceeded his authority or acted in the premises without its knowledge or sanction.

In the case of Standard Oil Co. v. State, 117 Tenn. 618, [100 S. W. 705], where the company and its agent were jointly indicted under the anti-trust law of Tennessee, the supreme court of that state uses the following language: "We are of the opinion that, HNT independent of statute, upon principle and in furtherance of sound public policy, both corporations and their officers and agents, who engage in the conspiracy, must be held to be parties to it, and be counted in computing the necessary number to constitute it. There are respectable authorities which tend to this conclusion"; citing People v. Duke, 19 Misc. Rep. 292, [44 N. Y. Supp. 336]; Samuels v. Oliver, 130 Ill. 73, [22 N. E. 499]; [***20] Eddy on Corporations, sec. 362. (See, also, United States v. MacAndrews, 149 Fed. 823.)

There is no substantial ground upon which the information may be held to be insufficient because the dates upon which the acts of the alleged conspirators, committed in the prosecution of such conspiracy occurred are not definitely stated and fixed in the information. While in no manner vitiating the information, there was, in our opinion, no real necessity for alleging the acts constituting the actual accomplishment of the object or purpose of the combination or conspiracy. They constitute mere probative facts, since [*485] the gist of the crime of conspiracy is in its formation for an unlawful purpose, and, therefore, the averments of the information with reference to the times at which such acts were committed may be treated as surplusage. In other words, the legislative power of the government very properly treated combinations formed for the purpose of restricting trade or for any other unlawful purpose very much in the light in which a loaded gun is regarded--a dangerous instrument to be lying around loose--and upon the same principle which sustains local legislative [***21] measures declaring it to be a misdemeanor for one to have in his possession burglarious tools and instruments, deals with such combinations so that prevention may be accomplished before a cure becomes necessary. Therefore, the acts constituting the actual execution of the purpose of a criminal conspiracy are only evidence of the existence of [**719] such conspiracy, which is the ultimate fact to be proved in order to establish the wrongful act against which the statute inveighs.

3. It is further contended and argued with much earnestness that the superior court is without jurisdiction of criminal cases arising under the anti-trust law, but that such cases are cognizable alone in the justice's or police court. This contention is untenable, as we think we can without difficulty show.

The argument upon this point arises out of the failure of the legislature to expressly declare, in the penal section of the statute, whether a violation of the provisions of the law constitutes a felony or a misdemeanor, or to expressly designate the jail or prison in which a party, upon conviction, may be imprisoned in the event the court, in the exercise of the discretion vested in it, elects to [***22] impose the penalty of imprisonment. The section referred to provides that any person, firm, partnership, etc., violating either or all of the provisions of "this act" shall be "punished by a fine of not less than fifty (50) dollars nor more than five thousand (\$ 5,000) dollars, or be imprisoned not less than six months nor more than one year, or by both such fine and imprisonment." It is clear, from the nature and extent of the penal punishment which is authorized to be inflicted by the section mentioned, that neither the justices' courts nor the "police court" of the city of Sacramento, if such a court as [*486] the latter exists, have jurisdiction to try criminal cases arising under the statute. That this is true will readily become obvious upon reading section 5 of article VI of the constitution, and from an examination of the statutes establishing the jurisdiction and powers of the inferior courts of the city of Sacramento as to misdemeanors.

The section of the constitution adverted to, after specifically outlining the jurisdiction of the superior courts as to numerous subjects, provides generally that those courts shall have jurisdiction "of cases of misdemeanor not otherwise [***23] provided for." The jurisdiction of the class of misdemeanors to which the one in the case at bar belongs is not, as seen, expressly fixed, and, as we have stated, the penalty authorized to be imposed therefor is beyond the power of the justices' courts or of the "police court" of the city of Sacramento to impose, as will presently

more clearly be made to appear; hence, by the terms of the constitution itself, the superior court of the county of Sacramento has exclusive jurisdiction of the crimes defined in the statute involved here.

The criminal jurisdiction of justices' courts is expressly confined, by the provisions of [section 1425 of the Penal Code](#), to "all misdemeanors punishable by fine not exceeding \$ 500, or imprisonment not exceeding six months, or by both such fine and imprisonment." The jurisdiction thus in general language conferred in criminal cases on justices' courts is in addition to the jurisdiction vested in such courts of other expressly enumerated offenses, for none of which, however, does the penalty exceed a fine of \$ 500 or imprisonment for six months, or both.

There is no distinct court known and designated as the "police court" of [***24] the city of Sacramento, exercising the jurisdiction ordinarily given to municipal police courts. The city justice's court of said city exercises the jurisdiction and performs all the functions of a police court under the authority and power vested in it by [section 1425 of the Penal Code](#), *supra*, and not from any power which may be supposed to have been given it by the charter of the city of Sacramento, approved by the legislature of 1893. (Stats. 1893, p. 564.) But, even upon the assumption that there resided in the legislature at the time of its approval of said [*487] charter the power to create by such means or through such instrumentality municipal courts or judicial tribunals of any character, or to thus confer upon the city justices' courts judicial functions or duties in addition to those prescribed by statute--a power which it has been held did not exist in the legislature at that time ([Ex parte Sparks, 120 Cal. 395, 152 Pac. 715](#))--the provision of said charter with respect to the jurisdiction of the court thus sought to be set up or upon which new judicial functions were thus attempted to be conferred would not confer upon [***25] such court jurisdiction of the offenses denounced by the statute concerned here. Said provision (article IV, subdivision 3, of said charter), substantially follows and copies all of [section 1425 of the Penal Code](#), and includes the following general language of said section: "And all misdemeanors punishable by fine not exceeding \$ 500, or imprisonment not exceeding six months, or by both such fine and imprisonment."

Section 4426 of the Political Code can have no application here because, as we have seen, there does not exist in the city of Sacramento a police or any other municipal court, strictly speaking, and if there did exist there such a court the section referred to would clothe it with no more power as to misdemeanors than is conferred upon justices' courts generally by [section 1425 of the Penal Code](#).

Counsel for appellant declare that they are sustained in the point now under review by the case of [Union Ice Co. etc. et al. v. Rose, 11 Cal. App. 357, 104 Pac. 1006](#). But counsel cannot point out the remotest analogy between the case at bar and the one cited favorable to their contention upon the point [***26] under consideration.

The cited case involved an application to the district court of appeal of the second district, for a writ of prohibition to restrain the respondent, a police court judge in the city of Los Angeles, from further attempting to entertain jurisdiction of a criminal prosecution inaugurated under the [antitrust law](#), upon the [**720] ground that the trial of the case was not, under the provisions of said law, within the jurisdiction of said court, and the appellate court, upholding the constitutionality of an act of the legislature of 1901 creating police courts for cities of the one and one-half class, to which the city of Los Angeles belongs, merely holds that the police [*488] courts so created, having been given, by section 2 of said act, jurisdiction of *all* misdemeanors punishable by fine or by imprisonment, or by both such fine and imprisonment, committed in cities where such police courts are held, are thus invested with jurisdiction to try cases involving offenses created by the Cartwright law. No one will undertake to challenge the soundness of that conclusion. Nor will the proposition be disputed that the legislature has the right and the power [***27] to confer upon justices' and police courts jurisdiction of all *misdemeanors*, whatever may be the extent of the punishment authorized to be inflicted in the event of a conviction thereof, such courts being limited, of course, in the execution of their judgments of imprisonment to imprisonment in a local or county jail.

But it is at once perceivable upon reading the opinion in the cited case that it has no application here. There is, as we have shown, no police court in the city of Sacramento to which the provisions of the statute of 1901, *supra*, can apply. Besides, the court in that case in effect expresses the opinion that in those cities where the justices' and police courts are limited in their jurisdiction to the trial of misdemeanors for which no greater penalty than that

prescribed by [section 1425 of the Penal Code](#), and section 4426 of the Political Code, the jurisdiction of criminal prosecutions under the anti-trust law is exclusively in the superior courts.

Nor does the fact that the legislature omitted to specifically designate the jail or prison in which a sentence of imprisonment shall be executed under the statute here render any the less [***28] manifest the soundness of the proposition that jurisdiction of these cases is alone in the superior courts of those counties where jurisdiction thereof is not otherwise expressly apportioned or assigned. We are not called upon here to inquire whether the legislature contemplated, in the enactment of the anti-trust law, that more than a county jail sentence of imprisonment should, under any circumstances, be imposed for a violation of its provisions, or intended to give to the superior courts the power to determine in any case whether an infraction of the law shall, by the nature of the punishment inflicted therefor, operate as a felony or as a misdemeanor. ([Pen. Code, sec. 17; People v. Gray, 137 Cal. 267, 170 Pac. 20; In re Sullivan, 3 Cal. App. 193, 1*4891 184 Pac. 781](#)) Nor (the court in the present case having treated the offense of the appellant as a misdemeanor by the nature of the punishment imposed), are we required to speculate as to what may be the effect, if any, upon the question of the validity of the penal section of the statute of a want of uniformity in the nature of the punishments imposed which [***29] may arise by reason of the jurisdiction in some instances being alone in the superior courts and in others exclusively in police courts. It is, nevertheless, true, as declared, that no proposition could be further removed from the realm of disputation than that, from the very nature and extent of the punishment prescribed, the justices' courts of the city of Sacramento are without jurisdiction of this class of misdemeanors. We judicially know that the judgments of imprisonment of justices' courts in criminal cases cannot be executed in any other than the county jail, except in those cases where, in certain cities, a justice's court performs the functions of a police court by taking cognizance of cases arising under city ordinances. We further know, judicially, that the judgments of the superior courts in criminal cases are, save in a few exceptional cases, executed either by imprisonment in a state prison or by the infliction of the death penalty. We can, therefore, judicially know, and thus readily determine, when a statutory offense is cognizable in the superior or the justice's court by reference to the nature and extent of the punishment prescribed, whether the statute designates [***30] such offense as a felony or a misdemeanor or as neither, or whether or not it specifies the jail or prison in which the judgment is to be executed. The truth is that, in the determination whether a certain offense is a felony or a misdemeanor, no material aid is necessarily afforded by the mere characterization of the prohibited and penalized act as either the one or the other, since the nature and extent and mode of the punishment prescribed (or inflicted, where the superior court is clothed with a discretion of determining whether the sentence shall be executed by imprisonment either in a state prison or the county jail), is the sole test. ([Pen. Code, sec. 17](#)) For illustration, if a statute should denounce a certain act as a felony, but limited the power of punishment therefor to imprisonment in the county jail for a term not exceeding six months [*490] or a fine not exceeding \$ 500, or by both such fine and imprisonment, it would readily appear, notwithstanding its designation by the statute as a felony, that, from the nature of the punishment prescribed, the act so denounced and designated could be nothing more than an ordinary misdemeanor, of which [***31] justices' courts have exclusive jurisdiction. Therefore, in the case at bar the nature of the punishment prescribed, being in excess of the punishment which a justice's court possesses the power to impose, fixes the jurisdiction in the superior court of Sacramento [**721] county as clearly and as unquestionably as though such jurisdiction were conferred in express terms.

4. The contention that the evidence does not justify the verdict is not sustained by the record.

We shall not undertake an elaborate or detailed examination of the evidence as it is presented by the record and upon which the jury felt justified in adjudging the appellant guilty of the crime charged against him. It will suffice to say that the most that can be said of the evidence is that upon the question of the defendant's guilt, there exists therein a substantial conflict, and in that state of the record the verdict only represents the exercise of a power which resides exclusively within the province of the jury.

We may, however, point to these facts which not only stand undisputed, but some of which the appellant himself admitted at the trial: That there existed in the city of Sacramento at the time of the [***32] trial an organization known as the Sacramento Butchers' Protective Association, which was composed of a large majority, if not all, with the exception of Albert Robinson, of the retail meat dealers in said city; that said Robinson was not a member of said association; that when he (Robinson) first applied to appellant to supply him with fresh meats to be sold in said

city by retail, said appellant stated to him that, before he could give him a definite answer with regard to the proposition, he (appellant) would be required to first confer with the main office at San Francisco; that appellant did finally furnish Robinson with fresh meats, but uniformly charged him, variously, a cent and a cent and a half and two cents per pound more for meats than he charged the members of the association for the same kind of meats. Appellant was a witness for himself, and [*491] admitted charging Robinson more for meats than he required members of the association to pay for the same class of meats, and the only explanation he had to offer for thus discriminating against Robinson was that he had a right to do so, and had been so advised by his attorney.

There was other testimony received which [***33] tended to establish the truth of the charge against the appellant. It was, for instance, shown that numerous complaints involving protests against selling meats to Robinson by the meat company were made to appellant by certain members of the butchers' association, and these complainants, except in the case of one who claimed that Robinson's place of business was situated nearer his place of business than the rules of the association permitted, were usually satisfied after inspecting Robinson's bills, disclosing that he was paying higher prices for meats than they were compelled to pay. It was, moreover, shown by the witness, Brier, the stenographer who reported the testimony at the preliminary examination of the appellant, that at said examination O'Keefe was a witness, and as such stated, among other things, that he (O'Keefe) "did not wish to encourage Robinson's trade, and also in his testimony said that he consulted with members of the Sacramento Butchers' Association about selling Robinson meat"; that O'Keefe further testified at said examination that "Robinson paid more for his meat than was paid by anybody else purchasing beef from his corporation at that time . . ."; that the [***34] "defendant also testified in his examination that the prices on meat sold by him to Robinson from January 4th to 11th, inclusive, were higher than the prices on the meats sold by him during that time to members of the Sacramento Butchers' Protective Association"; that he stated that "he did not propose to give any satisfaction to Robinson; that he knew that Robinson was not a member of the association; that he knew the other dealers getting meat here were members of that association; stated that he talked with members of the association about selling Robinson meat prior to the time Robinson came to see him in reference to buying meat from the Western Meat Company, and prior to the time of selling Robinson meat; stated that it was his intention to consult as many of the members as he could before selling Robinson meats; that he would be governed [*492] by the desires of the association in dealing with Robinson, and that in his dealings with Robinson he was governed by the desires of the members of the association," etc. There is considerable more testimony shown by the record corroborative of that of which the foregoing is a mere synopsis, but we have referred sufficiently to the [***35] proof adduced by the people to show that the jury were justified in reaching the conclusion that the charge alleged in the information was established by the degree of proof required in criminal cases. As we have before stated, the gist or gravamen of the crime charged in the information is the formation by the parties named therein of the conspiracy for the purpose of destroying free competition in the retail meat business in the city of Sacramento, and, therefore, except in so far as it serves as evidence of the crime charged, the actual execution of the conspiracy is immaterial. It is enough, in other words, to show that the purpose of the combination into which the parties referred to in the information entered was to carry out contracts and agreements and understandings between them in restraint of trade. Therefore, while it is not for this court to analyze the evidence with the purpose of ascertaining and passing upon its probative force and effect, it may well be suggested that with the uncontradicted evidence of the appellant's admissions, considered with the other circumstances to which we have briefly referred, what possible ground is there presented here for holding, or [***36] even doubting, that the conclusion [**722] of the jury that the purpose of the combination was to circumvent legitimate competition in the business of retailing meats in the city of Sacramento is not justified. It is idle, and no answer to this position, to say, as is the fact, that the appellant and each of the members of the Butchers' Protective Association positively denied that there ever was any "understanding, compact or agreement" between the members of said association and the Western Meat Company or O'Keefe, as the manager of said company, "whereby it was understood or agreed in any manner, shape or form that the Western Meat Company was to charge persons who did not belong to that association a higher or a different price for fresh meats than would be charged members of the Butchers' Protective Association"; for thus there is, plainly, brought [*493] about that conflict only which, under our system, forecloses interference by reviewing courts with the verdict of a jury or the findings of a court.

5. There are many alleged errors assigned in the rulings of the court upon questions involving the admission and rejection of evidence. All these we shall not undertake [***37] to specially review, for it will be sufficient to say that

we have been unable, after a careful examination of these assignments, to find in any of the rulings, even if it might well be conceded that some of them were erroneous, anything prejudicial to the substantial rights of the appellant. But most of the objections interposed by appellant to the admission of certain testimony, in their very nature bear upon the weight rather than upon the question of the competency or relevancy of such testimony.

We may, however, point out a few of the overruled objections interposed by the defendant, and of which advantage is sought to be taken by appellant on this appeal, as illustrating the nonprejudicial effect of the rulings generally of the trial court, assuming that they or some of them were not strictly correct.

Certain witnesses, introduced by the people, testified that Robinson bought smoked and cured meats from the company and was charged therefor prices at which the same kind and quality of such meats were sold to other retailers, including the members of the butchers' association. There was no complaint, nor was there any dispute upon the proposition that the company discriminated [***38] in prices against Robinson in the sale of smoked and cured meats. The charge was, as the evidence clearly discloses, that the discrimination complained of was made on the sale of fresh meats. The testimony with regard to smoked or cured meats was, in some measure, whether large or small is unimportant, corroborative of the evidence of the conspiracy charged, showing that the meat company discriminated in favor of the members of the butchers' association and against Robinson in the sale of fresh meats. In other words, it emphasized to some extent the direct proof of the existence of the conspiracy by showing that as to those meats in which the members of the association did not deal, the meat company did not discriminate against Robinson but sold him such [*494] meats at normal prices. If such were not the purpose and effect of the testimony concerning cured or smoked meats, then it had none at all, and therefore, if erroneously admitted, could not have been prejudicial.

Objection was also made and overruled to the introduction in evidence by the people of the by-laws of the Butchers' Protective Association. We think the ruling was proper. The by-laws were not only proper for [***39] the purpose of disclosing the identity of the members of the association, but also to show the nature and purposes of the association and the object of its connection, if any, with the Western Meat Company. Indeed, if the by-laws tended in any manner to disclose the criminal conspiracy charged in the information, they were competent evidence for that purpose. (*Judd v. Harrington*, 139 N. Y. 105, 134 N. E. 790; 10 Am. & Eng. Ency. of Law, p. 863.) But if the by-laws failed to show, or contained nothing tending to disclose the conspiracy charged, then, clearly they were harmless as evidence, and their admission into the record could have had no prejudicial effect upon the rights of the appellant.

The further claim is made that the court erred to the detriment of the defendant by allowing the people to inquire of the members of the association, upon cross-examination, whether they contributed money toward the employment of counsel for the defense or otherwise aided the defendant in the preparation and maintenance of his defense. The object of this cross-examination was, of course, to show that the members of the association were more than ordinarily interested [***40] in the defense and were, therefore, partisans. It is not necessary to refer to authorities to show the manifest propriety of the cross-examination which appellant condemns. It is always proper for a party against whom a witness has given damaging testimony to show out of the mouth of the witness himself, if he can, or by other sources, if necessary, that such witness has an unusual interest in the outcome of the case, thus putting the jury in possession of a circumstance which may materially aid them in determining how much weight, if any, the testimony of such witness is entitled to.

Thus we have referred to some of the many objections against the validity of the judgment and order here based [*495] upon the rulings of the trial court upon the evidence, and, as suggested, they fairly represent the general character, in their effect upon the rights of the appellant, of those other objections to which we must forbear giving special attention.

[**723] 6. Many of the instructions of the court are assailed as involving erroneous statements of the law applicable to the case. We shall not specially review all these assignments. The charge of the court in its entirety is full, [***41] clear and fair upon all the vital points in the case.

The instructions by which the jury were told that the crime of conspiracy could be proved by circumstantial as well as by direct evidence were perfectly proper. No reason exists for requiring the proof of the crime of conspiracy to be

by means of direct rather than by circumstantial evidence. No one has ever challenged the proposition that it is competent to prove any ultimate fact by circumstantial evidence. Indeed, it would be impossible to prove many cases of conspiracy or of any other crime without the aid of such evidence.

The italicized part of the following instruction is particularly criticized:

"The common design is the essence of the charge, and while it is necessary in order to establish a conspiracy, to prove a combination of two or more persons, by concerted action, to accomplish the criminal or unlawful purpose, *it is not necessary to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the detail of the plans or means by which* [***42] *the unlawful combination was to be made effective* It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or [*496] was to be executed at a remote distance from the other conspirators."

The evident and rational meaning of the portion of the foregoing instruction put in italics, when read with the remainder of said instruction, is that "no explicit or formal agreement" need be proved, if it be otherwise satisfactorily proved that two or more persons, in any manner, come to a mutual understanding to accomplish a common and unlawful design. In other words, the instruction in effect, and with reasonable clearness, declared to the jury that it is immaterial how or in what manner a conspiracy may be formed, so long as it sufficiently [***43] appears from the evidence that it was formed for an unlawful purpose.

Several other instructions of similar import to the fore-going are complained of, but in view of what we have said with regard to the quoted instruction they need not be specially noticed.

The instruction to the effect that, if the jury should find from the evidence beyond a reasonable doubt that, in pursuance of an understanding or agreement, either express or tacit, between one F. J. Salcedo, a member of the butchers' association and the defendant, whereby O'Keefe agreed to charge, and did charge, Albert Robinson more for the meat purchased by him of said defendant than was charged by said defendant to any member of said association, with the intent to lessen competition, it would be the duty of the jury to convict the defendant, was pertinent, and based upon the testimony of the witness Brier and that of said Salcedo. It is not disputed that Salcedo was, at the times mentioned in the information, a member of the butchers' association, and it further appears that on several different occasions he personally remonstrated with the defendant against the sale of fresh meats to Robinson.

It will be remembered that [***44] it was proved that the defendant himself admitted, while on the witness-stand at the preliminary hearing of the charge against him, that, in his dealings with Robinson "he was governed by the desires of the members of the association."

We have thus given attention to some of the more important objections to the charge of the court. As declared, the instructions as a whole with clearness correctly declared to [*497] the jury the rules by which they were to be governed in considering the evidence.

Some intimation is thrown out by counsel for the appellant that the law against trusts and unlawful combinations is out of joint with the constitution, and as well conflicts with the law on the subject of criminal conspiracies as defined by the Penal Code. The specific ground for the constitutional objection to the law is not pointed out, and we do not think any such objection can be shown. Nor can we perceive any incompatibility, if such an objection could be successfully urged against the anti-trust law, between the latter and the code section pertaining to the crime of conspiracy. The essence or gist of conspiracy here, as is true of the crime as it is defined by section 182 of the Penal Code [***45], is in the formation and maintenance of the conspiracy for the purpose of accomplishing some unlawful object, or, also under the code, for the purpose of accomplishing a lawful object by unlawful means. As we

12 Cal. App. 471, *497 107 P. 712, **723 1910 Cal. App. LEXIS 332, ***45

have before declared, in the case at bar the actual acts constituting the crystallization of the object of the conspiracy constitute evidence only of the unlawful combination or agreement to co-operate together for the purpose of destroying free competition in trade, and the only distinction, which is none at all, so far as the crime itself is concerned, between the conspiracy charged here and that with which the code section deals, is that the former is made to apply to a different object from any mentioned in the code.

[**724] We have found nothing in the record demanding a reversal of either the judgment or the order, and both are, therefore, affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 23, 1910.

End of Document

Munter v. Eastman Kodak Co.

Court of Appeal of California, Third Appellate District

October 26, 1915, Decided

Civ. No. 1349

Reporter

28 Cal. App. 660 *; 153 P. 737 **; 1915 Cal. App. LEXIS 389 ***

HARRY MUNTER, Appellant, v. EASTMAN KODAK COMPANY, (a Corporation), Respondent

Prior History: [***1] APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Mogan, Judge.

Disposition: The judgment is affirmed.

Core Terms

dealers, articles, prices, retail dealer, retail, commerce, manufacture, anti-trust, terms, purchaser, restrictions, conditions, commodity, trade discount, combinations, customers, selling, coal, tobacco company, coal company, merchandise, wholesale, supplies, damages

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Governments > Local Governments > Claims By & Against

[HN1](#) [] **Private Actions, Remedies**

The Cartwright Antitrust Law, 1907 Cal. Acts, pp. 984-987, at § 11, provides that in addition to the criminal and civil penalties herein provided, any person who shall be injured in his person or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any court having jurisdiction thereof 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 two-fold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceedings under this act may be 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 they reside in the county where such action is pending, or not.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Torts > Business Torts > General Overview

HN2 [down] Private Actions, Remedies

In a civil action for damages based upon the Cartwright **Antitrust Law** (Act), 1907 Cal. Acts, pp. 984-987, it is incumbent upon the complaining party, not only to allege and prove the existence of an unlawful trust or combination but also to allege and prove that his business or property is injured by the very fact of the existence and prosecution of such unlawful trust or combination. To be "injured in business or property," within the contemplation of said Act, is where the injury directly results from the fact of the existence of the trust. That is, where the business or property directly sustains injury solely by reason of the restrictions in trade or commerce which are fostered by such trust or combination. While one whose business or property is injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the Act for double the damages he actually suffers from the injury so inflicted, yet he cannot maintain an action based upon the Act if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, does not arise by reason of the restrictions in trade or commerce carried out by such trust or combination.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3 [down] Public Enforcement, State Civil Actions

There is no violation of the Cartwright **Antitrust Law**, 1907 Cal. Acts, pp. 984-987 in the mere act of a person purchasing or otherwise securing control of a number of different concerns engaged in the business of manufacturing and selling the same article or commodity. The control by one person or corporation of a number of other concerns engaged in its line of business can only become unlawful when the effect of such combination is to establish and foster a monopoly which affects or injures the public welfare.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4 [down] Public Enforcement, State Civil Actions

It is within the legitimate province of a manufacturer and wholesale vendor to select its own customers, and to sell at higher prices to one than to another, provided, that such discrimination in prices is not the result of a combination, agreement, or conspiracy between it and others, the object of which is to monopolize or restrict trade or commerce or to prevent legitimate competition, or otherwise to injure the public.

Headnotes/Summary

Headnotes

Cartwright Anti-trust Law--Action for Damages--Refusal to Sell Goods--Pleading--Insufficient Complaint.--A complaint in an action for damages based upon the provisions of section 11 of the Cartwright anti-trust law (Stats. 1907, pp. 984, 987), fails to state a cause of action, where the gist of the charge against the defendant is that it is the owner or in control of a large number of different establishments engaged in the manufacture and sale as a wholesaler of certain articles mentioned in the complaint, and that it has refused to sell any of its goods to plaintiff at the prices at which and upon the conditions upon which it sees fit to sell the same kind of articles or goods to other retail dealers.

Id.--Damage--Essential to Show.--While in a criminal prosecution against persons for maintaining a trust or combination in restraint of commerce or trade, the gist of the offense is in the formation and maintenance of such trust or combination, and the fact of the existence of the combination for the purpose of doing some prohibited act is

all that need be proved to support and sustain the charge, yet, in a civil action for damages based upon the Cartwright anti-trust law, it is incumbent upon the complaining party, not only to allege and prove the existence of an unlawful trust and combination, but also to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination.

Id.--Business Combination--When Unlawful--Monopoly.--There is no violation of the statute in the mere act of a person purchasing or otherwise securing control of a number of different concerns engaged in the business of manufacturing and selling the same article or commodity, and the control by one person or corporation of a number of other concerns engaged in its line of business can only become unlawful when the effect of such combination is to establish and foster a monopoly which affects or injures the public welfare.

Id.--Fixing of Prices of Manufactured Goods--Selection of Customers--Right of Manufacturer.--A manufacturer or wholesaler has not only the right to fix the prices for his goods, but he has the right to establish the prices at which such goods shall be sold by retailers, so long as such acts are not the direct effect or result of a combination formed and maintained by him and others to create restrictions in trade or commerce; and he has also the right to select his own customers, and to sell at higher prices to one than to another, provided that such discrimination is not the result of a combination, agreement, or conspiracy between him and others to monopolize or restrict trade or commerce or to prevent legitimate competition.

Syllabus

The facts are stated in the opinion of the court.

Counsel: James L. Nagle, for Appellant.

Samuel Knight, for Respondent.

Judges: HART, J. Chipman, P. J., and Ellison, J., pro tem., concurred.

Opinion by: HART

Opinion

[*661] [**738] HART, J. The defendant demurred to the second amended complaint in this action on both general and special grounds and the same was allowed, without leave to amend. Thereupon judgment was entered in favor of the defendant.

From the judgment so entered, the plaintiff prosecutes this appeal.

The action is for damages and purports to be based upon the provisions of section 11 of the so-called Cartwright **antitrust law**. (Stats. 1907, pp. 984, 987.) Said section reads as follows:

HN1 [↑] "In addition to the criminal and civil penalties herein provided, any person who shall be injured in his person or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any court having jurisdiction thereof in the county where [***2] 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 two-fold the damages by him sustained, and the costs of suit. Whenever it shall appear to the court before which any proceedings under this act may be 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 they reside in the county where such action is pending, or not."

The defendant, a corporation, is and had been for some time prior to the commencement of this action engaged, in the city of San Francisco, in the business of wholesale dealing in [*662] photographic supplies, kodaks, cameras, and the usual or essential equipments thereof.

The plaintiff was for more than two years prior to the seventeenth day of January, 1911, (the alleged time at which the alleged cause of action against the defendant accrued to the plaintiff) engaged at No. 716 Clement Street, in the said city of San Francisco, in the business of selling, exclusively at retail, "kodaks, cameras, photographers' supplies and other articles [***3] furnished and supplied exclusively by defendant to the dealers in said goods."

The complaint in substance alleges: That the defendant, as a wholesale dealer, has at all times mentioned in the complaint furnished and "continues to furnish" to the trade in the city of San Francisco and elsewhere the articles above mentioned at a certain trade discount to enable the retail dealers "to carry on the said business and annually issued a circular in which they fixed the price at which various dealers (retail) could sell the said articles"; that (upon information and belief) there are certain retail dealers to whom the defendant will sell said articles "at what the defendant terms 'dealer rates' under and by virtue of an agreement between said defendant and said dealers, and refuses to sell to any other person, although engaged in the business of dealers, unless the said defendant recognizes the said dealer as a dealer and refuses to said dealer the trade discount granted to other dealers in the same general business of dealers in said articles." It is further alleged that the defendant has made and entered into an agreement with dealers to whom it furnishes and sells said articles whereby [***4] the latter "bound themselves for one year, commencing on the 1st day of January, 1911, not to sell or dispose of said articles to any person engaged in said business as a retail dealer but the person who was as such dealer recognized by the defendant as a retail purchaser and not as a dealer and did agree and combine to pool and directly and indirectly did unite their said several interests so that the price that they should secure said articles for, and which were to be furnished by said defendant, and the companies, persons and associations under the defendant's control would be cheaper and less so that they could, as dealers, sell to the general public, and in pursuance of said conspiracy and combination the said plaintiff was prevented from obtaining said articles herein alleged on [*663] dealers' terms and prices"; that the defendant, for the purpose of obtaining the exclusive privilege of supplying the dealers of the city of San Francisco and elsewhere with the said articles and so controlling the market with respect thereto has, "by means of purchase and otherwise, obtained control of a large number of corporations, copartnerships, and other associations engaged in the [***5] manufacture of said articles so that persons engaged in the purchase and sale of said articles to the general public cannot obtain the said articles from any other person than defendant, and said dealer, in order to obtain said articles at a trade discount, the same as other dealers, must be first recognized by the said defendant."

It is averred that, up to the seventeenth day of January, 1911, the plaintiff was known to and recognized by the defendant as a retail dealer in kodaks, cameras, and photographers' supplies, and up to said date sold said articles to the plaintiff, as a retail dealer, at a trade discount, "so that he could again sell the same to the general public at the retail price fixed by the said defendant in the aforesaid annual circular"; that up to the time mentioned the plaintiff could as a retail dealer purchase said articles from the defendant or any of the corporations, companies, and manufactories owned and controlled by it; that, on the said seventeenth day of January, 1911, the defendant, "unlawfully, fraudulently, and knowingly, for the purpose of injuring, depriving, cheating and defrauding plaintiff of said business, notified plaintiff that it would refuse [***6] to sell, to deal any longer with, or recognize plaintiff as a dealer in the said articles and goods, and refused to sell to him at the prices with a trade discount for which they sell to other dealers in the city of San [**739] Francisco or to recognize plaintiff as a retail dealer in said goods or allow the plaintiff to order from them or purchase at prices for which they sold the same articles to other dealers at retail"; that the plaintiff, since said date, has been unable to purchase as a retail dealer any of the articles or goods mentioned from the defendant; that the defendant has by means of threats "and other acts" prevented other companies it controls from selling the said articles or goods to the plaintiff at the prices at which the defendant and its confederates sell the same goods to the different dealers recognized by them in the city of San Francisco, [*664] "and has compelled said dealers to aid and assist them in preventing the plaintiff from obtaining or purchasing said articles or goods from any of them under the penalty of refusing to receive any further orders from them as dealers or to recognize or deal with them as dealers or to sell to them at the prices [***7] sold to dealers recognized by them."

It is further alleged that the plaintiff, on the seventeenth day of January, 1911, had on hand or in stock and undisposed of a large quantity of the said goods and articles which he had previously purchased from the defendant, the latter then recognizing him as a dealer, and that said stock was of the value of eight hundred dollars, "which in ordinary course of trade would sell at retail for the sum of \$ 1200.00, providing the plaintiff should be treated as a dealer by defendant and permitted thereafter to purchase at a trade discount"; that the plaintiff, having been engaged in the said business for a great number of years, had established a large and lucrative business from which he derived a profit of \$ 3.50 per day, and that in building up said business he had expended a large sum of money and became widely known as a dealer in the goods and articles "of the defendant and its many confederates aforesaid, all of which was well known to the defendant, and the good-will on said day was of the value of \$ 1,200.00." The plaintiff further declares that he would not have engaged in said business of handling the defendant's goods "but for the false [***8] and deceitful pretenses of said defendant that it would recognize the plaintiff as theretofore as a dealer and would treat him as such and permit the purchase of said articles and goods as such dealer for the purpose of sale, the same as other dealers."

The complaint proceeds: "That in the terms of sale issued to retail dealers in the defendant's goods and articles, all goods are sold to dealers at dealers' rates, upon the express condition that they may be resold in strict accordance with the conditions set forth in the notice of terms of sale and among the said conditions was that said dealers could not sell to any person for a price less than the retail prices fixed by defendant."

The demurrer was properly sustained.

While, in a criminal prosecution against persons for maintaining a trust or combination in restraint of commerce or trade, the gist of the offense is in the formation and maintenance [*665] of such trust or combination, and the fact of the existence of the combination for the purpose of doing some prohibited act is all that need be proved to support and sustain the charge, yet, HN2[¹] in a civil action for damages based upon our anti-trust statute, it is incumbent [***9] upon the complaining party, not only to allege and prove the existence of an unlawful trust or combination but also to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination. Or, as was said by this court in Krigbaum v. Sbarbaro, 23 Cal. App. 427, 433, [138 Pac. 364]: "To be 'injured in business or property,' within the contemplation of said law, as we understand it, is where the injury has *directly* resulted from the fact of the existence of the trust—that is to say, where the business or property has directly sustained injury solely by reason of the restrictions in trade or commerce which are fostered by such trust or combination. In other words, while one whose business or property has been injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the antitrust law for double the damages he has actually suffered from the injury so inflicted, yet he could not maintain an action based upon said law if the injury, although directly the result of the wrongful [***10] acts of the trust or the constituent members thereof, did not arise by reason of the restrictions in trade or commerce carried out by such trust or combination."

It must at once become manifest, upon reading the complaint in this action, that, boiling its averments down to their simplest statement, the limit of the intendments thereof does not extend beyond the mere assertion of a claim that the defendant, for some reason not divulged by that pleading, refused to recognize the plaintiff as a retail dealer within the purview of the terms and conditions of its annual circular and so has refused to sell to him its goods and wares.

There is, as will readily be noted, no statement in the complaint that a combination has been formed and is being maintained by and between the defendant and its alleged allied companies to create or carry out restrictions in trade or commerce," (Stats. 1907, p. 984, sec. 1, subd. 1); or "to limit or reduce the production, or increase or reduce the price of merchandise [*666] or of any commodity" (Id., subd. 2); or "to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity" (Id., subd. 3); [***11] or "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 the state" (Id., subd. 4); or to violate any of the provisions of subdivision 5 of section 1 of said act.

There is no averment from which it may be concluded or even inferred that the prices at which the defendant and others connected [**740] with it sell the articles named to retail dealers or the prices at which the defendant requires the retail dealers to sell said goods to the public are in excess of what ought to afford only a fair and reasonable return or profit on the manufacture and retail sale of the same, and consequently there is a failure to disclose that the public is or will be injured by the prices so fixed.

HN3[[↑]] There is no violation of the statute in the mere act of a person purchasing or otherwise securing control of a number of different concerns engaged in the business of manufacturing and selling the same article or commodity. The control by one person or corporation of a number of other concerns engaged in its line of business [***12] can only become unlawful when the effect of such combination is to establish and foster a monopoly which affects or injures the public welfare. In other words, the statute against predatory trusts or business combinations is violated only where a combination has been formed and is maintained for the purpose and having the effect of creating and fostering restrictions in trade or commerce or preventing legitimate competition in the manufacture and sale or purchase of merchandise, produce, or any commodity. No such combination is charged in the complaint. As before stated, the gist of the charge against the defendant is that it is the owner or in control of a number of different establishments engaged in the manufacture and the sale as a wholesaler of the articles mentioned and that it has refused to sell any of its goods and wares to the plaintiff at the prices at which and upon the conditions upon which it sees fit to sell the same kind of articles or goods to other retail dealers.

[*667] The defendant not only has the right to fix its own prices as a manufacturer or wholesaler, but also the right to establish the prices at which its goods are to be sold by retail dealers therein [***13] to whom it sells such goods for retail sale, so long as those acts are not the direct effect or result of a combination formed and maintained by it and others to create restrictions in trade or commerce, or, in short, to maintain a monopoly of the trade, and, as stated, nowhere does the complaint directly declare that this was the fact here. The defendant has the further right to sell its goods to whomsoever it pleases and to refuse to sell to particular persons. **HN4**[[↑]] In other words, it was and is within its legitimate province as a manufacturer and wholesale vendor to select its own customers, and, moreover, to sell at higher prices to one than to another, provided, of course, that such discrimination in prices is not the result of a combination, agreement, or conspiracy between it and others, the object of which was or is to monopolize or restrict trade or commerce or to prevent legitimate competition, or otherwise to injure the public, the protection of whose welfare is the first consideration of all anti-trust legislation. (*Grogan v. Chaffee*, 156 Cal. 611, [27 L. R. A. (N. S.) 395, 105 Pac. 745]; *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355, [128 Pac. 1041]; [***14] *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, [60 C. C. A. 290, 64 L. R. A. 689]; *Union Pacific Coal Co. v. United States*, 173 Fed. 737, [97 C. C. A. 578].)

In *Grogan v. Chaffee*, it is said: "There is nothing either unreasonable or unlawful in the effort by a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his product may have attained." Again, the court in that case said: "It is not every limitation on absolute freedom of dealing that is prohibited, and it is the tendency of the modern decisions to view with greater liberality contracts claimed to be in restraint of trade."

The Continental Tobacco case, above cited, involved an action wherein the plaintiff sued for damages under the provisions of the federal anti-trust law. It was alleged in the complaint that the defendant, Tobacco Company, and its agent had refused to sell to or supply the plaintiff with the goods of the company at as low a figure as it sold to others and that the result was that he was forced out of business. The [*668] federal court, affirming the judgment [***15] entered upon an order by the court below sustaining a demurrer to the complaint, said: "The tobacco company and its employee sold its products to customers who refrained from dealing in the goods of its competitors at prices which rendered their purchases profitable. But there was no restriction upon competition here, because this act left the rivals of the tobacco company free to sell their competing commodities to all other purchasers than those who bought of the defendants, and free to compete for sales to the customers of the tobacco company by offering to them goods at lower prices or on better terms than they secured from that company. The tobacco company and its employee were not required, like competitors engaged in public or *quasi* public service, to sell to all applicants who sought to buy, or to sell to all intending purchasers at the same prices. They had the right to select their customers, to sell and to refuse to sell to whomsoever they chose, and to fix different prices for sales

of the same commodities to different persons. In the exercise of this right they selected those persons who would refrain from handling the goods of their competitors as their customers, [***16] by selling their products to them at lower prices than they offered them to others. There was nothing in this selection, or in the means employed to effect it, that was either illegal or immoral."

In the case of Union Pacific Coal Co. v. United States, 173 Fed. 737, [97 C. C. A. 578], the defendant was prosecuted for the violation of the federal anti-trust act, the gist of the indictment being that the defendant with other defendants named in the indictment had combined to force one Sharp, a retail dealer in coal, and a purchaser of that article from the defendant, coal company, out of business by refusing to sell and transport to him any of the coal mined by said company. The court held that the evidence did not show a combination, and, among other things, said: " [**741] The gist of the offense charged in the indictment was not the refusal of the coal company and Moore to sell coal on the purchaser's terms, or of the railroad companies and Buckingham to transport it. It was the combination so to do, and if there was no combination there was no offense. There was no law which forbade the coal company to prescribe the terms on which it would sell its product [***17] to Sharp, or to any other purchaser. There was no law which required the coal company to sell its coal [*669] to Sharp on the terms which he prescribed, or to sell it to him at all. It had the undoubted right to refuse to sell its coal at any price. It had the right to fix the prices and the terms on which it would sell it, to select its customers, to sell to some and to refuse to sell to others, to sell to some at one price and on one set of terms and to sell to others at another price and on a different set of terms. There is nothing in the act of July 2, 1890, which deprived the coal company of any of these common rights of the owners and vendors of merchandise, and if it did not combine with some other person or persons so to do its refusal to sell its coal to Sharp unless he would withdraw his advertisement of a reduction in his retail price of it was not a violation of the Sherman Antitrust Act charged in the indictment. (Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. 173, [8 Am. Rep. 159]; Whitwell v. Continental Tobacco Co., 125 Fed. 454, 460, 461, 463, [60 C. C. A. 290, 296, 297, 299, 64 L. R. A. 689]; 1 Eddy on Combinations, [***18] sec. 292; Allgeyer v. Louisiana, 165 U.S. 578, 589, 17 Sup. Ct. Rep. 427, [41 L. Ed. 832]; In re Greene, [C. C.], 52 Fed. 104, 115; In re Grice, [C. C.], 79 Fed. 627, 644; Walsh v. Dwight, 40 App. Div. 513, [58 N. Y. Supp. 91, 93]; Brown v. Rounsvell, 78 Ill. 589.)"

Thus it is clear that the defendant was entirely within its rights in fixing reasonable terms and conditions upon which alone the retail trade might handle its goods. There is nothing in the complaint which indicates or tends to disclose that the terms and conditions established and published by the defendant were or are unreasonable or, as before stated, that their effect is or will be to create restrictions in trade or commerce or of preventing or in any way circumventing free and unhampered competition to the detriment of the public. And it may with no impropriety be further suggested in this connection that the complaint does not show that the plaintiff was willing or able to accept and abide by those terms and conditions.

It is clear to our minds that the complaint utterly fails to make out a case of injury to [***19] property or business under the provisions of the state anti-trust act. In other words, it is plain that the plaintiff has not by the averments of his complaint shown that the defendant by the acts alleged against it has violated the inhibitions against the maintenance of [*670] trusts or combinations whose object is to restrict trade or commerce or to destroy legitimate competition within the meaning and intent of the so-called Cartwright anti-trust law.

The judgment is affirmed.

Chipman, P. J., and Ellison, J., *pro tem.*, concurred.



Overland Publishing Co. v. Union Lithograph Co.

Court of Appeal of California, First Appellate District, Division Two

April 18, 1922, Decided

Civ. No. 4127

Reporter

57 Cal. App. 366 *; 207 P. 412 **; 1922 Cal. App. LEXIS 329 ***

OVERLAND PUBLISHING COMPANY (a Corporation), Appellant, v. UNION LITHOGRAPH COMPANY (a Corporation), et al., Respondents

Subsequent History: [***1] A Petition to have the Cause Heard in the Supreme Court, after Judgment in the District Court of Appeal, was Denied by the Supreme Court on June 15, 1922.

Prior History: APPEAL from a judgment of the Superior Court of the City and County of San Francisco. H. M. Owens, Judge.

Disposition: Affirmed.

Core Terms

Printers', printing, allegations, damages, contracts, practices, city and county, do business, restrictions, commerce, compose, dollars, join

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1 [down arrow] **Public Enforcement, State Civil Actions**

The Cartwright Act, 1907 Cal. Stat. 984, as amended by 1909 Cal. Stat. 594, contains a provision that labor, whether skilled or unskilled, is not a commodity within the meaning of the Act.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN2 [down arrow] **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

It is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal with, any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without being held in any way accountable therefor. These rights may be exercised in association with others so long as they have no unlawful object in view. Thus, where building contractors and a group of workmen make an agreement which restricts the opportunities of a contractor not a party thereto, though the business of the third party is interfered with, a court can

give no relief, since the law can only make it possible for the complainant to do business in the way he chooses by compelling a defendants to do business in the way they does not choose. When equal rights clash, the law cannot interfere.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN3 **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

The direct object or purpose of a combination furnishes the primary test of its legality. It is not every injury inflicted upon third persons in its operation that renders the combination unlawful. It is not enough to establish illegality in an agreement between certain persons to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interests of the parties is not rendered illegal by the fact that it may, incidentally, injure third persons. A laborer as well as a builder, trader, or manufacturer has the right to conduct his affairs in any lawful manner even though he may thereby injure others. So several laborers and builders may combine for mutual advantage, and, so long as the motive is not malicious, the object not unlawful, nor oppressive and the means neither deceitful nor fraudulent, the result is not a conspiracy although it may necessarily work injury to other persons. The damage to such persons may be serious, it may even extend to their ruin, but if it is inflicted by a combination in the legitimate pursuit of its own affairs, it is *damnum absque injuria*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN4 **Collective Bargaining & Labor Relations, Strikes & Work Stoppages**

An association of individuals may determine that its members shall not work for specified employers of labor. The question ever is as to its purpose in reaching such determination. If the determination is reached in good faith for the purpose of bettering the condition of its members and not through malice or otherwise to injure an employer, the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against enforcing such action. In case of a peaceable and ordinary strike, without breach of contract, and conducted without violence, threats, or intimidation, a court will not inquire into the motives of the strikers, their acts being entirely lawful, their motives are immaterial.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5 **Public Enforcement, State Civil Actions**

An action by a private corporation, and, as such, is governed by the provisions of § 11 of the Cartwright Act, 1907 Cal. Stat. 984, as amended by 1909 Cal. Stat. 594. In § 11, it is provided that an action may be brought by any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden in the Act.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Torts > Business Torts > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN6 **US Department of Justice Actions, Criminal Actions**

While in a criminal prosecution against persons for maintaining a trust or combination in restraint of commerce or trade, the gist of the offense is in the formation and maintenance of such trust or combination, and the fact of the existence of the combination for the purpose of doing some prohibited act is all that need be proved to support and sustain the charge, yet in a civil action for damages based upon our anti-trust statute, it is incumbent upon the complaining party, not only to allege and prove the existence of an unlawful trust or combination, but also to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination. While one whose business or property is injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the anti-trust law for double the damages he has actually suffered from the injury so inflicted, yet he can not maintain an action based upon said law if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, does not arise by reason of the restrictions in trade or commerce carried out by such trust or combination.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[**HN7**](#) [] **Public Enforcement, State Civil Actions**

Section 11 of the Cartwright Act, 1907 Cal. Stat. 984, as amended by 1909 Cal. Stat. 594 gives no right to injunctive relief to a private person in a case of violation of the provisions of the Act, but such a person is merely given a right to recover double damages.

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[**CA\(1\)**](#) [] (1)

Labor Unions — Agreement to Sell Labor Only to Special Class—Validity of.

--An agreement between an employers' association and a labor union whereby the latter agrees to sell the labor of its members only to members of such employers' association is legal and involves no restraint of trade.

[**CA\(2\)**](#) [] (2)

Id.—Exercise of Right to Work.

--It is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal with, any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without being held in any way accountable therefor; and these rights may be exercised in association with others so long as they have no unlawful object in view.

[**CA\(3\)**](#) [] (3)

Id.—Boycott of Employer—Inability to Secure Union Labor—Damages—Injunction.

--The fact that a publishing house, because of its refusal to become a member of an employers' association, is prevented from securing union labor to continue its business does not entitle it to either injunctive relief or damages.

CA(4) [] (4)

Monopolies—Violation of Cartwright Act—Action by Private Person—Damage—Pleading.

--A private corporation cannot maintain an action against an association of employers because of alleged price-fixing practices engaged in by the latter, under section 11 of the Cartwright Act, without pleading and proving special damage to its business or property by reason thereof.

CA(5) [] (5)

Id. — Relief Accorded by Act to Private Persons.

-- Under the Cartwright Act, a private person is given no right to injunctive relief in case of a violation of the provisions of the act, but such a person is merely given a right to recover double damages.

Counsel: Hoefler, Cook & Snyder for Appellant.

Harry G. McKannay and Heidelberg & Murasky for Respondents.

Judges: LANGDON, P. J. Nourse, J., and Sturtevant, J., concurred.

Opinion by: LANGDON

Opinion

[*367] [**413] LANGDON, P. J. This is an appeal by the plaintiff from a judgment against it entered after general demurrers to the complaint had been sustained. The complaint asks for injunctive relief and for damages; its allegations are lengthy and complex. In substance, they are as follows:

Plaintiff is a corporation doing business under the laws of California. Certain named defendants and some two hundred others, whose names are unknown to plaintiff, composed an organization known as the "Printers' Board of Trade." Said association is formed for the purpose, among others (as set forth in its by-laws) "to investigate and check injurious trade practices, and encourage the opposite" in the business of printing and publishing, [***2] which is the business carried on by the several members of the association. Certain of the named defendants, together with about thirteen hundred others whose names are unknown to plaintiff, composed an association known as [*368] "S. F. Typographical Union No. 21." Certain named defendants and five hundred other persons whose names are unknown to plaintiff compose an association of persons engaged in the business of printing pressmen and assistants known as the "S. F. Printing Pressmen & Assistants Union No. 24." Certain named defendants, with numerous other persons whose names are unknown to plaintiff, compose an association of persons engaged in the printing trades in the city and county of San Francisco under the name of "Franklin Printing Trades Association." The executive officers of each of these associations are also joined as defendants.

The complaint continues with allegations, in effect, as follows: That on or about March 1, 1920, plaintiff was engaged in the city and county of San Francisco in carrying on and doing business as a printer and publisher in said city and county and had invested in its business capital in excess of twenty-five thousand dollars and had [***3] built up an established trade and employed on the average more than twenty-five persons in said business; that in the month of March, 1920, the said association known as "Printers' Board of Trade of San Francisco" caused an agent or representative of said association to approach the managing officers of plaintiff and to demand that plaintiff become a member of said Board of Trade; that plaintiff, for its own good reasons, declined to join said Board of Trade. On January 17, 1921, plaintiff received from said Board of Trade a written communication signed by the secretary thereof, inviting plaintiff to become a member of said Board of Trade and

reciting that the monthly dues of members would amount to two dollars, plus one dollar for each employee in plaintiff's composing-room and press-room. Plaintiff again advised the said Board of Trade that it did not desire to become a member thereof.

It is alleged that on November 23, 1920, a written agreement was entered into by and between the defendant association, "Franklin Printing Trades Association," and the association known as the "Printers' Board of Trade" (in said agreement referred to as the "Employers' Association") and the association [***4] known as the "S. F. Typographical Union No. 21." Said agreement is referred to [*369] as the "Typographical Agreement" and it is alleged that it provides, in paragraph fifth thereof, as follows:

"In order that the Union may secure the adoption and carrying out by all commercial printing concerns within its jurisdiction of the scale of wages and working conditions herein specified, and have the responsibility of the Employers for their observance and performance, the Union requests and the Employers hereby agree that the Employers will admit to membership in their association all reputable printing concerns; and in consideration hereof, and of the assumption of the responsibility by the Employers for any and all violations of said scale of wages and working conditions by every member of the Employers, the Union agrees that its members will work only for such printing concerns as are members of the Employers, provided that the Employers shall not arbitrarily, or for any but good cause, refuse admission to or deny retention of membership in the Employers' Association."

The complaint sets forth that during the years 1919 and 1920, the representatives of the Printers' Board of Trade [***5] sought to induce plaintiff to join said Board of Trade and threatened to enforce the provisions of said Typographical Agreement above set forth and compel the members of said unions who were working for plaintiff to leave such employment. Plaintiff was also visited by representatives of the union involved, who stated that if plaintiff did not join the association known as Printers' Board of Trade of San Francisco, the said two union associations would be compelled and would, in pursuance of paragraph V of said Typographical Agreement, order the withdrawal from the employ of plaintiff of all members of said two union associations.

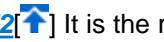
Plaintiff refused to join the Printers' Board of Trade and the union employees left plaintiff's employ.

It is alleged that if plaintiff persists in its refusal to become a member of the Printers' Board of Trade, the persons alleged to have quitted its employ will "refuse to resume work and refuse to longer continue in the employ of plaintiff"; "that without the co-operation of the aforesaid quitting members of said S. F. Typographical Union No. 21, it will be impossible, within a period of three or four days, for plaintiff to continue its printing [*370] [***6] and publishing operations." It is then alleged that plaintiff has on hand important large contracts for printing and is under written contract to publish certain magazines and periodicals and that time is of the essence of such contracts, and that [**414] by reason of the acts and things charged against the defendants, plaintiff will be prevented from carrying out said contracts and will become liable in damages thereon.

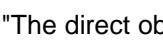
There are also allegations to the effect that the unions involved here are members of the American Federation of Labor Unions, which controls a magazine with a wide circulation among its members and affords "a ready, convenient, powerful and effective vehicle for the dissemination of information as to persons, products and manufacturers boycotted or to be boycotted"; that "if the defendants . . . continue in the course which they have consummated and threatened of boycotting this plaintiff and advising others to boycott plaintiff, it will result in the very great injury of plaintiff."

CA(1)[] (1) We shall pause here in our enumeration of the allegations of the complaint so as to consider the effect of those already set forth. The Typographical Agreement, in so far as it is set forth [***7] in the complaint, is one which is perfectly legal and involves no restraint of trade. Provisions substantially the same as those pleaded herein were considered in the case of *People v. Epstein*, 102 Misc. 476 [170 N.Y.S. 68, 70]. The agreement in that case was between the Photo-Engravers' Board of Trade of New York and members of a Photo-Engravers' Union. The reasoning of the court in that case is applicable in considering the portion of the Typographical Agreement before this court in the present case. **HN1[]** The so-called Cartwright Act (Stats. 1907, p. 984, as amended by Stats. 1909, p. 594), upon which plaintiff relies in bringing this action, contains a provision that labor, whether skilled or unskilled, is not a commodity within the meaning of this act. The portion of the Typographical Agreement pleaded

by plaintiff is a contract concerning labor. It is an agreement by the unions to sell their labor only to persons coming within a designated class.

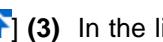
CA(2)[] (2) **HN2[]** It is the right of every man to engage to work for or to deal with, or to refuse to work for or to deal [*371] with, any man or class of men as he sees fit, whatever his motive or whatever the resulting injury, without [***8] being held in any way accountable therefor. ([Parkinson v. Building Trades, 154 Cal. 581, 599 \[16 Ann. Cas. 1165, 21 L.R.A. \(N.S.\) 550, 98 P. 1027\]](#); [Pierce v. Stablemen's Union, 156 Cal. 70, 75 \[103 P. 324\]](#).) These rights may be exercised in association with others so long as they have no unlawful object in view. ([Parkinson v. Building Trades, supra, at p. 599](#).) Thus, where building contractors and a group of workmen made an agreement which restricted the opportunities of a contractor not a party thereto, it was said, that though the business of the third party was interfered with, the courts could give no relief, since "the law could only make it possible for the complainant to do business in the way he chooses by compelling the defendants to do business in the way they did not choose. When equal rights clash, the law cannot interfere." ([National Fireproofing Co. v. Mason Builders' Assn., 169 F. 259 \[26 L.R.A. \(N.S.\) 148\]](#), 94 C. C. A. 535].)

In the case of [Pierce v. Stablemen's Union, 156 Cal. 70 \[103 P. 324\]](#), it was said: "We think that to-day no court would question the right of an organized union of employees, by concerted [***9] action, to cease their employment (no contractual obligation standing in the way) and this action constitutes a 'strike.' We think, moreover, that no court questions the right of these men to cease dealing by concerted action, either socially or by way of business, with their former employer, and this latter act, in its essence constitutes the primary boycott."

HN3[] "The direct object or purpose of a combination furnishes the primary test of its legality. It is not every injury inflicted upon third persons in its operation that renders the combination unlawful. It is not enough to establish illegality in an agreement between certain persons to show that it works harm to others. An agreement entered into for the primary purpose of promoting the interests of the parties is not rendered illegal by the fact that it may, incidentally, injure third persons. . . . A laborer as well as a builder, trader, or manufacturer has the right to conduct his affairs in any lawful manner even though he may thereby injure others. So several laborers and builders may combine for mutual advantage, and, so long as the motive is not malicious, [*372] the object not unlawful, nor oppressive and the means [***10] neither deceitful nor fraudulent, the result is not a conspiracy although it may necessarily work injury to other persons. The damage to such persons may be serious -- it may even extend to their ruin -- but if it is inflicted by a combination in the legitimate pursuit of its own affairs, it is *damnum absque injuria*." ([National Fireproofing Co. v. Mason Builders' Assn., 169 F. 259, 265 \[26 L.R.A. \(N.S.\) 148\]](#), 94 C. C. A. 535].)

HN4[] "An association of individuals may determine that its members shall not work for specified employers of labor. The question ever is as to its purpose in reaching such determination. If the determination is reached in good faith for the purpose of bettering the condition of its members and not through malice or otherwise to injure an employer, the fact that such action may result in incidental injury to the employer does not constitute a justification for issuing an injunction against enforcing such action." ([Bossert v. Dhuy, 221 N.Y. 342, 359](#) [Ann. Cas. 1918D, 661, [117 N.E. 582](#)].)

In this state, the doctrine has been announced even more broadly. In the case of [Parkinson Co. v. Building Trades Council, 154 Cal. 581, at page \[***11\]](#) [599 \[16 Ann. Cas. 1165, 21 L.R.A. \(N.S.\) 550, 98 P. 1027, 1034\]](#), it is said: "In case of a peaceable and ordinary strike, without breach of contract, and conducted without violence, threats, or intimidation, this court would not inquire into the motives of the strikers -- their [**415] acts being entirely lawful, their motives would be held immaterial."

CA(3)[] (3) In the light of the foregoing cases, we think it clear that in so far as the allegations of the complaint so far enumerated are concerned, they state no ground for either injunctive relief or for the recovery of damages.

But the complaint continues, in another section thereof, with allegations concerning the practices of the Printers' Board of Trade. There are no allegations establishing a causal connection between the plaintiff's grievance, i. e., the withdrawal of the union printers and these averments regarding the methods of the Printers' Board of Trade. The latter are made upon information and belief and are, substantially, as follows: That said board now is, and for more than three years last past has been, engaged in "a combined [*373] scheme and effort to violate the laws of

the State of California and of the United States of [***12] America in such case made and provided, by causing the prices of articles and services made and furnished by various members of the said Printers' Board of Trade of San Francisco, to be fixed grossly in excess of an amount that would yield to the persons making the charge and collecting said prices, a fair and reasonable profit"; that in pursuance of said scheme and effort various members composing the said Printers' Board of Trade meet daily in the office of the said Printers' Board of Trade in the city and county of San Francisco and said Board of Trade requires that all of the new contracts and proposals for business involving an amount in excess of fifteen dollars, then under submission to members of said Printers' Board of Trade of San Francisco, be reported and submitted at such meetings, and that thereupon, by lot or agreement, tentative prices are fixed upon said new contracts, and it is likewise determined which member of the Printers' Board of Trade shall perform the services or furnish the materials contemplated by such proposals or contracts; that, thereupon, all of the members, other than the member so decided upon, refrain from bidding for the doing of said work or the [***13] furnishing of said material except in an amount above the amount so fixed. It is alleged that by reason of these facts a person seeking to have work done or materials furnished is compelled to pay the price fixed as aforesaid by said members of said Printers' Board of Trade; that said price so fixed is arrived at through corrupt, unjust, and illegal methods as aforesaid, practiced by said Printers' Board of Trade of San Francisco, and the person desiring the work or materials believes that the price so fixed is obtained as a result of competitive bidding; that as the result of said unjust and illegal practices aforesaid, competition *between the members* of said Printers' Board of Trade of San Francisco (which board embraces practically ninety-five per cent of the concerns engaged in the printing trade in the city and county of San Francisco) is destroyed and rendered impossible, and that said acts constitute an unjust, discriminating, and unlawful restraint upon trade and commerce, both intrastate and interstate.

Appellant contends that these allegations, if proven, constitute the Printers' Board of Trade a trust within the meaning [*374] of the so-called Cartwright Act. (Act [***14] 4166, General Laws of California [1915] Deering; Stats. 1907, p. 984, as amended by Stats. 1909, p. 594.) Conceding, for the purposes of this opinion, that this be true, the said association would, in consequence, be subject to forfeiture of its charter rights, franchises, and privileges, and to dissolution upon proceedings taken by the attorney-general or the district attorney. (Sec. 2, Stats. 1907, p. 984.) But this is not such a proceeding. This is [HN5](#) [↑] an action by a private corporation, and, as such, is governed by the provisions of section 11 of said act. In that section it is provided that an action may be brought by "any person who shall be *injured in his business or property* by any other person or corporation . . . by reason of anything forbidden" in said act.

In the present case the plaintiff makes no allegations of any such injury or damage. The general allegation of its complaint: "That by means of each and all of said acts done and threatened by the defendants aforesaid, respectively, as hereinbefore set forth, the trade and commerce of the plaintiff with its patrons and customers . . . has been and will continue to be forcibly suspended and unless the relief hereinafter [***15] prayed shall be granted . . . plaintiff will lose valuable copyrights because of its inability to continue its usual operations; and that plaintiff by reason of the premises has suffered, and will suffer in an increasing degree, damages . . . in excess of seventy-five thousand dollars," is insufficient. There is no allegation of the particulars in which the plaintiff has been or will be damaged by the restraint of competition among the members of the Printers' Board of Trade. The only damage to plaintiff which is alleged, i. e., the loss of contracts, copyrights, etc., arises from the alleged inability of plaintiff to continue its operations, due to the fact that it cannot secure union labor. This matter we have disposed of in the first part of this opinion. We consider it *damnum absque injuria*. There is no allegation of loss to plaintiff arising because of the alleged practices of the Printers' Board of Trade in restricting competition *among its own members*. On the contrary, it is perfectly apparent that plaintiff's business could not be injured by such practice, but must be benefited thereby. If, as plaintiff alleges, ninety-five per cent of the persons engaged in the printing [***16] business voluntarily form an association and restrain themselves [*375] [**416] from competing with one another, plaintiff, being free from such restraint, has the fewer competitors with whom to contend. Indeed, plaintiff does not complain of loss or damage because of the want of competition among the members of the Printers' Board of Trade, of which plaintiff is not a member. If plaintiff could secure union labor and continue to operate its business, the activities of the Printers' Board of Trade in restricting competition among its own members would not injure plaintiff in the least. It is alleged that these practices have continued for three years. Apparently they have not injured plaintiff, but have probably meant to it a business opportunity. It is the withdrawal of the union labor and the

consequent inability of plaintiff to operate its business in competition with the members of the Printers' Board of Trade which is its real complaint.

CA(4)[] (4) Plaintiff cannot maintain an action against the Printers' Board of Trade because of these alleged practices without pleading and proving special damage to his business or property by reason thereof. There are no facts alleged in the complaint showing [***17] damage to plaintiff because of said defendant's methods of doing business.

In the case of [Munter v. Eastman Kodak Co., 28 Cal. App. 660, at page 664 \[153 P. 737, 739\]](#), it is said: **HN6[]** "While in a criminal prosecution against persons for maintaining a trust or combination in restraint of commerce or trade, the gist of the offense is in the formation and maintenance of such trust or combination, and the fact of the existence of the combination for the purpose of doing some prohibited act is all that need be proved to support and sustain the charge, yet in a civil action for damages based upon our anti-trust statute, it is incumbent upon the complaining party, not only to allege and prove the existence of an unlawful trust or combination, but also to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination. Or, as was said by this court in [Krigbaum v. Sbarbaro, 23 Cal. App. 427, 433 \[138 P. 364\]](#): 'To be 'injured in business or property,' within the contemplation of said law, as we understand it, is where the injury has directly resulted from the fact of the existence of the trust [***18] -- that is to say, where the business or property has directly sustained injury solely by reason of the restrictions in trade or commerce [*376] which are fostered by such trust or combination. In other words, while one whose business or property has been injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the anti-trust law for double the damages he has actually suffered from the injury so inflicted, yet he could not maintain an action based upon said law if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, did not arise by reason of the restrictions in trade or commerce carried out by such trust or combination.'"

CA(5)[] (5) Furthermore, **HN7[]** the statute gives no right to injunctive relief to a private person in a case of violation of the provisions of the act, but such a person is merely given a right to recover double damages. (Sec. 11, Stats. 1907, p. 984, as amended Stats. 1909, p. 594. See, also, [National Fireproofing Co. v. Mason Builders' Assn., 169 F. 259 \[26 L.R.A. \(N.S.\) 148, 94 C. C. A. 525\]](#).)

[***19] The demurrs were properly sustained; the judgment is affirmed.

Nourse, J., and Sturtevant, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 15, 1922.

All the Justices concurred, except Shurtleff, J., and Waste, J., who were absent.



People v. Bldg. Maint. Contractors Ass'n

Court of Appeal of California, First Appellate District, Division One

March 3, 1953, Filed

No. 14,868

Reporter

1953 Cal. App. LEXIS 2053 *; 253 P.2d 983

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, vs. BUILDING MAINTENANCE CONTRACTORS ASSOCIATION, INC., et al., Defendants and Respondents.

Disposition: [*1] Reversed.

Core Terms

contractors, building maintenance, words, reasonable profit, questioned, commodity, restraint of trade, ultimate fact, prices, terms, defendant association, local member, Cartwright Act, new trial, marketed, cases, sufficiently definite, combinations, restrictions, contracting, provisions, employees, enjoining, monopoly, parties, proviso, loud, bid, conclusions of law, existing contract

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] Price Fixing & Restraints of Trade, Vertical Restraints

Cal. Bus. & Prof. Code § 16,723 excepts from the operation of the statute any agreement, combination or association, the object and purpose of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Contracts Law > Contract Formation > Consideration > General Overview

HN2[] Public Enforcement, State Civil Actions

Cal. Bus. & Prof. Code § 16,725 excepts an agreement, association, or combination, 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.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Governments > Legislation > Overbreadth

HN3 [+] **Public Enforcement, State Civil Actions**

The provisions of Cal. Bus. & Prof. Code § 16,723 are invalid and inoperative for lack of certainty.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN4 [+] **Public Enforcement, State Civil Actions**

A proviso excepting any agreement or association, the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed, is too indefinite to furnish a standard of guilt.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

HN5 [+] **Public Enforcement, State Civil Actions**

The provisions of Cal. Bus. & Prof. Code § 16,723 are too vague and uncertain to serve as a standard of conduct under the due process requirements of the United States Constitution.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Expiration, Repeal & Suspension

HN6 [+] **Public Enforcement, State Civil Actions**

As to the question of separability of the provisions of Cal. Bus. & Prof. Code § 16,723 from the rest of the Cartwright Act, there really is no question. That issue is settled in favor of separability.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Evidence > Burdens of Proof > General Overview

HN7 [down arrow] **Public Enforcement, State Civil Actions**

The burden of proving that a questioned agreement comes within one of the exceptions to the Cartwright Act (such as those expressed in [Cal. Bus. & Prof. Code §§ 16,723](#) or [16,725](#)) rests upon the defendants in a case. In the absence of evidence that the questioned agreement is "in furtherance of trade," the defendants will have failed to meet this burden and will be unsuccessful in invoking the exception provided by [§ 16,725](#).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Governments > Legislation > Expiration, Repeal & Suspension

HN8 [down arrow] **Public Enforcement, State Civil Actions**

The phrase "furtherance of trade" in [Cal. Bus. & Prof. Code § 16,725](#) does not furnish a sufficiently definite and certain standard. It is virtually impossible to apply it to any of the inhibitions expressed in [Cal. Bus. & Prof. Code § 16,720](#). That term is too indefinite and uncertain to serve as a standard. The provision is invalid and inoperative, and it is separable from the original enactment for the same reasons that [Cal. Bus. & Prof. Code § 16,723](#) is separable.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN9 [down arrow] **Price Fixing & Restraints of Trade, Vertical Restraints**

Under [Cal. Bus. & Prof. Code § 16,720\(a\), \(b\), and \(c\)](#), it is unlawful for two or more persons to combine to create or carry out restrictions in trade or commerce; to limit or reduce the production of any commodity; or to prevent competition in the sale or purchase of merchandise, produce or any commodity. These enactments are distinct from the remainder of the section which has to do with price fixing. Although price fixing and monopolistic practices tend to affect competition, production and restrictions in trade, the legislature has not limited illegal combinations in restraint of trade to those which involve price fixing or monopoly.

Civil Procedure > Trials > Bench Trials

HN10 [down arrow] **Trials, Bench Trials**

Ordinarily, the necessity for findings of fact is dispensed with where the case is submitted upon a stipulation of facts. It has been held, however, that where the stipulation sets forth evidentiary material only, it is proper for the trial court to make findings of the ultimate facts.

Judges: Fred R. Wood, J. WE CONCUR: Peters, P.J., Bray, J.

Opinion by: Fred R. Wood

Opinion

Plaintiff appeals from an order granting a new trial after judgment had been rendered for plaintiff in an action brought by the state to enjoin alleged violations of the Cartwright Act ([Bus. & Prof. Code, §§ 16,700-16,758](#)).

The principal question is whether or not certain exceptions expressed in [sections 16,723](#) and, [16,725](#) of the code are constitutional. [Section 16,723 HN1](#)[] excepts from the operation of the statute any agreement, combination or association "the object and purpose of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed." [Section 16,725 HN2](#)[] excepts an agreement, association or combination "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." If these exceptions are unconstitutional or otherwise [*2] inapplicable, the question remains whether or not the stipulated facts demonstrate that the defendants formed a trust as defined in [section 16,720](#) of the code. For adequate consideration of these questions a fairly detailed statement of facts is necessary.

The defendants are Building Maintenance Contractors' Association, an unincorporated association, and the members thereof, each member being a building maintenance contractor.

THE COMPLAINT.

The complaint alleges: there is a building maintenance industry in San Francisco concerned with the operation, cleaning, painting, renovating and supplying of janitorial service for the owners or occupants of buildings who engage others to supply the requisite labor and materials. Other than the defendant association, the defendants are such persons who supply such labor and materials to buildings occupied by others. Defendants, other than the defendant association, supply all or nearly all of the labor and supplies used in the building maintenance industry in San Francisco which are supplied by contractors. Defendants, other than the association, have formed or joined the association and conspired together to create and carry out restrictions [*3] in trade and commerce. Pursuant to that conspiracy, defendants have created a monopoly and destroyed free competition in said building maintenance industry and are directly and indirectly preventing free and unrestricted competition among the defendant association members, refusing to contract with the public to furnish labor and materials except at prices fixed and agreed upon by them in advance.

THE FACTS AS STIPULATED.

The parties stipulated: (1) the sole question is whether or not the facts set forth in this stipulation constitute a violation as to plaintiff of the Cartwright Act. This stipulation sets forth the only material facts and no other or further evidence shall be introduced. Defendants shall be deemed to have filed answers generally denying all the allegations of the complaint and alleging all affirmative defenses necessary to support the materiality as a defense of any fact stipulated. The parties respectively reserve their rights to contest the materiality of any fact covered by this stipulation.

(2) The term "building maintenance industry" means all persons, associations, firms, partnerships and/or corporations participating in the maintenance operation, [*4] cleaning, painting, renovating, and supplying of janitorial service for buildings, lofts and stores in San Francisco. The terms "maintenance contractor" and "maintenance contractors" mean one or more persons engaged in the building maintenance industry in San Francisco, in the business of contracting, for a fixed term, as to buildings, lofts or stores located in San Francisco, to do part or all of any one or more of the following: window cleaning, janitorial work and providing elevator operators and starters, building engineers for maintaining heating equipment and for minor repairs, night watchmen, and powder room matrons. The word "service," whether as a noun or a verb, means contracting to do any of the work just described.

(3) In San Francisco there are 44 maintenance contractors of whom 30 are not members of defendant association. Members of defendant association employ approximately 90% of the total number of employees employed by all

maintenance contractors in San Francisco and service approximately 90% of all San Francisco buildings, lofts and stores serviced by maintenance contractors.

(4) The defendants who participate in the building maintenance industry only by contracting [*5] to provide service, have, through the association, agreed that if the owner of a building who had an existing contract with any member for servicing and asked for bids from another member for the same service, the latter would report the fact to the defendant association and inquire as to the contract price then prevailing; that an investigation was then to be made by the defendant association to determine (a) whether that price was unreasonable in being too high; (b) whether the contractor under contract to service the building was doing a good job; and (c) whether the owner of the building had any reason for dispensing with the contractor, such as personal dislike or inability to get along with the contractor; and if, in the opinion of the defendant association, the price was unreasonably high or if the work was not being performed satisfactorily or if the owner had a specific reason, no matter how trivial, for dispensing with the existing contractor, then any other member of defendant association was not precluded from undertaking to get the business on such terms as such member might elect; that if, in the opinion of the defendant association, the price charged was reasonable in [*6] fact and if the work was being performed satisfactorily and if the owner was completely satisfied with the personal and business relationships between the owner and the contractor, then and only then the members were required, if they bid upon the job, to make their minimum bid higher than the existing contract by a range of percentages from 20% higher to 5% higher, varying according to the job price per month under the existing contract.

(5) "Defendants entered into the foregoing agreement with the intent and for the object and purpose of conducting operations at a reasonable profit, of marketing at a reasonable profit products and services which could not otherwise be so marketed and of acting in furtherance of trade, and with no other intent whatever nor for any other object or purpose whatever. There is no evidence, except as stated in this stipulation, if any is stated herein, that the effect of the admitted agreement has exceeded, exceeds or will exceed the stated intentions, objects or purposes."

(6) The entire organized labor force in the building maintenance industry in San Francisco consists of members of Building Service Employees Union, Local 87, Window Cleaners Union, [*7] Local 44, Elevator Operators and Starters Union, Local 117, and Stationary Engineers Union, Local 39, each union an affiliate of the American Federation of Labor. * All of said unions have contracts establishing wages, hours, working conditions, number of men to be used, type of work to be performed, and the like. The identical contract is entered into by the unions, whether on behalf of union employees working for a building maintenance contractor or working for a building owner or operator.

[EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O]<O] IS OVERSTRUCK IN THE SOURCE.]

Only a portion of the employed members in San Francisco of Building Service Employees Union, Local 87, work for Building Maintenance Contractors (725 to 794) as compared with the total [*8] number of employed members (2085-3534). Of a total of 190 office buildings in San Francisco, 22 are serviced by building maintenance contractors (including defendants and others) and 168 directly by owners or operators who employ members of Local 87. Of other types of buildings, the same figures in the same order are: 50 department and furniture stores, 14 and 36; 17 laundries and breweries, 3 and 14; 55 banks, 30 and 25; 4 newspapers, 1 and 3. Of buildings serviced by contractors or by owners or operators, employing members of Local 87, 24% are serviced by contractors; 76% independently of contractors. In addition, there are thousands of San Francisco buildings (exclusive of private homes, flats and the like) that are serviced neither by owners or operators who employ members of Local 87, nor by any maintenance contractor.

Building Maintenance Contractors employ but 121 of 404 members of Local 44, 165 of 965 members of Local 117, and 5 of 225 members of Local 39. Of buildings serviced by contractors or by members of these Locals

*Except that the buildings of the Pacific Gas & Electric Company and of the Pacific Telephone and Telegraph Company are serviced by those companies, respectively, employing members of [O> the <O] unions of the Congress of Industrial Organizations.

respectively, contractors service less than 30% while more than 70% are serviced under direct contract with or employment of members of Local 44 wholly independently [*9] of any maintenance contractor. Like figures in respect to members of Local 117 are 17% and 83% and as to members of Local 39 they are 5% and 99.5%. In addition, there are thousands of San Francisco buildings which are serviced neither by owners or operators who employ members of Locals 44, 117 or 39, nor by any maintenance contractor.

(7) Over-all, all defendant maintenance contractors service less than 1/2 of 1% of the buildings, lofts and stores in San Francisco, exclusive of private homes, flats and the like. Said defendants service no private homes, flats or the like. Over 99-1/2% of the buildings, lofts and stores in San Francisco, exclusive of private homes, flats and the like are serviced by (a) competitors of defendants, (b) owners or operators, or (c) other persons wholly independent, all and singular, of defendants, of competitors of defendants and of said unions and their members.

At the trial plaintiff objected to the consideration of any of the facts recited in paragraphs (5), (6) and (7), above, upon the ground that those facts are immaterial and do not tend to prove or disprove any matter at issue in the cause.

FINDINGS OF FACT, CONCLUSIONS OF LAW,

JUDGMENT, [*10] AND ORDER FOR NEW TRIAL.

The court found that the facts as stipulated are true and concluded that "the plaintiff is entitled to judgment against the defendants perpetually enjoining defendants as prayed for in the complaint," and rendered judgment in accordance with that conclusion.

The judgment enjoined the defendants from (1) formulating, promoting, participating or combining in any undertaking, compact, plan or agreement (a) to raise, fix, adhere to or maintain prices for the furnishing of labor, material, or services in the building maintenance industry or (b) to raise, fix, adhere to, maintain or bring about the use of uniform mark-ups, price differentials, allowances, discounts or terms or conditions with respect to the furnishing of such labor, materials or services, or (c) by which the contract terms or prices, or terms or prices for labor, materials or services charged by any defendant is revealed to any other person or corporation for any of the purposes hereby enjoined, and (2) creating or carrying out any restriction preventing or interfering with free competition in the building maintenance industry.

Upon motion of the defendants the court set aside the findings [*11] of fact and conclusions of law, vacated the judgment, and ordered a new trial upon the grounds that the evidence was insufficient to justify the decision and that the decision was against the law.

That order must be reversed. The decision was not against the law and the evidence was sufficient to justify the decision. We will consider first the exception expressed in [section 16,723](#).

AS TO THE CONSTITUTIONALITY AND
SEPARABILITY OF THE EXCEPTION

EXPRESSED IN [SECTION 16,723](#).

The parties stipulated that the defendants entered into the agreement described in paragraph (4), above, "for the object and purpose of conducting operations at a reasonable profit, of marketing at a reasonable profit products and services which could not otherwise be so marketed . . . and with no other intent whatever nor for any other object or purpose whatever." That was tantamount to a stipulation that the questioned agreement was one expressly excepted by [section 16,723](#), which says that no agreement is unlawful "the object and purpose of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed." Plaintiff suggests [*12] that the stipulation fell short of that, arguing that reasonableness as used in the statute means and is to be tested by the effect of the agreement, whereas the stipulation refers only to the mental attitude of the parties to the agreement. No such argument is logical or tenable. We are immediately concerned with the intent of the parties to the stipulation. When they lifted those words right out of [section 16,723](#), after having recited that the "sole question to be decided is whether or not the facts stipulated herein constitute a

violation . . . of the Cartwright Act," they must have intended to use those words with precisely the meaning they have in section 16,723.

This presents squarely the question of the constitutionality of section 16,723. If it is constitutional, defendants have not and are not violating the act, and our inquiry is at an end.

Our analysis of this section and of the pertinent judicial decisions, convinces us that HN3[¹] its provisions are invalid and inoperative for lack of certainty. That was the answer given in 1927 by the Supreme Court of the United States when considering a Colorado statute which in terms was a replica of our own. We have found no subsequent [*13] decision which persuades us that the court would come to a different conclusion should it again receive the identical question for consideration and decision.

Cline v. Frink Dairy Co., 274 U.S. 445, 71 L. Ed. 1146, 47 S. Ct. 681, is the 1927 decision to which we refer. The court said that the main provisions of the Colorado statute (those which were substantially the same as our § 16,720) sufficiently described the acts intended, to be punished, but that HN4[¹] a proviso excepting any agreement or association "the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed" was too indefinite to furnish a standard of guilt (p. 456). This proviso, and another with which we are not here concerned, said the court, "make the line between lawfulness and criminality to depend upon, first what commodities need to be handled according to the trust methods condemned in the first part of the Act to enable those engaged in dealing in them to secure a reasonable profit therefrom; second, to determine what generally would be a reasonable profit for such a business; and third, what [*14] would be a reasonable profit for the defendant under the circumstances of his particular business. . . . Such an exception in the statute leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused." (Pp. 456-457.) The defendants in the Cline case contended that the questioned proviso was less definite and certain than the Sherman Act which made criminal every contract and all monopolies in restraint of trade or interstate commerce, and directed attention to the fact that in Nash v. United States, 229 U.S. 373, 376, 57 L. Ed. 1232, 33 S. Ct. 780, the court had held that the Sherman Act fixed a permissible and ascertainable standard of guilt. In overruling that contention, the court in the Cline case said "In the Nash case we held that the common law precedents as to what constituted an undue restraint of trade were quite specific enough to advise one engaged in interstate trade and commerce what he could and could not do under the statute" (p. 460) and referred to the review of common law precedents which had been made in United States v. Addyston Pipe & Steel Co., 85 F. 271. That review indicated [*15] that the inhibitions against restraints of trade at common law at first had no exception but that in time it became apparent to the people and the courts that it was in the interest of trade that certain covenants in restraint of trade should be enforced, and so it developed that certain types of agreements in partial restraint of trade were deemed valid. An illustrative list of such types was furnished by the court in the Addyston case: "For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must [*16] find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employee of the confidential knowledge acquired in such business." (P. 281 of 85 Fed.)

Thus not every contract in restraint of trade was void and unenforceable at common law. Likewise, it was not every such contract which came within the penalty of the Sherman Act. It was recognized that there were incidental restraints on trade the statute was not intended to cover. This "view was fully confirmed," said the court in the Cline case, "in Standard Oil Company v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502, and United States v. American Tobacco Company, 221 U.S. 106, 55 L. Ed. 663, 31 S. Ct. 632, where the language of the Federal

statute was read in the light of the common law, and in accordance [*17] with its reason, and was construed not to penalize such partial restraints of trade as at common law were not only permitted but were promoted in the interest of the freedom of trade itself." (P. 461.) However, in respect to "reasonableness" of price or of profit, the "review of the many common law precedents as to due and undue restraints of trade shows," said the court in the Cline case, "that in only one or two cases, and those not well considered, was there left to the court or jury as a criterion of the validity of a restraint of trade the reasonableness of the prices fixed or the profit realized under it." ([274 U.S. at 461, 47 S. Ct. 681; 71 L. Ed. 1146.](#))

The court, in the Addyston case, had rejected a contention that the rule of "reasonableness" applied to the price fixed by or pursuant to a contract in restraint of trade, deeming such a standard too shifting, vague, and indeterminate. The Supreme Court had taken the same view of the matter in [United States v. Trenton Potteries, 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377](#): "The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised [*18] or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business, relations depend upon so uncertain a test as whether prices are reasonable - a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies." ([274 U.S. at 462-463, 47 S. Ct. 681; 71 L. Ed. 1146.](#)) [*19] Accordingly, the court in the Cline case concluded that "it will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result. When to a decision whether a certain amount of profit in a complicated business is reasonable is added that of determining whether detailed restriction of particular anti-trust legislation will prevent a reasonable profit in the case of a given commodity, we have an utterly impracticable standard for a jury's decision. A legislature must fix the standard more simply and more definitely before a person must conform or a jury can act." (P. 465.)

The decision in the Cline case compels the conclusion that [HN5↑](#) the provisions of [section 16](#),723 are too vague and uncertain to serve as a standard of conduct under the due process requirements of the Federal Constitution. Similarly convinced were the courts in [Blake v. Paramount Pictures \(1938\), 22 F. Supp. 249, 254-255](#) and [Ward v. Auctioneers Assn. of So. Cal. \(1944\), 67 Cal. App. 2d 183, 153 P.2d 765.](#) [*20] In each of those cases the court upon the authority of the Cline case held unconstitutional a proviso added in 1909 (now [section 16](#),723) and, deeming that proviso inseparable, found the entire act unconstitutional. The fact that they were mistaken as to separability does not detract from the persuasiveness and force of their reasoning that the proviso was and is void for uncertainty.

But, say the defendants, later decisions indicate that the United States Supreme Court would now overrule the Cline case and come to a different conclusion if the same question were again presented. The decisions which they invoke do not persuade us.

In [Bandini Co. v. Superior Court, 284 U.S. 8, 76 L. Ed. 136, 52 S. Ct. 103](#), a California statute prohibiting "the unreasonable waste of natural gas" was upheld as furnishing a sufficiently definite standard. Significantly, it appeared, the standard did not depend upon the words "unreasonable waste" alone. Those words had reference to the power of gas to lift the oil in which it occurred and the use of that power to produce the maximum quantity of oil in proportion to the quantity of gas withdrawn. The state Supreme Court had found that, depending [*21] upon various ascertainable physical factors, each oil and gas well has a best mean gas and oil ratio in the utilization of the lifting power of the gas and the production of the greatest quantity of oil in proportion to the amount of gas used,

which could be computed as to each well to a reasonable degree of certainty (see [People v. Associated Oil Co., 211 Cal. 93, 107, 294 P. 717](#)). In striking contrast, the formula used in our [section 16](#),723, "reasonable profit," has no such frame of reference, no means of producing certainty.

In [Old Dearborn Co. v. Seagram Corp., 299 U.S. 183, 81 L. Ed. 109, 57 S. Ct. 139](#), the court approved the expression "fair and open competition" in the context in which it appeared. It was used in a statute which dealt with contracts for the sale or resale of a commodity which bears the trade-mark, brand, or name of the producer "and which is in fair and open competition with commodities of the same general class produced by others." In such a contract the statute permitted stipulations concerning the resale price of the commodity. The court upheld the statute as designed primarily to protect the property, the good will of the producer, [*22] the price restriction being a means to that end, not an end in itself. Concerning the phrase "fair and open competition," the court said it "is as definite as the phrase contained in § 5 of the Federal Trade Commission Act, 'unfair methods of competition,' which this court has never regarded as being fatally uncertain. [Citations.] We think the phrases complained of are sufficiently definite, considering the whole statute; and that no one need be misled as to their meaning, or need suffer by reason of any supposed uncertainty." (Pp. 196-197.) Besides, as stated in one of the cases cited, the expression "unfair competition" had a "well settled meaning at common law." ([Fed. Trade Comm. v. Raladam Co., 283 U.S. 643, 648, 75 L. Ed. 1324, 51 S. Ct. 587](#))

In [Kay v. United States, 303 U.S. 1, 82 L. Ed. 607, 58 S. Ct. 468](#), the court found the term "like necessary services" sufficiently definite. Quite naturally so, for those words occurred in a portion of the Home Owners' Loan Act which prohibited the making of a charge in connection with a loan except ordinary charges authorized and required by the Corporation for services actually rendered for examination [*23] and perfecting of title, appraisal, and like necessary services." (P. 3.) "The phrase 'like necessary services' in the section describes services which are cognate to those mentioned in the preceding clause 'for examination and perfecting of title' and 'appraisal.'" (P. 9.) We see no analogy between that and the provisions of our [section 16](#),723.

In [Gorin v. United States, 312 U.S. 19, 85 L. Ed. 488, 61 S. Ct. 429](#), "national defense" was deemed sufficiently certain to sustain convictions under the National Espionage Act for unlawfully furnishing information relative to national defense. These words had acquired a historical and special meaning well enough known to enable those within their reach to apply them correctly. Said the court: ". . . the use of the words 'national defense' has given them, as here employed, a well understood connotation. They were used in the Defense Secrets Act of 1911. The traditional concept of war as a struggle between nations is not changed by the intensity of support given to the armed forces by civilians or the extension of the combat area. National defense, the Government maintains, 'is a generic concept of broad connotations, referring [*24] to the military and naval establishments and the related activities of national preparedness.' We agree that the words 'national 'defense' in the Espionage Act carry that meaning. . . . The language employed appears sufficiently definite to apprise the public of prohibited activities and is consonant with due process." (P. 28.) We are unaware of any usage which has given the words "reasonable profit" any greater specificity than they had in 1927 when the Cline case was decided.

A statute which prohibited the calling of another by an "offensive or derisive name" was upheld in [Chaplinsky v. New Hampshire, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766](#). The state court had interpreted the statute as one designed to preserve the peace and as prohibiting only such words, uttered in a public place, ". . . as have a direct tendency to cause acts of violence by the persons to whom, individually, 'the remark is addressed.'" (P. 573.) The word "offensive" was not defined in terms of what a particular person would think. The test was what men of common intelligence would understand would be words likely to cause an average addressee to fight. "Derisive" words were taken as coming [*25] within the purview of the statute only when they had this characteristic of plainly tending to excite the addressee to a breach of the peace. As thus limited, those words had an understandable meaning, sufficiently definite to guide a person in complying with the mandate of the statute.

[Kovacs v. Cooper, 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448](#), involved an ordinance which prohibited the operation, upon a public street, of ". . . any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or 'any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle

operated or standing upon said streets or public places . . ." (P. 78.) Of the words "loud and raucous" the court said: "While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." (P. 79.) Especially, we would add, when preceded and illustrated by such definitely descriptive words as "sound truck, loud speaker or amplifier, or radio [***26**] or phonograph with a loud speaker or sound amplifier or . . . calliope."

In [United States v. Petrillo, 332 U.S. 1, 91 L. Ed. 1877, 67 S. Ct. 1538](#), the court upheld that provision of the Federal Communications Act which made it unlawful to coerce a licensee to employ in connection with the conduct of the licensee's broadcasting business any person or persons "in excess of the number of employees needed by such licensee to perform actual services." The court did not agree with the contention that "persons of ordinary intelligence would be unable to know when their compulsive actions would force a person against his will to hire employees he did not need." ([332 U.S. at 6, 67 S. Ct. 1538, 91 L. Ed. 1877](#)) The court recognized there were difficulties in applying such a clause: "Of course as respondent points out, there are many factors that might be considered in determining how many employees are needed on a job. But the same thing may be said about most questions which must be submitted to a fact-finding tribunal in order to enforce statutes. Certainly, an employer's statements as to the number of employees 'needed' is not conclusive as to that question. It, like the alleged willfulness of a [***27**] defendant, must be decided in the light of all the evidence." (P. 6.) Respondent's argument amounted to the claim that no statutory language could meet the problem Congress had in mind. Of this the court said, "The Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress," adding that "it would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees." (P. 7.) The court apparently adopted the Government's view that Congress intended to prevent extortion, as distinct from bona fide demands relating to conditions of employment, a view which Justice Reed criticized in his dissenting opinion (pp. 16-18). As an anti-extortion statute, it does not furnish a basis for predicting that the Cline case is due soon to be overruled.

This brings us [HN6](#)[↑] to the question [***28**] of separability of the provisions of [section 16,723](#) from the rest of the Cartwright Act. There really is no question. That issue was settled in favor of separability by our Supreme Court in [Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 46-48, 172 P.2d 867](#). Yet, defendants argue that "the care of the Legislature in preserving the 1909 amendments in the codification process, affords strong evidence that the Legislature has refused to pass a state **antitrust law** sans the qualifications of § 16723 and § 16725, the more so because the Legislature has not changed its position either before or since the Speegle case." The first part of this argument misses the purpose expressed in [section 16,701](#) of the code, that of preserving the separability, if any, of the 1909 amendments to the Cartwright Act, a purpose discussed and given effect in the Speegle case at page 48. That purpose was stated in considerable detail by the Code Commission in its 1941 report to the Governor and the Legislature, * the report which accompanied the Code Commission's bill to codify the Cartwright Act as [sections 16](#),

* In that report, at page 10, the following statement appears: "The commission desires to call particular attention to its solution of a problem which arose in preparing the codification of the Cartwright Anti-Trust Act (Chapter 530, Statutes of 1907, as amended). In 1909 (Chapter 362) the act was amended, among other things, to provide certain exemptions in Section 1.

"The Federal District Court for the Southern District of California has held that these exemptions, added to the California Act in 1909, are unconstitutional and not separable and that, therefore, the entire California act is invalid. ([Blake vs. Paramount Pictures, Inc., \(1938\) 22 F. Supp. 249](#)). This decision relies on the United States Supreme Court decision which held unconstitutional a Colorado antitrust statute, containing exemptions substantially identical to those added to Section 1 of the California act in 1909, on the ground that these exemptions, a part of the Colorado statute as originally enacted, made the required standard of conduct too uncertain for a penal statute. ([Cline vs. Frink Dairy Co. \(1927\) 274 U.S. 445, 71 L. Ed. 1146, 47 S. Ct. 681](#)).

"The Attorney General of California is of the opinion that this 1909 amendment was invalid in view of the holding in Cline vs. Frink Dairy Co., never became a part of the 1907 act, hence that Section 1 of the Cartwright Act in the form in which originally enacted is valid and operative. (Opinion NS 2806, July 29, 1940.)

700- 16, 758 [*29] of the Business and Professions Code. Additionally, in furtherance of that purpose, no express repeal of the original act of 1907, or of the 1909 amendment, was included in the 1941 codification bill. (See Stats. 1941, ch. 526, p. 1834, § 2 at p. 1847; Bus. & Prof. Code, § 30, 028.) In other words, if it should prove impossible to preserve the separability of the 1909 amendment in the process of codification, then the codification would fail, leaving the 1907 and 1909 enactments on the books uncodified. It is difficult to see how the Legislature could more clearly and emphatically have indicated its intention to preserve the separability of the 1909 amendment.

[*30] The argument that legislative inaction since 1941 might in some way indicate the intent with which the Legislature acted in 1941 or in 1909, is utterly without foundation.

Because of the unconstitutional vagueness of section 16,723 and the separability of its provisions, the legality of defendants' conduct is to be tested by reading the statute as if it did not contain that section.

AS TO THE CONSTITUTIONALITY AND
SEPARABILITY OF EXCEPTIONS

EXPRESSED IN SECTION 16,725.

An additional qualifying clause was added to the Cartwright Act in 1909, which in 1941 was carried into the Business and Professions Code as section 16,725. It declares 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." (Emphasis added.)

Defendants make no claim that the questioned agreement promotes, encourages or increases competition. They do claim that its purpose and its effect are in furtherance of trade. That is correct as to the purpose. The parties' stipulation is that the defendants entered into the agreement [*31] "with the intent and for the object and purpose . . . of acting in furtherance of trade." But the stipulation stops short of saying that the agreement is one "which is" in furtherance of trade.

Defendants emphasize this clause of the stipulation: "There is no evidence, except as stated in this stipulation, if any is stated herein, that the effect of the admitted agreement has exceeded, exceeds, or will exceed the stated intentions, objects or purposes." Whatever these words may mean, we do not find in them a statement that the agreement has the effect of furthering trade. To say that there is no evidence, outside the stipulation, that the effect of the agreement "exceeds" the purpose of furthering trade, is not to say the agreement does further trade or that there is evidence that it furthers trade. Nor do we find elsewhere in the stipulation a statement or the basis for an inference that the agreement is in furtherance of trade. The restrictions which the agreement imposes may well further the trade of the individual member but not that of trade as a whole. Those restrictions seem totally inconsistent with any conceivable concept of furtherance of trade.

Defendants have suggested [*32] that this agreement operates to do no more than protect existing contracts from unjustifiable interference, and as such is commendable and lawful, citing Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 112 P.2d 631. We do not see the applicability of that case, which holds that an action will lie for unjustifiably inducing a breach of contract. By the questioned agreement none of the defendants has undertaken to refrain from inducing the breach of a contract. He has, instead, agreed under certain conditions not to accept a building owner's invitation to bid except at a price appreciably higher than currently specified in a fellow member's contract which is about to expire. Each defendant assures to each of the others the continued renewal of his contractual relationships

"In the absence of a decision by the California Supreme Court, the commission has prepared a codification of the entire California act, as amended. As thus codified, without substantial change, it will, of course, have neither greater nor less validity, operation or effect than prior to codification. (Business and Professions Code, Sec. 2: San Joaquin etc. Irr. Co. vs. Stevenson, 164 Cal. 221, at 233, 128 P. 924 and 234; Sobey vs. Molony, 40 Cal. App. 2d 381, 104 P.2d 868.) However, as a special precaution, the commission has inserted a specific saving clause (Section 16701) which is specially designed to leave as it is the question of separability, so that the 1907 Cartwright Act, and the 1909 amendments thereto, will manifestly have no greater (and no less) validity, operation, or effect than if they had not been codified."

without price competition from his fellow members. Even if there were directly involved some degree of prevention of unwarranted induction of breach of contract, that would not necessarily characterize the restraint as being one in furtherance of trade.

HN7 [↑] The burden of proving that the questioned agreement comes within one of the exceptions (such as those expressed in 16,723 or in [section 16,725](#)) rests upon [*33] the defendants in this case ([People v. H. Jevne Co., 179 Cal. 621, 178 P. 517](#)). In the absence of evidence that the questioned agreement is "in furtherance of trade," defendants have failed to meet this burden and are unsuccessful in invoking the exception provided by [section 16,725](#).

However, a complete answer is not furnished by saying there is a failure of proof under any conceivable concept **HN8** [↑] of "furtherance of trade." The question remains whether that expression furnishes a sufficiently definite and certain standard. We think not. It is virtually impossible to apply it to any of the inhibitions expressed in [section 16,720](#). For example, what "restriction in trade or commerce" ([subd. \(a\) of § 16,720](#)) is "in furtherance of trade" ([§ 16,725](#))? What limitation or reduction of production or increase of the price, of a commodity (subd. (b)) furthers trade? What combination to prevent competition in manufacturing, transporting, selling or purchasing a commodity (subd. (c)) furthers trade? What agreement whereby the price of a commodity to consumers is controlled or established in any manner (subd. (d)) is "in furtherance of trade?" That term is too indefinite and uncertain [*34] to serve as a standard. The reasoning of the court in the Cline case applies to render this provision invalid and inoperative. This invalid exception, added in 1909, is separable from the original enactment for the same reasons that [section 16,723](#) is separable.

IS THE QUESTIONED AGREEMENT A

TRUST AS DEFINED IN [SECTION 16,720](#)?

Defendants claim they have not violated the Cartwright Act, irrespective of the validity or invalidity of [sections 16,723](#) and [16,725](#). They say that this Act is a statutory enactment of the common law rules against restraints of trade and that California decisions demonstrate that the questioned agreement is not one of the proscribed restraints.

They rely in part upon cases concerning exclusive trading contracts ([Schwalm v. Holmes, 49 Cal. 665](#), and [Twomey v. People's Ice Co., 66 Cal. 233, 5 P. 158](#)) and agreements by a producer with his customers for the maintenance of the price of his products. ([Grogan v. Chaffee, 156 Cal. 611, 105 P. 745](#); [D. Ghirardelli Co. v. Hunsicker, 164 Cal. 355, 128 P. 1041](#), and [Munter v. Eastman Kodak Co., 28 Cal. App. 660, 153 P. 737](#)), cases which do not bear [*35] upon our problem. Two of their cases held certain cooperative, marketing agreements valid under the 1909 amendment of the Cartwright Act ([Anaheim C. F. Assn. v. Yeoman, 51 Cal. App. 759, 197 P. 959](#), and [Poultry Producers etc. v. Barlow, 189 Cal. 278, 208 P. 93](#)) but were decided prior to the rendition of the decision in the Cline case.

This leaves [Herriman v. Menzies \(1896\), 115 Cal. 16, 46 P. 730](#). It involved a contract, between several stevedoring firms at San Francisco, which provided for the fixing of prices for stevedoring services tendered by them and for the division of their profits and losses. It did not appear that the contracting parties were in the control, or anything like the control, of that business in San Francisco, to an extent to enable them to exclude competition therein, or to control the price of such labor or business. There was nothing to show that they comprised more than the most insignificant part, in number or volume of business, of those engaged in that trade in that community. The court held the contract valid, - not a monopoly, not an unreasonable restraint of trade.

Defendants claim that they too control but a small portion [*36] of the building maintenance business in San Francisco: For example, they are but 14 of the 44 contractors; all the contractors, including defendants, service but 24% of the buildings serviced by members of unions; defendants service less than .5% of the buildings, exclusive of private homes, that are serviced in San Francisco. More significant are the figures concerning defendants' position in the contracting end of the building maintenance business. That is the portion of the business that counts. It is the entire area of the business in which defendants operate and in which there is competition. Defendants have 90% of

that business, whether measured by percentage of buildings serviced or by number of persons employed by defendants and by all building maintenance contractors. This fact alone makes the holding in the Menzies case inapplicable here.

Later decisions indicate that the holding in the Menzies case should not be extended beyond the facts of that case. In *Endicott v. Rosenthal*, 216 Cal. 721, at 726, 16 P.2d 673, the court, quoting from an intervening decision, said: "In the Menzies case it was held that the contract was not illegal, for it was not shown that [*37] it was designed to, or did effect a control of business to an extent enabling the contracting firms to exclude competition or control the prices of the commodity." (P. 726.) The Endicott case involved an agreement between all but one of the cleaning and dying firms in Los Angeles and Orange Counties and had for its purpose the increase of prices and the elimination of competition. The court found it a restraint upon trade prohibited by *section 1673 of the Civil Code* (now *section 16, 600 of the Bus. & Prof. Code*) and that the reasonableness of the prices fixed was immaterial, quoting (at pp. 726 and 727 of 216 Cal.) from *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 P. 36, and from *United States v. Trenton Potteries Co.*, 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377. (See, also, *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210-218, 84 L. Ed. 1129, 60 S. Ct. 811, and *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213, 95 L. Ed. 219, 71 S. Ct. 259, concerning the price-fixing agreement as illegal *per se*.) In *People v. Sacramento Butchers' Assn.*, 12 Cal. App. 471, 107 P. 712, [*38] it was held that an information charging a combination for the purpose of destroying full and free competition in the retail meat business need not allege that the defendants "were in a position to control the market with respect to meat. As we have stated, the object of the statute is to prevent such combinations or conspiracies between persons engaged in a particular line of business as will destroy free competition therein, and if the purpose of such combination is to restrict trade or destroy competition in the sale and purchase of 'merchandise, produce, or any commodity,' or if such combination tends to restrict trade or to prevent free competition therein, such combination is against the letter and paramount object of the law. It is, therefore, not necessary to prove, and much less to allege in the information in order to state the offense denounced by the statute, that the defendants or any of the persons referred to in the information as being connected with the alleged combination were in a position to control the market in the sale and purchase of the commodity to which the charge relates." (Pp. 481-482.) A petition for a hearing by the Supreme Court was denied. (P. 497.)

[*39] Of the Cartwright Act it can be said, as has been said of the Sherman Act: "Congress [the Legislature] was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent." (*Standard Oil Co. v. Trade Comm'n.*, 340 U.S. 231, 249, 95 L. Ed. 239, 71 S. Ct. 240.) In *Kold Kist v. Amalgamated Meat Cutters*, 99 Cal. App. 2d 191, 221 P.2d 724, the court overruled a contention that only those combinations are in unlawful restraint of trade which seek to control prices and create a monopoly: "A complete answer to this contention is found in the statute itself.  Under subdivisions (a), (b) and (c), of *section 16720, Business and Professions Code*, it is unlawful for two or more persons to combine to create or carry out restrictions in trade or commerce; to limit or reduce the production of any commodity; or to prevent competition in the sale or purchase of merchandise, produce or any commodity. These enactments are distinct from the remainder of the section which has to do with price fixing. Although price fixing and monopolistic practices tend to affect competition, production and restrictions in trade, the [*40] Legislature has not limited illegal combinations in restraint of trade to those which involve price fixing or monopoly." (P. 201.) A petition for a hearing of this case was denied by the Supreme Court. (P. 204.)

We conclude that the questioned agreement was a trust as defined by *section 16*, 720 of the Business and Professions Code.

WAS THE INJUNCTIVE RELIEF GRANTED BY
THE JUDGMENT BROADER AND MORE EXTENSIVE
THAN THE FACTS WARRANT?

Defendants have suggested that in enjoining any agreement to raise, fix, maintain or bring about the use of "uniform" mark-ups, price differentials, terms or conditions with respect to the furnishing of labor, materials or services, the judgment restrained acts not involved in the questioned agreement, acts which none of the defendants has committed or threatens to commit.

We do not so view it. The promise of each defendant to bid from 5% to 20% higher than the existing contract rate, under certain circumstances, has an aspect of uniformity which justified the use of the word "uniform" in the judgment. Thus, if the current job price per month is \$ 100.00 or less, the minimum bid must exceed [*41] it by 20%; if \$ 101 to \$ 250, 15%; \$ 251 to \$ 500, 10%; \$ 501 to \$ 1,000, 7-1/2%; \$ 1,001 and up, 5%. Such a schedule is uniform in its application. Each rate of mark-up applies uniformly to all cases which come within its range. (For a discussion of the principle involved, see *Rainey v. Michel*, 6 Cal. 2d 259, 268-271, 57 P.2d 932; *In re Weisberg*, 215 Cal. 624, 629, 12 P.2d 446; and *In re Nowak*, 184 Cal. 701, 709, 195 P. 402.)

DID THE SUPERIOR COURT HAVE JURISDICTION

TO CONSIDER A MOTION FOR NEW TRIAL?

Plaintiff claims that when, as here, the facts were stipulated, there was no "trial" of an issue of fact, hence no basis for a "new" trial. It advances this as an additional reason for reversal of the order for a new trial.

Such a process of reasoning would be sound if the stipulation set forth all the ultimate facts as well as the evidentiary facts.

Defendants claim that the stipulation omits the ultimate facts, that the court failed to find the ultimate facts, hence the judgment is not supported by the decision and the order for a new trial should be affirmed.

The position of neither party is correct. The stipulation abounds in [*42] evidentiary facts but leaves ultimate facts to be found by the court. It happens that the ultimate facts are so closely connected with questions of law as to be almost inextricably bound up with them. In such a case the finding of the ultimate facts seem necessarily implied or contained in the conclusions of law which the court put in express terms by reference to the complaint. Thus, when the court drew and declared the legal conclusion that plaintiff was entitled to a judgment enjoining the defendants from participating in any agreement to raise, fix or maintain prices or to bring about the use of uniform mark-ups, or from carrying out any restrictions in the building maintenance industry, the court thereby impliedly found that the questioned agreement is a trust as defined in *section 16*,720 of the code.

Precedents for implying the finding of ultimate facts from the conclusions of law in such a situation as this are furnished by *Stanwood v. Carson*, 169 Cal. 640, 147 P. 562, and *Taylor v. George*, 34 Cal. 2d 552, 212 P.2d 505. The Stanwood case involved the validity of certain street assessments. The trial was had upon a stipulated statement of the evidence, [*43] most of which consisted of the record of the proceedings on file in the City Clerk's office. The trial court did not in express terms find the ultimate facts. It concluded and declared, from the stipulated facts, that each of the assessments was valid. The questions presented at the trial were questions "of fact mixed with and determinable upon more or less intricate questions of law." (*169 Cal. at 646, 147 P. 562*.)

In the Taylor case, there was a failure to find, in express terms, whether or not a testator intended to satisfy his obligation to support his child by means of the proceeds of a policy of insurance upon the testator's life. The evidentiary facts had been stipulated. The Supreme Court stated the problem and gave its solution in these words: **HN10** [↑] "Ordinarily, the necessity for findings of fact is dispensed with where the case is submitted upon a stipulation of facts. [Citations.] It has been held, however, that where the stipulation sets forth evidentiary material only, it is proper for the trial court to make findings of the ultimate facts. [Citations.] Although all of the evidence in this case was embraced within the stipulation and exhibits attached thereto, it is at least [*44] arguable that the ultimate fact of whether the decedent intended to satisfy his obligation of support by means of the insurance benefits was a fact to be found by the trial court. But the failure to make a specific finding on that subject does not require a reversal. The judgment rendered on the stipulated facts in the defendant's favor may be deemed in itself an implied determination of the ultimate fact. (*Stanwood v. Carson*, 169 Cal. 640, 646 [147 P. 562].)" (*34 Cal. 2d at 556, 212 P.2d 505*.)

We conclude that in our case there is no such defect in the findings of fact and conclusions of law as would justify an order for a new trial.

The order appealed from is reversed.

Wood (Fred R.), J.

WE CONCUR:

Peters, P.J.

Bray, J.

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A. B. C. Distributing Co. v. Distillers Distributing Corp.

Court of Appeal of California, Second Appellate District, Division Two

October 4, 1957

Civ. No. 22084

Reporter

154 Cal. App. 2d 175 *; 316 P.2d 71 **; 1957 Cal. App. LEXIS 1607 ***

A. B. C. DISTRIBUTING COMPANY (a Corporation), Appellant, v. DISTILLERS DISTRIBUTING CORPORATION (a Corporation) et al., Respondents

Subsequent History: [***1] A Petition for a Rehearing was Denied October 28, 1957, and Appellant's Petition for a Hearing by the Supreme Court was Denied November 26, 1957. Carter, J., and Schauer, J., were of the Opinion that the Petition Should be Granted.

Prior History: APPEAL from a judgment of the Superior Court of Los Angeles County. Arthur Crum, Judge.

Action for an accounting, damages and injunctive relief.

Disposition: Affirmed. Judgment of dismissal affirmed.

Core Terms

products, distributor, renew, customers, distribute, parties, alcoholic beverage, manufacture, Distillers, purchases, retailers, lease, competitors, defendants', damages, distributorship, prices, percent, appointment, importation, restraining, antitrust, covenant, licensed, notice, declarations, solicitation, repudiation, conspiracy, terminated

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Contracts Law > Contract Conditions & Provisions > General Overview

Contracts Law > Contract Interpretation > General Overview

HN1[] Types of Contracts, Quasi Contracts

Nothing may be added by way of implication except that which is necessary to carry out the intentions of the parties, as derived from the agreement itself and not merely from the circumstances under which it is made. In the construction of such an agreement it will be conclusively presumed that it expresses their entire understanding.

Contracts Law > Contract Conditions & Provisions > General Overview

154 Cal. App. 2d 175, *175 316 P.2d 71, **71 1957 Cal. App. LEXIS 1607, ***1

Contracts Law > Contract Interpretation > General Overview

HN2 Contracts Law, Contract Conditions & Provisions

Matters which are intentionally omitted from a contract may not be added under the guise of interpretation.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Contract Interpretation > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Contracts

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

HN3 Types of Contracts, Covenants

Implied covenants are not favored in the law. Courts will declare the same to exist only when there is a satisfactory basis in the express contract of the parties which makes it necessary to imply certain duties and obligations in order to effect the purpose of the parties to the contract made.

Antitrust & Trade Law > Clayton Act > General Overview

Torts > Business Torts > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN4 Antitrust & Trade Law, Clayton Act

Section 4 of the federal Clayton Act, [15 U.S.C.S. § 15](#), is substantially like [Cal. Bus. & Prof. Code § 16750](#) which authorizes a person injured in his business or property by reason of anything forbidden to recover twofold the damages sustained. But the right to double damages is not exclusive. The local statute merely articulates in greater detail a public policy against restraint of trade that is long recognized at common law.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5 Price Fixing & Restraints of Trade, Vertical Restraints

Under the common law of California, combinations entered into for the purpose of restraining competition and fixing prices are unlawful. One whose business is injured by the activities of a combination in restraint of trade is entitled to damages, not only under the Cartwright Act, [Cal. Bus. & Prof. Code §16750](#), but also under the common law.

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Antitrust & Trade Law > Clayton Act > General Overview

HN6[] **Antitrust & Trade Law, Clayton Act**

See the Clayton Act § 4, [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7[] **Public Enforcement, State Civil Actions**

See [Cal. Bus. & Prof. Code § 16750](#).

Antitrust & Trade Law > Clayton Act > General Overview

HN8[] **Antitrust & Trade Law, Clayton Act**

Where a party has an absolute right either to renew or not to renew a contract, and the exercise by it of that right did not, it could not form the basis of a suit under [15 U.S.C.S. § 15](#).

Contracts Law > Contract Formation > Capacity of Parties > General Overview

HN9[] **Contract Formation, Capacity of Parties**

It is the right, long recognized, of a trader engaged in a strictly private business, freely to exercise his own independent discretion as to the parties with whom he will deal.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Contracts Law > Contract Formation > Capacity of Parties > General Overview

HN10[] **Regulated Practices, Trade Practices & Unfair Competition**

From the mere fact of a producer's refusal to sell to another, no inference of unlawful agreement can arise for the reason that a producer may lawfully select his own customers.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN11[] **Private Actions, Remedies**

In the absence of injury to the plaintiff, a violation of the anti-trust statute is not actionable by a private party.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Customers of Former Employer

HN12[] Types of Contracts, Covenants

There is no vested and indefeasible right to monopolize customers. Customers are not things to be owned by anyone. They are the life-stream of trade and commerce; are free to choose for themselves and to be chosen by those whose only motive is to advance their own welfare and to do no harm to others. So long as competition is fairly and legally conducted and the customer is not restrained by negative covenants; a former employee is free to solicit business from his former employer's customers.

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] (1)

Contracts—Interpretation—Extension of Time.

--Where a contract of distribution of liquor products gives the distributor only the right to apply to the manufacturer for extension of such contract "not less than 30 days before" a designated date, such language does not give the distributor an option to extend the contract beyond the expiration date, but leaves it to the manufacturer to extend or decline to extend.

CA(2)[] (2)

Id.—Interpretation—Questions of Law.

--Whether a written contract is a complete expression of all the terms agreed on is a question of law.

CA(3)[] (3)

Id.—Interpretation—Questions of Law.

--The court, having concluded that a writing expressed the complete agreement of the parties, has the function of determining from the document itself the meaning thereof.

CA(4)[] (4)

Id.—Interpretation—Terms Implied.

--Nothing may be added to an agreement by way of implication except that which is necessary to carry out the intention of the parties, as derived from the agreement itself and not merely from the circumstances under which it was made.

CA(5)[] (5)

Id.—Interpretation—Terms Implied.

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--It will be conclusively presumed that a written agreement, workable and complete as to matters it purports to cover, expresses the parties' entire understanding.

CA(6) [] (6)

Id.—Interpretation—Terms Implied.

--Matters intentionally omitted from a contract may not be added under the guise of interpretation.

CA(7) [] (7)

Agency—Exclusive Agencies.

--A contract appointing plaintiff "Distributor as a distributor" of liquor products does not make him a sole distributor and he is not entitled exclusively to sell such products in the prescribed territory; an inhibition against the appointment of another person as distributor in the same territory is not clearly implied.

CA(8) [] (8)

Contracts—Interpretation—Terms Implied.

--Implied covenants are not favored in the law; courts will declare the same to exist only when there is a satisfactory basis in the express contract of the parties which makes it necessary to imply certain duties and obligations in order to effect the purpose of the parties to the contract made.

CA(9) [] (9)

Id.—Breach—Waiver.

--One party waives alleged breaches of contract by continued performance on its part without any claim of breach by the other party.

CA(10) [] (10)

Monopolies and Combinations—Cartwright Act.

--The Cartwright Act ([Bus. & Prof. Code, §§ 16700-16758](#)) merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law.

CA(11) [] (11)

Id.—Restraint of Trade.

--Under the common law of this state, combinations entered into for the purpose of restraining competition and fixing prices are unlawful.

CA(12) [] (12)

154 Cal. App. 2d 175, *175 316 P.2d 71, **71 1957 Cal. App. LEXIS 1607, ***1

Id.—Damages for Injuries.

--One whose business has been injured by the activities of a combination in restraint of trade is entitled to damages, not only under the Cartwright Act ([Bus. & Prof. Code, § 16750](#)), but also under the common law. ([Civ. Code, § 3281](#).)

[CA\(13\)](#) [] (13)

Id.—Particular Agreements and Combinations.

--A manufacturer's alleged reason for not renewing its contract with a distributor because the distributor was taking on the line of one of its principal competitors is not sufficient to make it guilty of anti-trust law violation; a trader has the right to exercise his own independent discretion as to the parties with whom he will deal.

[CA\(14\)](#) [] (14)

Id.—Particular Agreements and Combinations.

--Unless defendant manufacturer had agreed with another party not to deal with plaintiff there was no restraint of trade in defendant's refusing to use plaintiff as its distributor; the fact that plaintiff had contracted with one of defendant's competitors to distribute the latter's products also was not sufficient to render the refusal to proceed with plaintiff a monopoly.

[CA\(15\)](#) [] (15)

Id.—Existence of Monopoly.

--Statistics that during certain years a manufacturer distributed not to exceed 7 per cent of the nation's consumed distilled spirits and not over 3 per cent of those consumed in California disprove that it was a monopoly.

[CA\(16\)](#) [] (16)

Id.—Fair Trade Act.

--Defendant manufacturer of liquor products did not violate either the federal or state fair trade act where it fixed no prices on its products except those at which it sold to plaintiff and the prices at which plaintiff sold to retailers; where its contract with plaintiff specified that the retail prices to be charged by plaintiff to retailers should be in accordance with the Fair Trade Act of California, such control by defendant over resale prices was in accordance with the Alcoholic Beverage Control Act ([Bus. & Prof. Code, §§ 24750, 24756](#)), which prevails in the event it should conflict with other statutes.

[CA\(17\)](#) [] (17)

Id.—Necessity for Injury.

--In the absence of injury to plaintiff, a violation of an anti-trust statute is not actionable by a private party.

[CA\(18\)](#) [] (18)

Injunctions—Trade Secrets.

--Solicitation of business from those concerns made known to defendant manufacturer through information furnished by plaintiff distributor after the distributorship was terminated is not unlawful and does not constitute improper use of trade secrets.

CA(19) [] (19)**Monopolies and Combinations—Right to Monopolize Customers.**

--There is no vested and indefeasible right to monopolize customers; they are not things to be owned by anyone but are the life-stream of trade and commerce; they are free to choose for themselves and to be chosen by those whose only motive is to advance their own welfare and do no harm to others.

CA(20) [] (20)**Intoxicating Liquors—Actions for Violation of Statute.**

--If defendant's employees violated the Alcoholic Beverage Control Act ([Bus. & Prof. Code, § 23366](#)) by making an illegal sale to a retailer, such illegality would not justify an action against defendant unless it was the proximate cause of injury to plaintiff.

Counsel: J. Albert Hutchinson for Appellant.

Lawler, Felix & Hall and John M. Hall for Respondents.

Judges: Moore, P. J. Fox, J., and Ashburn, J., concurred.

Opinion by: MOORE

Opinion

[*177] [**73] Appeal from a judgment or order of dismissal entered after motion for nonsuit had been granted and from the judgment for costs.

Plaintiff is a licensed importer. It purchases from manufacturers and other distributors alcoholic beverages for resale to retail dealers.

Defendant Distillers Distributing Corporation, herein referred [*178] to as "Distillers" is by virtue of successive mergers, successor to Calvert Distillers Corporation. Both are herein referred to as "Calvert." Defendant Chivas Brothers Import Corporation is referred to as "Chivas."

There ***2 are five causes of action which compositely seek an accounting, damages and injunctive relief by reason of alleged unfair competition and, also, damages for alleged breach of contract. Count 1 charges an unlawful restraint of trade and unfair competition on the part of both defendants; counts 2 and 4 seek declarations of plaintiff's rights as to each of the defendants but both counts were on motion of plaintiff dismissed. ¹ Count 3

¹ Plaintiff urges that the dismissal was forced by the court's stated intention to try the declaratory relief issues first and in the absence of the jury. Plaintiff urges error in the ruling of the court in view of the decision of the Supreme Court in [State Farm etc. Ins. Co. v. Superior Court](#), 47 Cal.2d 428, 431 [304 P.2d 13], filed after the trial in the instant action. But it is not necessary to

alleges damages caused by Calvert by reason of its repudiation of its written contract; count 5 alleges damages caused by Chivas for breach of its oral agreement. The gravamen of the several counts "is the appropriation of plaintiff's business by defendants and certain of their favored customers, pursuant to a pre-existing and continuing combination and conspiracy to restrain trade in, and to monopolize the distribution of, alcoholic beverages -- in general and in plaintiff's area of operation -- and the deprivation of profits and good will by means of wrongful refusal to deliver supplies for resale in accordance with contracts between the immediate parties."

[***3] Count 1

Count 1 alleges the corporate existence of Distillers and its authority to do business in California; its successorship to Calvert by way of merger and declares that the transactions alleged were had with Calvert and Chivas; that plaintiff is the holder of all licenses necessary to permit it "to engage in the wholesale distributing of alcoholic beverages within the State of California"; [**74] and is so engaged in such business principally within the county of Los Angeles; that defendants are licensed to be and "are engaged in the manufacture, importation, exportation and sale of alcoholic beverages in foreign and interstate commerce within the United States" [*179] and to the extent licensed have so engaged in such lines in the State of California; that defendants do not manufacture distilled spirits within California; that defendants are not authorized to conduct or participate in transactions respecting alcoholic beverages "with persons licensed to sell alcoholic beverages at retail to unlicensed persons."

That defendants import and manufacture a large number of "distilled spirits products" of the varieties customarily purchased by the consuming public and competitive [***4] with defendants' principal competitors as to variety, quality and price range; that such products are sold in containers bearing labels and trade-marks owned and controlled by defendants and unavailable from any other source; that defendants distribute and sell a substantial proportion of all the potable distilled spirits sold and consumed in the United States; that certain of said products have been advertised and have customer acceptance whereas others have not been so advertised; that there is a tendency of the purchasing public to continue the use of products known to it and a reluctance to accept new products of the same general kind as a substitute therefor; that from time to time certain of defendants' products have been in short supply and have been allocated to their wholesale customers by some means unknown to plaintiff; that defendants have adopted the policy of distributing their products "as a group sometimes known as each respective defendant's 'line,' indifferently to the demand, customer acceptance, quality, price and competitive advantage or particular products" and have attempted to require the purchase of unpopular products as a condition to the purchase or allocation [***5] of acceptable products and have required their distributors to maintain in advance large stocks; "that at all times defendants have determined, declared and controlled the prices from time to time to be charged by them of their immediate purchasers and by their purchasers upon resale thereby by means of contract provisions, implied agreements, arrangements, recording, and causing the recording thereof, and by other means."

That at all times defendants distributed their products through licensed wholesale distributors; that defendants employed salesmen known as "specialty" men who visited customers of the distributors, solicited orders and submitted the same to the distributors for delivery; that for this purpose defendants sought to discover the identity of the customers of such distributors.

[*180] That prior to 1945, one Moyer was doing business as A.B.C. Distributing Company and was the distributor for Calvert; that during 1945 plaintiff entered into negotiations with Moyer "for the purchase of the business, stocks, good will, accounts, customer lists and physical properties and distributorships of Moyer"; that during such negotiations, in response to plaintiff's inquiry, [***6] "defendants expressly and affirmatively assured and represented to plaintiff that, in the event of the purchase of said business of Moyer by plaintiff, said defendants would appoint plaintiff their distributor in place and instead of Moyer and would continue the distribution of their said products by and through plaintiff as such distributor"; that on July 2, 1945, plaintiff purchased the business of Moyer and on the same day entered into an oral contract of distributorship with "said defendants"; that thereafter the

pass upon that question in view of our conclusion. Even if the declaratory relief issues had been presented to the jury and they had returned a verdict declaring that plaintiff had an option to renew the contract, such verdict would have been patently erroneous. Therefore, even if the court's ruling was erroneous, plaintiff suffered no prejudice thereby.

contract was renewed from time to time to and including January 21, 1952; that on January 1, 1951, plaintiff entered into a similar oral distribution agreement with defendant Chivas for the distribution of Chivas products; that the Chivas contract was renewed, from time to time, to and including February 5, 1954; that both contracts have been duly performed by plaintiff.

[**75] That plaintiff, at its own expense, used its best efforts to increase the volume of sales of defendants' products and "to this end . . . expanded its facilities, increased the numbers of its employees and established additional suitable facilities"; that the purchase of defendants' products [**7] by plaintiff's customers progressively increased in volume and amount, "exceeding on the 1st day of January, 1952, annual purchases from plaintiff of defendants' products in excess of fifteen thousand five hundred (15,500) cases at sales prices in excess of plaintiff's cost of acquisition of One Hundred Thousand Dollars (\$ 100,000) per year; and would have continued to so progressively increase in volume and amount in the absence of defendants' wrongful conduct, as hereinafter set forth."

That defendants are, and each of them, is "an affiliate and member of a combination of in excess of twenty corporations . . . engaged in the importation, manufacture and sale of alcoholic beverages in foreign and interstate commerce in the United States and in trade and commerce within the State of California"; that such combination "imports, manufactures and sells . . . in excess of twenty-five per cent (25%) of all alcoholic beverages" and that the aggregate gross sales of the alleged combination are in excess of \$ 700,000,000 per year; [*181] that each member of the combination is in competition with other persons and in "pretended competition" with each of the other members of the combination; [**8] that the combination "is organized, carried out and managed by stock ownership, common directors and officers, planned common courses of action, conferences, committees, correspondence and exchange of information"; that each member of the combination was "created and acquired by Distillers Corporation-Seagrams, Ltd. . . . and is owned by Distillers Corporation-Seagrams, Ltd. directly and through subsidiary corporations of said combination."

That the members of the combination, including the defendants, "have combined, agreed, conspired and acted together as a combination of capital, skill and acts for the purpose . . . and effect of unfairly competing with other persons engaged" in the same business, and of "restraining, restricting and hindering competition, trade and commerce therein by means of said combination"; that this has been accomplished by placing the following conditions upon the sale to, and resale by, distributors such as plaintiff: (1) allocation of customers; (2) allocation of territories; (3) requirements for minimum purchases and stated percentages of the distributor's aggregate business in the products of members of the combination, and (4) the enforcement of agreements, [**9] expressed and implied, "requiring distributors and other purchasers to give notice to members of said combination in advance of dealing in any alcoholic beverage product produced or sold by any person other than a member of said combination."

That on July 1, 1951, "defendants wrongfully demanded that plaintiff surrender its said distributorship with respect to substantial areas of said county in which plaintiff was then defendants' said distributor . . . and permit competitors of plaintiff in said areas to appropriate plaintiff's customers . . . as a condition to the continuation of said distributorship in other areas of said county"; that they demanded that unless plaintiff acceded to their proposal, defendants would repudiate the contract. That thereupon plaintiff did accede to such demand and on January 21, 1952, Calvert required the execution of an instrument in writing designating the areas in which plaintiff would continue as distributor and providing that plaintiff would be sole distributor in those areas for a "period of one year from and after the 1st day [*182] of March, 1952, and subject to renewal from year to year, for like periods, at the option of plaintiff." [**10] That plaintiff complied with the demand and executed such instrument.

That prior to March 1, 1953, "plaintiff duly exercised its said option to renew said distributorship" whereupon Calvert presented to plaintiff for execution a distributorship [**76] agreement dated February 5, 1953, which will hereinafter be designated as the 1953 contract; that about June 1, 1953, Calvert allowed others of its distributors to operate in the territory assigned to plaintiff; that the contract contained a provision requiring plaintiff to "spend no less than 22.1 per cent of its time and effort" and "of the money spent by it on advertising and sales promotion" in the sale and promotion of Calvert products; that this provision was intended by Calvert to prevent plaintiff from distributing the products of other manufacturers and as a means of requiring minimum purchases of Calvert's

products; that the contract provided also that plaintiff "will not undertake the distribution of any additional brands of alcoholic beverages without giving Calvert 90 days' written notice of its intention so to do" and that "in the event this contract is not renewed" plaintiff "agrees that within 30 days after March [***11] 1, 1954, it will return to Calvert at its invoice price all of the Calvert merchandise remaining in its inventory"; that the foregoing provisions were intended to prevent plaintiff from dealing in the products of persons other than members of the alleged combination.

That on November 19, 1953, defendants stipulated with the United States Federal Trade Commission in a proceeding pending before that agency entitled "In the Matter of Distillers Corporation-Seagrams, Ltd. and its subsidiaries" (1) that defendants (respondents in that proceeding) had required its distributors to give notice in advance of an intention to deal in products of defendants' competitors and (2) that the Commission might make its order declaring such to be "unfair methods of competition" and that defendants "cease and desist" from such practices; that the order pursuant to the stipulation was entered March 2, 1954.²

[***12] That on January 28, 1954, plaintiff advised Calvert that it had entered into negotiations with a competitor of Calvert looking toward the distribution of the products of such competitor in addition to those of Calvert; that thereupon Calvert [*183] notified plaintiff that it repudiated its 1953 contract and the alleged option to renew it after March 1, 1954; that Calvert gave as its reason for such repudiation plaintiff's intention to distribute the products of a competitor; that thereafter Calvert refused to fill orders placed with it by plaintiff after March 1, 1954; that this repudiation had the effect of restraining competition in alcoholic beverages in violation of state and federal laws; that thereafter "defendants commenced a systematic course of solicitation of orders for alcoholic beverages of plaintiff's customers"; that in such solicitation defendants used confidential information previously obtained from plaintiff; that plaintiff has been damaged by this course of conduct.

By counts 3 and 5, no new factual allegations are included but the implied prayers thereof will be answered by the discussion below.

The evidence was not sufficient to support finding in favor [***13] of plaintiff for either a violation of the contract or by reason of a tort committed by defendants.

CA(1) [1] (1) At the very outset, plaintiff's contention that it had an option to extend the term of its 1953 contract beyond its expiration date, is met by paragraph 11, an express, nonambiguous provision, namely: "If distributor desires to renew the contract, he shall apply for a renewal not less than 30 days before March 1, 1954." By no reasonable construction can it be said that such provision granted plaintiff an option to extend the contract beyond February 28, 1954. Also, if plaintiff had no such option, Calvert was under no inhibition to decline to renew the contract. The quoted clause gave plaintiff only the right to apply to Calvert for such extension; it must do so "not less than 30 days before March 1, [**77] 1954." No renewal was assured. The language clearly leaves it to the discretion of Calvert to extend or to decline to extend the contract.

CA(2) [2] (2) The contract having been admitted and being in ordinary words, in common use, the only question left for the trial court's decision was whether that document was a complete expression of all the terms agreed upon. (Falkenstein v. [***14] Popper, 81 Cal.App.2d 131, 137 [183 P.2d 707].) But such was a question of law. (Heffner v. Gross, 179 Cal. 738, 742 [178 P. 860]; Miranda v. Miranda, 81 Cal.App.2d 61, 66 [183 P.2d 61].)

CA(3) [3] (3) The court having concluded that the writing had expressed the complete agreement of the parties, it was the function of the court to determine from the document [*184] itself the meaning thereof. (O'Connor v. West Sacramento Co., 189 Cal. 7, 18 [207 P. 527]; McKenzie v. Ray, 168 Cal. 618, 623 [143 P. 1018].) Hence, the question posed is not what the evidence proved with reference to whether an option for extension of the agreement

² This order, herein referred to as the "consent decree," was refused admission into evidence at the trial. Plaintiff's claim of error in this respect is considered below.

had been granted but it was whether the trial court properly determined that plaintiff had no right of renewal of the contract.

That no option for plaintiff to renew the contract or to extend its terms is contained in the 1953 contract has been considered and definitely decided by other courts on similar writings. Where a lease for one year provided that the tenant "hereby agrees to give formal notice to the landlord on or before the 15th of January 1920, of tenant's wish as to a continuance of the tenancy beyond the [***15] term hereby granted" -- the lessee erroneously conceived that he had an option to continue his lease. Judgment for lessee was reversed. There was no ambiguity in the lease. "The only thing accomplished by admitting the oral testimony objected to was to allow the jury to find the making of another agreement which differed from the agreement contained in the written contract of the parties." ([Bernstein v. Smith, 119 Misc. 34 \[194 N.Y. Supp. 789, 791\].](#))

Where a lease provided that "six months written notice before the termination of this lease shall be given by either of said parties to the other in the event that either of said parties desires a renewal of said lease, and failure to give said notice shall be regarded as an intention . . . that said lease shall not be renewed," in affirming a judgment for the lessor, the Supreme Court of Massachusetts held: "*The covenant did not create an absolute and unqualified right in either . . . There are no words indicating a right in the lessor to bind the lessee beyond the expiration of the term, or to obligate the lessor in like manner.*" ([Gardella v. Greenburg, 242 Mass. 405 \[136 N.E. 106, 26 A.L.R. 1411\].](#))

One Sharpe [***16] was employed by a written contract at a salary of \$ 450 a month, not to "be reduced during your current Tour of Foreign Duty. However, in the event you fail to work an eight-hour day, six-day week, your pay may be reduced proportionately to the number of lost hours or days in a month . . ." The plaintiff contended that since eight hours constituted a work day, anything over eight hours was overtime for which he should be compensated over and above the \$ 450 salary. In reversing the plaintiff's judgment, the court held that an agreement that if an employee works less than [*185] eight hours a day, six days a week, his pay will be reduced proportionately is not an agreement that if he works more than eight hours a day his monthly salary will be increased proportionately.

CA(4) [↑] (4) HN1 [↑] "Nothing may be added by way of implication except that which is necessary to carry out the intentions of the parties, as derived from the agreement itself and not merely from the circumstances under which it was made . . .

CA(5) [↑] (5) And, in the construction of such an agreement it will be conclusively presumed that it expresses their entire understanding." ([Sharpe v. Arabian American Oil Co., 111 Cal.App.2d 99, \[***17\] 102 \[244 P.2d 83\].](#))

For a court to attempt to make a new contract by adding all or any of the conditions laid down as the basis of plaintiff's claims would be to exceed its authority.

CA(6) [↑] (6) HN2 [↑] Matters which were intentionally omitted from a contract may not be added under the guise of interpretation. [**78] ([Sharpe v. Arabian American Oil Co., supra; Foley v. Euless, 214 Cal. 506, 511 \[6 P.2d 956\]; Stockton Dry Goods Co. v. Girsh, 36 Cal.2d 677, 681 \[227 P.2d 1, 22 A.L.R.2d 1460\]; Ablett v. Clauson, 43 Cal.2d 280, 285 \[272 P.2d 753\]; Nissen v. Stovall-Wilcoxson Co., 120 Cal.App.2d 316, 319 \[261 P.2d 249\]; Roberts-Atkinson Co. v. International Harvester Co., 191 N.C. 291 \[131 S.E. 757, 758\].](#))

In [Crossin v. Elysian Springs Water Co., 105 Cal.App. 449 \[287 P. 985\]](#), the plaintiff with the defendant's approval in 1922 purchased from one Kinne, a distributor, his truck and the good will of his route. By his contract with Elysian, Crossin had the "exclusive right to sell and distribute . . . water and carbonated beverages" in the described territory for one year, "or such time as the distributor shall faithfully comply [***18] with the requirements herein enumerated." After the plaintiff had built up the route from 250 to 600 customers, Elysian terminated the distributorship in 1925 and refused to deliver any more water to him. In his action for damages, Crossin argued that

his employment was from year to year and that his agency was coupled with an interest and that his contract could not be cancelled. The court rejected the argument and affirmed the judgment holding that the provision for one year's employment "can only be read as particularly providing that the relationship shall exist for the period of one year, and thereafter during the will of the parties. Unless so read it would be a contract providing for a relationship to exist in perpetuity, something which the law abhors."

Plaintiff's contention that in April 1953 the written contract [*186] for 1953 was abrogated by the representatives of the parties is not sustained by the evidence or substantial inferences therefrom; moreover, on January 28, 1954, the president of A.B.C. wrote Calvert requesting a renewal of "our present contract." What really occurred was the mutual, oral elimination of the provision restricting plaintiff's sales [***19] to "specified communities."

CA(7)[[↑]] (7) While plaintiff's president testified that all plaintiff's orders for Calvert products were honored during February 1954, the contention is urged that the appointment of the Snyder Company as a distributor in the fall of 1953 was a breach of the contract. Such claim is met by the language of the contract which "appoints Distributor as a distributor." It was, therefore, not a sole distributor and was not entitled exclusively to sell the products of Calvert in the prescribed territory. But it is argued that if the appointment of Snyder was not prohibited by the contract, such inhibition was clearly implied. Such implication is not warranted by the decisions of this state. Where the plaintiff leased to the defendant certain space in its store "to be conducted as a shoe department," the defendant's claim that it thereby gained the exclusive right to operate a shoe department in the store was rejected. The defendant sought "to build an implied covenant upon an inference from the fact that there had always been but one shoe department in the store." Such implication was not warranted. The language of the lease did not indicate "that an exclusive grant [***20] was so clearly contemplated that it would be unnecessary to express it." ([Stockton Dry Goods Co. v. Girsh, supra, 36 Cal.2d 677, 680, 681.](#))

CA(8)[[↑]] (8) A similar holding was announced in [Cousins Inv. Co. v. Hastings Clothing Co., 45 Cal.App.2d 141, 143 \[113 P.2d 878\]](#), where it was held that [HN3\[[↑]\]](#) "implied covenants are not favored in the law; and courts will declare the same to exist only when there is a satisfactory basis in the express contract of the parties which makes it necessary to imply certain duties and obligations in order to effect the purpose of the parties to the contract made." (See [Grass v. Big Creek Development Co., 75 W.Va. 719 \[84 S.E. 750\]](#), L.R.A. 1915E 1057].)

From such authorities it must be concluded that there was no basis for a holding that an implied agreement that Calvert would not appoint a fourth Calvert distributor was "so clearly within the contemplation [**79] of the parties that they deemed it unnecessary to express it." ([Cousins Inv. Co. v. Hastings Clothing Co., supra, p. 149.](#)) Conclusions similar [*187] to those announced in the above cited cases were reached in numerous decisions of other courts. ([Wiley v. California \[***21\] Hosiery Co., 3 Cal.Unrep. 814 \[32 P. 522\]; Dahath Electric Co. v. Suburban Electric Dev. Co., 332 Pa. 129 \[2 A.2d 765\]; J. I. Case Threshing Machine Co. v. Wright Hardware Co., 61 Tex.Civ.App., 481, 486 \[130 S.W. 729\]; Wm. Deering & Co. v. Beatty, 107 Iowa 701 \[77 N.W. 325\]; Duboff v. Matam Corp., 272 App.Div. 502 \[71 N.Y.S.2d 134\].](#)) Inasmuch as the 1953 contract was a full and complete expression of the parties, the appointment of Snyder as a distributor was a lawful act of Calvert and the trial court correctly held that no covenant was violated thereby. ([Heffner v. Gross, supra, 179 Cal. 738, 742; Miranda v. Miranda, supra, 81 Cal.App.2d 61, 66.](#)) Hence, neither the evidence must be weighed nor the inferences measured. As matters of law, the acts of Calvert are determined to have been correct.

CA(9)[[↑]] (9) Moreover, plaintiff waived such alleged breaches of contract by continued performance on its part without any claim of breach by defendant. (See [International Shoe Co. v. Waldron, 200 Ark. 345 \[138 S.W.2d 1046\]](#); 12 Cal.Jur.2d Contracts, § 251, p. 478.)

The testimony that witnesses had visited retailers within the [**22] territory after February 28, 1954, and found Calvert salesmen on or near the premises and had observed the products of Calvert which had not been delivered there by plaintiff is wholly beside the question at issue as above decided. If appellant had a perpetual contract to distribute Calvert products in Los Angeles County and if it was entitled to profits earned by the sales of such

products, such proof could be considered. But since plaintiff had no contract after February 28, 1954, such evidence is irrelevant.

Was Refusal to Deal With Plaintiff Lawful?

The Cartwright Anti-Trust Law, Statutes of 1907, chapter 530, was incorporated into the [Business and Professions Code, sections 16700 through 16758](#), in 1941. Section 4³ [***24] of the federal Clayton Act ([15 U.S.C.A. § 15](#)) [HN4](#)[] is substantially [[*188](#)] like [section 16750](#),⁴ [Business and Professions Code](#), which authorizes a person injured in his business or property by reason of anything forbidden to recover twofold the damages sustained. But the right to double damages is not exclusive.

[CA\(10\)](#)[] (10) The local statute "merely articulates in greater detail a public policy against restraint of trade that has long been recognized at common law. [CA\(11\)](#)[] (11) Thus, [***23] [HN5](#)[] under the common law of this state combinations entered into for the purpose of restraining competition and fixing prices are unlawful . . .

[CA\(12\)](#)[] (12) One whose business has been injured by the activities of a combination in restraint of trade is entitled to damages, not only under the Cartwright Act ([Bus. & Prof. Code, § 16750](#)), but also under the common law. ([Civ. Code, § 3281](#), see cases cited in 36 Am.Jur. 660, n. 9.)" ([Speegle v. Board of Fire Underwriters, 29 Cal.2d 34 at 44](#) and [46 \[172 P.2d 867\]](#).) We [**80] must therefore inquire whether the proof presents substantial evidence of an unreasonable restraint of trade on the part of defendants.

[CA\(13\)](#)[] (13) Calvert's alleged reason for not renewing its contract because plaintiff was taking on the line of Schenley, one of Calvert's principal competitors, is not sufficient to make it guilty of [antitrust law](#) violation. Where a defendant had refused to renew a contract with the plaintiff, the plaintiff charged a violation of section 1 of the Sherman Act and section 3 of the Clayton Act. It contended that the defendant had declined to renew their contract because plaintiff had refused to give up the handling of a competing product. A judgment for plaintiff was reversed, because "plaintiff had no tenure, no right to a renewal of his contract [***25] as master dealer. [HN8](#)[] Defendant on the other hand had an absolute right either to renew or not to renew it, and the exercise by it of that right did not, it could not form the basis of a suit under [section 15](#)." ([Hudson Sales Corp. v. Waldrip, 211 F.2d 268](#). See [Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911](#).)

Plaintiff's position is not unlike that of one Brosious who sued Pepsi-Cola Company and its distributor for treble damages under the antitrust act after he had purchased such [[*189](#)] product from Cloverdale for six years. When Cloverdale conditioned its sale of Pepsi-Cola to Brosious upon the latter's agreement to sell only Pepsi-Cola, and after the Pepsi-Cola Company refused to approve Cloverdale's conduct, Brosious charged a conspiracy between the producer and its distributor. But the court found no evidence that would support the finding of a conspiracy to violate the antitrust laws. [HN9](#)[] "It is the right, long recognized of a trader engaged in a strictly private business,

³ Clayton Act, section 4, [15 U.S.C.A. § 15](#).

[HN6](#)[] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

⁴ [Business and Professions Code, section 16750](#).

[HN7](#)[] "Any person who is injured in his 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 twofold the damages sustained by him, and the costs of suit."

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freely to exercise his own independent discretion as to the parties with whom he will deal." ([*Brosious v. Pepsi-Cola Co., 155 F.2d 99, 102.*](#))

Other federal courts have announced [***26] the same doctrine with clarity and finality.

"In general, it seems a necessary part of our business mores for a manufacturer to have free selection in dealing with its distributors. Upon the recognition of this fact, why may he not refuse to do business with one who deals in a closely competitive product?" ([*Camfield Mfg. Co. v. McGraw Electric Co. \(Del., 1947\), 70 F.Supp. 477.*](#))

"Every manufacturer has a natural and complete monopoly of his particular product, especially when sold under his own private brand or trade name." ([*Schwing Motor Co. v. Hudson Sales Corp. \(Md., 1956\), 138 F.Supp. 899, 902.*](#))

"We have not yet reached the stage where the selection of a trader's customers is made for him by the government." ([*Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co. \(C.C.A.2, 1915\), 227 F. 46, 49.*](#))

"Likewise a wholesale dealer has the right to stop dealing with a manufacturer 'for the reasons sufficient to himself.'" ([*Federal Trade Com. v. Raymond Bros.-Clark Co. \(1924\), 263 U.S. 565 \[44 S.Ct. 162, 68 L.Ed. 448, 30 A.L.R. 1114\].*](#))

"It requires no argument to demonstrate that appellant [plaintiff] had the right to decline to sell any but its [***27] own product upon the leased property." ([*Associated Oil Co. v. Myers \(1933\), 217 Cal. 297, 306 \[18 P.2d 668\].*](#))

CA(14)↑ (14) From the foregoing authorities and the pronouncements of the several courts, it is clear that unless Calvert had agreed with another party not to deal with plaintiff there was no restraint of trade in Calvert's refusing to use plaintiff as its distributor. The fact that plaintiff had contracted with one of Calvert's competitors to distribute the latter's products also, was not sufficient to render the refusal to proceed [*190] with plaintiff a monopoly. ([*Rolley, Inc. v. Merle Norman Cosmetics, 129 Cal.App.2d 844, 851 \[278 P.2d 63, 282 P.2d 991\].*](#)) **HN10↑** From the mere fact of Calvert's refusal to sell plaintiffs, no inference of unlawful [**81] agreement can arise for the reason that a producer "may lawfully select his own customers." ([*Johnson v. J. H. Yost Lbr. Co., 117 F.2d 53, 61; Theatre Enterprises v. Paramount Distrib. Corp., 346 U.S. 537, 541 \[74 S.Ct. 257, 98 L.Ed. 273\]; Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d 34, 38.*](#) See [*Webster Motor Car Co. v. Packard Motor Car Co., 135 F.Supp. 4, 8; Kiefer-Stewart \[***28\] Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 \[71 S.Ct. 259, 95 L.Ed. 219\].*](#)) Conspiracy was proved in the Kiefer-Stewart case by showing the conferences between the officials of Seagram and Calvert, "concerning sales of liquor to" Kiefer-Stewart and sales were made to other wholesalers who abided by the conditions but no shipments were made to Kiefer-Stewart. It was proved that the agreement worked *an injury to the public.*

CA(15)↑ (15) The statistics that from 1951 to 1954, inclusive, Calvert distributed not to exceed 7 per cent of the nation's consumed distilled spirits and not over 3 per cent of those consumed in California disprove that it was a monopoly. Judge Hand held that "it is doubtful whether sixty or sixty-four per cent would be enough and certainly thirty three per cent is not." ([*United States v. Aluminum Co. of America, 148 F.2d 416, 424.*](#))

CA(16)↑ (16) Further to show that Calvert did not act violative of either the federal or state fair trade act, it fixed no prices upon its product except those which it sold to plaintiff and the prices at which the latter sold to retailers. In its 1953 contract with plaintiff, it specified the retail prices to be charged by plaintiff [***29] to retailers should be in accordance with the Fair Trade Act of California. Such control by Calvert over resale prices to be charged by plaintiff is in accordance with the law. (Cal. Alcoholic Beverage Control Act, [*Bus. & Prof. Code, §§ 24750, 24756.*](#)) The cited act prevails in the event it should conflict with other statutes. ([*Nelson v. Reilly, 88 Cal.App.2d 303, 306 \[198 P.2d 694\].*](#))

With meticulous severity plaintiff arrays three paragraphs (2, 9 and 12)⁵ of the 1953 contract and seeks to have them [*191] declared illegal. The purpose of this action is to determine whether plaintiff by defendants' refusal to extend the term of the 1953 contract suffered detriment and whether the refusal to renew the contract caused damage to the plaintiff. Plaintiff has striven valiantly to establish the affirmative of both questions. Now, whether paragraph 2 was designed to prevent plaintiff from purchasing and selling the products of other manufacturers, competitors of Calvert, or whether paragraph 9 was used to prevent plaintiff from purchasing and selling the products of other manufacturers in competition with Calvert, or whether paragraph 12 was a punitive and unlawful [***30] covenant running with the goods is immaterial. Plaintiff approved those paragraphs along with the others when it signed the contract in [*82] 1953 and subsequently when it demanded a renewal of such contract. There is no showing that plaintiff suffered injury by reason of such paragraphs from March 1952 to March 1954.

[**31]

CA(17) (17) Moreover, the law is against plaintiff's contention. **HN11** In the absence of injury to the plaintiff, a violation of the anti-trust statute is not actionable by a private party. ([Wolfe v. National Lead Co., 225 F.2d 427, 432](#); [Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362](#); [Sargent v. National Broadcasting Co., 136 F.Supp. 560, 566](#).)

Plaintiff contends that Calvert misused information it gained from plaintiff during the tenure of their contract. The record discloses no instance in which Calvert used any information gained from plaintiff except when it used information relative to its own business and the information was used with plaintiff's consent. (See [Alex Foods, Inc. v. Metcalfe, 137 Cal.App.2d 415, 427 \[290 P.2d 646\]](#).)

CA(18) (18) The solicitation of business from those concerns made known to [*192] Calvert through information furnished by plaintiff after the distributorship had been terminated "is not unlawful and does not constitute . . . trade secrets." ([J. C. Millett Co. v. Park Tilford Distillers Corp., 123 F.Supp. 484, 496](#).)

Plaintiff was not injured in any way by Calvert's use of information gained from plaintiff.

Plaintiff [***32] asserts an exclusive perennial right to deal with customers to whom it had sold Calvert's products during the period of the contract. No such right is upheld by law. When plaintiff's 1953 contract terminated, Calvert was at liberty to advise any other distributor with reference to retailers within his area.

CA(19) (19) **HN12** There is "no vested and indefeasible right to monopolize customers." ([Corica v. Ragen, 140 F.2d 496, 498](#).) Customers are not things to be owned by anyone. They are the life-stream of trade and commerce; are free to choose for themselves and to be chosen by those whose only motive is to advance their own welfare and to do no harm to others. So long as his competition is fairly and legally conducted and he is not

⁵ "2. Distributor hereby accepts the appointment as such distributor and agrees to sell and distribute to retail licensees such alcoholic beverages within the designated territory. Distributor warrants that during the year ending December 31st, 1952, the proportion of its total sales of alcoholic beverages represented by Calvert products was 22.1 per cent. Distributor agrees that during the term of this contract, it will spend no less than 22.1 per cent of its time and effort on the sale of Calvert products and not less than 22.1 per cent of the money spent by it on advertising and sales promotion shall be expended on Calvert products."

"9. Distributor represents that at the time of the execution of this agreement, it is acting as a distributor of the brands of alcoholic beverages listed on Exhibit B attached hereto.

"Distributor agrees that it will not undertake the distribution of any additional brands of alcoholic beverages without giving Calvert 90 days' written notice of its intention so to do."

"12. In the event this contract is not renewed, Distributor agrees that within 30 days after March 1, 1954, it will return to Calvert at its invoice price all of the Calvert merchandise remaining in its inventory."

154 Cal. App. 2d 175, *192 316 P.2d 71, **82 1957 Cal. App. LEXIS 1607, ***32

restrained by negative covenants, a former employee is free to solicit business from his former employer's customers. ([Aetna Building Maintenance Co. v. West, 39 Cal.2d 198, 203 \[246 P.2d 11\]](#); [Avocado Sales Co v. Wyse, 122 Cal. 627, 634 \[10 P.2d 485\]](#).)

CA(20)↑ (20) Plaintiff contends that Calvert violated the alcoholic Beverage Control Act ([Bus. & Prof. Code, § 23366](#)) by selling its products directly to retailers. Not only is such claim negated by [***33] the declarations of the complaint but there is no evidence that Calvert sold its products to retailers, and if Calvert's employees had made an illegal sale to a retailer, such illegality would not justify an action against Calvert unless it was the proximate cause of injury to plaintiff. It will be readily conceded that a sale by Calvert made after plaintiff's relations with Calvert had terminated could not have proximately caused injury to plaintiff.

Inasmuch as we have concluded that Calvert in refusing to sell to plaintiff had not acted in violation of any anti-trust statute, it follows that Chivas also had a right to refuse to distribute its products through plaintiff. There is no evidence of an unlawful conspiracy, as plaintiff contends, between Chivas and Calvert. Both corporations were justified in distributing their products through the same distributors. There is no evidence that they conspired unlawfully to restrain [*193] trade. There was no error in granting the nonsuit as to Chivas.

Judgment affirmed.

End of Document



Heavy, Highway Bldg. & Constr. Teamsters Committee v. Superior Court of San Francisco

Court of Appeal of California, First Appellate District, Division Two

May 16, 1962 ; May 16, 1962

Civ. No. 20483

Reporter

203 Cal. App. 2d 591 *; 21 Cal. Rptr. 840 **; 1962 Cal. App. LEXIS 2398 ***; 50 L.R.R.M. 2709; 45 Lab. Cas. (CCH) P17,695

HEAVY, HIGHWAY BUILDING AND CONSTRUCTION TEAMSTERS COMMITTEE FOR NORTHERN CALIFORNIA et al., Petitioners, v. THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent; CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION et al., Real Parties in Interest

Subsequent History: [***1] The Petition of the Real Parties in Interest for a Hearing by the Supreme Court was Denied July 11, 1962. Traynor, J., was of the Opinion that the Petition Should be Granted.

Prior History: PROCEEDING in prohibition to restrain the Superior Court of the City and County of San Francisco from hearing or taking any proceedings in a civil action.

Disposition: Writ granted.

Core Terms

parties, owner-operator, federal law, bargaining, collective bargaining agreement, subject matter, Relations, wages

LexisNexis® Headnotes

Civil Procedure > Remedies > Writs > General Overview

HN1 [down arrow] **Remedies, Writs**

Where a trial court has determined that it has jurisdiction, prohibition lies to prevent exercise thereof when jurisdiction is challenged in that court by demurrer, motion, plea or other objection of some kind.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

HN2 [down arrow] **Collective Bargaining & Labor Relations, Federal Preemption**

The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. Within the area in which collective bargaining is required, Congress is not concerned with the substantive terms upon

which the parties agree. The purposes of the Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreements themselves. Federal law creates a duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty, and federal law sets some outside limits on what their agreement may provide. There is no room in this scheme for the application of a state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. Where the federal law operates, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the state.

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

[HN3](#) [down] **Transportation, Railroads**

The paramount force of federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. Clearly it is immaterial that a conflict is between federal labor law and the application of what a state characterizes as an antitrust law. Congress has sufficiently expressed its purpose to exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the state to the more inclusive area of restraint of trade. If there is to be a limitation concerning a conflict between a federally sanctioned agreement and a state policy which seeks specifically to adjust relationships in the world of commerce on the arrangements that unions and employers may make with regard to these subjects, pursuant to the collective bargaining provisions of the Wagner and Taft-Hartley Acts, it is for Congress, not the states, to provide it.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > Compensation & Benefits

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

Labor & Employment Law > ... > Employment Contracts > Conditions & Terms > General Overview

[HN4](#) [down] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Where the subject matter of a collective bargaining agreement concerns wages, hours and other terms and conditions of employment upon which federal law directs the parties to bargain, a state trial court has no jurisdiction to consider the cause. The subject matter of the controversy is one which the United States Supreme Court has determined is in the area of exclusive federal jurisdiction.

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) [down] (1)

Prohibition—Jurisdiction—Objections.

--Where a trial court has determined that it has jurisdiction, prohibition will lie to prevent exercise thereof when jurisdiction is challenged in that court by demurrer, motion, plea or other objection of some kind.

CA(2) [] (2)**Labor—National Labor Relations Act.**

--Where a specific provision of a collective bargaining contract prescribed and regulated the terms and conditions under which owner-operators of dump trucks drove their equipment for individual employers engaged in interstate commerce, the superior court had no jurisdiction of an action for violation under the Cartwright Act by an association of dump truck owner-operators not parties to the contract to enjoin the enforcement of the clause relating to them; since the subject matter of the contract concerned wages, hours and other employment conditions on which federal law directs the parties to bargain, the subject matter of the controversy was in the area of exclusive federal jurisdiction.

CA(3) [] (3)**Prohibition—Procedure — Determination — Moot Questions.**

--Although, in a proceeding in the District Court of Appeal to restrain trial court action with respect to a collective bargaining agreement, it appears that such contract has expired, the District Court of Appeal will nevertheless determine the issues presented in view of the fact that the question presented is of continuing importance to the parties in their negotiations of future contracts.

Counsel: LeProhn & LeProhn, Robert LeProhn, Brundage, Hackler & Flaum, Albert Brundage, McCarthy, O'Hara & Johnson, P. H. McCarthy, Jr., Neyhart & Grodin and Duane B. Beeson for Petitioners.

No appearance for Respondents.

Scott Elder, Pembroke Gochnauer, Samuel L. Holmes and Angell, Adams, Gochnauer, Elder & Holmes for Real Parties in Interest.

Judges: Kaufman, P. J. Shoemaker, J., and Agee, J., concurred.

Opinion by: KAUFMAN

Opinion

[*592] [841]** Petitioners, the Heavy, Highway Building & Construction Teamsters Committee for Northern California, and the Western Conference of Teamsters, on behalf of their affiliated local unions, seek a writ of prohibition to restrain the respondent court from hearing action No. 507496, instituted by California Dump Truck Owners Association, an association of owner-operators, the real parties in **[***2]** interest, to enjoin the enforcement of certain provisions of a 1959 collective bargaining agreement between the union and the A.G.C., an association of contractors in the highway and construction industry in northern California. All members of **[*593]** the A.G.C. are employers engaged in interstate commerce within the meaning of the National Labor Relations Act. (61 Stat. 140, [29 U.S.C.A. § 141 et seq.](#))

The specific provision relating to owner-operators, adopted on July 27, 1961, pursuant to the modification clause of the collective bargaining agreement, prescribed the terms and conditions which regulated the terms under which an

owner-operator drove his equipment for an individual employer in the performance of work covered by the collective bargaining agreement.

The complaint of the real parties in interest alleged that the owner-operators were not parties to the collective bargaining agreement but were individuals and an association of individuals who owned dump trucks and drove themselves for the performance of transportation services, under a permit and regulation by the California Public Utilities Commission; that the owner-operator clause unlawfully interfered with their [***3] freedom to carry on business and constituted a violation of the Cartwright Act. Petitioners demurred to the complaint on the ground that the respondent court did not have jurisdiction over the subject matter as the provision of the contract relates to a right protected by the National Labor Relations Act. Petitioners' demurrer was overruled without opinion on October 20, 1961, and the petition for the writ ensued.

The question is whether the fact that the contract provision relating to owner-operators was contained in an agreement which was the fruit of the exercise of collective bargaining rights under the National Labor Relations Act precludes the respondent superior court from applying the Cartwright Act to prohibit application of the owner-operator provision to the real parties in interest.

CA(1)[[↑]] (1) It is well settled that [HN1\[[↑]\]](#) where the trial court has determined that it had jurisdiction, prohibition will lie to prevent exercise thereof when jurisdiction is challenged in that court by demurrer, motion, plea or other objection of some kind ([Harden v. Superior Court, 44 Cal.2d 630-634 \[284 P.2d 9\]](#)). The writ is a necessary and proper method of obtaining relief under the circumstances [***4] ([Tide Water Assoc. Oil. Co. v. Superior Court, 43 Cal.2d 815-820 \[279 P.2d 35\]](#)).

The question here presented was recently decided by the United States Supreme Court in an almost identical fact situation in [International Brotherhood of Teamsters v. Oliver, 358 U.S. 283 \[79 S.Ct. 297, 3 L.Ed.2d 312\]](#), and [International \[*594\] Brotherhood of Teamsters v. Oliver, 362 U.S. 605 \[80 S.Ct. 923, 4 L.Ed.2d 987\]](#). In the Oliver cases, an owner-operator who leased and drove his vehicle in the service of an interstate carrier, challenged the validity of a substantially identical contract provision under the Ohio **Antitrust Law**. The court determined that the purpose of the owner-operator provision was not price fixing but wages and that (at pp. 294-297): "The regulations embody not the 'remote and indirect approach to the subject of wages' perceived by the Court of Common Pleas but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract. The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly [**842] [***5] bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service. Cf. [Bakery Drivers Local v. Wohl, 315 U.S. 769, 771 \[62 S.Ct. 816, 86 L.Ed. 1178\]](#).

"....

HN2[[↑]] "The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. See [Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 \[57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352\]](#); [Labor Board v. American National Ins. Co., 343 U.S. 395, 401-402 \[72 S.Ct. 824, 96 L.Ed. 1027\]](#). Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. Cf. [Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 6 \[63 S.Ct. ***61 420, 87 L.Ed. 571\]](#). The purposes of the Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreements themselves. To allow the application of the Ohio **antitrust law** here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here. Federal law here created the duty upon the [*595] parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty, [Textile Workers Union v. Lincoln Mills, 353 U.S. 448 \[77 S.Ct. 912, 1 L.Ed.2d 972\]](#); and federal law sets some outside limits (not contended to be exceeded here) on what

their agreement may provide, see *Allen Bradley Co. v. Local Union*, 325 U.S. 797 [65 S.Ct. 1533, 89 L.Ed. 1939]; cf. *United States v. Employing Plasterers Assn.*, 347 U.S. 186, 190 [74 S.Ct. 452, 98 L.Ed. 618]. We believe that there is no room in this scheme for the application [***7] here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. Cf. *California v. Taylor*, 353 U.S. 553, 566-567 [77 S.Ct. 1037, 1 L.Ed.2d 1034]. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. *Hill v. Florida*, 325 U.S. 538, 542-544 [65 S.Ct. 1373, 89 L.Ed. 1782]. Cf. *International Union v. O'Brien*, 339 U.S. 454, 457 [70 S.Ct. 781, 94 L.Ed. 978]; *Amalgamated Assn. v. Wisconsin Employment Relations Board*, 340 U.S. 383 [71 S.Ct. 359, 95 L.Ed. 364, 22 A.L.R.2d 874]; *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953 [70 S.Ct. 491, 94 L.Ed. 588]. The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States. Cf. *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 307-312 [69 S.Ct. 584, 93 L.Ed. 691]. Of course, **HN3**[¹] the paramount force of the federal law remains even though it is [***8] expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress. See *Railway Employes' Dept. v. Hanson*, 351 U.S. 225, 232 [76 S.Ct. 714, 100 L.Ed. 1112]. Clearly it is immaterial that the conflict is between federal labor law and the application of what the State characterizes as an [**843] **antitrust law**. ' . . . Congress has sufficiently expressed its purpose to . . . exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade.' *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 481 [75 S.Ct. 480, 99 L.Ed. 546]. We have not here a case of a collective bargaining agreement in conflict with a local health or safety regulation; the conflict here is [*596] between the federally sanctioned agreement and state policy which seeks specifically to adjust relationships in the world of commerce. If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects, pursuant to the collective bargaining provisions of the [***9] Wagner and Taft-Hartley Acts, it is for Congress, not the States, to provide it." (Emphasis supplied.)

The owner-operators in the instant case, of course, contend that their case is distinguishable from the *Oliver* case because the subject matter of the contract affects their status as individual businessmen as it compels them to become employees of the contractors when they drive trucks for them and that as individual contractors, they are exempt from the act and that they cannot be made a party to a collective bargaining agreement. However, the identical argument was raised by the plaintiff Oliver in the *Ohio* case, *supra*. As indicated, the *Oliver* case necessarily implies that Oliver's status was immaterial and that the real issue was the subject matter of the collective bargaining agreement.

Furthermore, in the subsequent decision in the *Oliver* case at *362 U.S. 605*, the Supreme Court commented that on remand the Ohio court set aside the prior order as applied to Oliver as a lessor-driver but continued the provision order in full force and effect as it applied to Oliver as lessor-owner and employer of drivers of his equipment, the Ohio court holding that the [***10] Supreme Court decision did not preclude an injunction against enforcement of the clause insofar as it required the carriers to use their own equipment and employees before hiring extra equipment. The Supreme Court held in *International Brotherhood of Teamsters v. Oliver*, 362 U.S. 605 [80 S.Ct. 923, 4 L.Ed.2d 987] that the applicable provisions are ". . . at least as intimately bound up with the subject of wages as the minimum rental provisions we passed on then. Accordingly, as in the previous case, we hold that Ohio's **antitrust law** here may not 'be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as to which federal law directs them to bargain.'" (At p. 606.)

CA(2)[¹] (2) The owner-operator clause in the present case cannot be distinguished from that in the *Oliver* case. Thus, **HN4**[¹] as the subject matter of the contract concerns wages, hours and other terms and conditions of employment upon which federal law directs the parties to bargain, the respondent court has no [*597] jurisdiction to consider the cause. (*San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 [79 S.Ct. 773, 3 L.Ed.2d 775]; *Calise v. Superior* [**111] *Court*, 159 Cal.App.2d 126, 132 [323 P.2d 859].) The subject matter of the controversy is one which the United States Supreme Court has determined is in the area of exclusive federal jurisdiction.

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CA(3) [↑] (3) While the record indicates that the collective bargaining agreement was to expire on April 30, 1962, we are satisfied we should not treat the question as moot. The question presented is one of continuing importance to the parties in their negotiations of future contracts. This is not a situation in which the parties are no longer interested in the legal issue involved. No purpose but delay would be served by treating the question as moot and the public interest in the orderly process of collective bargaining negotiations and in the orderly administration of justice compels a determination now (*Di-Giorgio Fruit Corp. v. Department of Employment*, 56 Cal.2d 54 at 58-59 [13 Cal.Rptr. 663, f**844] 362 P.2d 487]). As a practical matter, this judgment has a direct bearing on the owner-operator provision in any new contract.

In view of the foregoing, it is ordered that a peremptory writ of prohibition issue forthwith, restraining the respondent court from hearing or taking any [***12] proceedings in superior court action No. 507496.

End of Document



Futurecraft Corp. v. Clary Corp.

Court of Appeal of California, Second Appellate District, Division One

June 29, 1962

Civ. No. 25602

Reporter

205 Cal. App. 2d 279 *; 23 Cal. Rptr. 198 **; 1962 Cal. App. LEXIS 2131 ***

FUTURECRAFT CORPORATION, Plaintiff and Appellant, v. CLARY CORPORATION et al., Defendants and Respondents

Prior History: [***1] APPEAL from a judgment of the Superior Court of Los Angeles County. William J. Palmer, Judge.

Action by a corporation against a former employee and his new employer for an injunction, damages and an accounting for alleged wrongful use and disclosure of trade secrets.

Disposition: Affirmed. Judgment for defendants affirmed.

Core Terms

trade secret, valve, formulas, manufacture, employees, patent, skill, confidential, trial court, competitors, confidence, discloses, designs, prior art, predicate, secret, confidential relationship, notice of decision, legal basis, technological, missiles, Italics, chemist, unfair

LexisNexis® Headnotes

Business & Corporate Law > ... > Duties & Liabilities > Care, Good Faith & Reasonable Skill > General Overview

HN1 [down arrow] **Duties & Liabilities, Care, Good Faith & Reasonable Skill**

See [Cal. Labor Code §§ 2856, 2859, 2860](#).

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Real Property Law > Torts > Trespass to Real Property

HN2 [down arrow] **Trade Secrets & Unfair Competition, Trade Secrets**

Whether any duty or interdiction, other than the general duties that rest upon us all, hangs over the ex-employee depends on the existence or nonexistence of either or both of two possibilities: (1) a contract yet in force in one or

more respects, and to be performed, or a new contract, or (2) an item of private property, which may be a product of the mind, belonging to the ex-employer, in respect to which the ex-employee still carries a trust responsibility, or the ownership of which, as of any other private property, commands by law the respect of, and forbids the invasion, trespass or conversion by, others than the owner.

Evidence > Inferences & Presumptions > General Overview

HN3 Evidence, Inferences & Presumptions

See [Cal. Civ. Proc. Code § 1962](#).

Real Property Law > Torts > Trespass to Real Property

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Confidentiality

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Existence & Ownership

HN4 Torts, Trespass to Real Property

Manifestly and necessarily, when we confront the claimed existence of a trade secret, and a claim that it has been misappropriated, trespassed upon or wrongly converted, we are commanded to an inquiry that is just as vital as that which looks for a confidential relationship, namely, an inquiry into the existence or nonexistence of the element of private property.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

HN5 Trade Secrets & Unfair Competition, Trade Secrets

See [Cal. Civ. Code § 983\(b\)](#).

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Patent Law > Infringement Actions > Exclusive Rights > General Overview

HN6 Trade Secrets & Unfair Competition, Trade Secrets

The patent laws of the United States delimit the only legitimate way by which one can establish a monopoly in the commercial utilization of an original mechanical idea.

Patent Law > Ownership > General Overview

Trade Secrets Law > Federal Versus State Law > Governmental Agencies

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

205 Cal. App. 2d 279, *279 23 Cal. Rptr. 198, **198 1962 Cal. App. LEXIS 2131, ***1

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Trade Secret Determination Factors > Property Rights

Trade Secrets Law > Federal Versus State Law > **Antitrust Law**

Trade Secrets Law > Federal Versus State Law > Patent Law

HN7 Patent Law, Ownership

After a person has applied for a patent from the United States Government and has complied with the law pertaining to the public disclosure of his ideas, he is hardly in a position thereafter to claim that any of the ideas so disclosed is a trade secret. If he establishes a claim of invention, he, of course, will have a right of private property as evidenced by, and to the extent granted in, the patent. Thereupon his rights of monopoly will be controlled by the patent laws, not by any equitable or legal principles applicable to the misuse of trade secrets.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

HN8 Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements

To prevent or to attempt to prevent a person from using his own learning and skill, in respect to which he is under no duty of restraint by virtue of a trust or confidence, would be so plainly an injustice and a social and economic folly, that when we have an actual or possible integration of such knowledge with knowledge or ideas encumbered by a prohibition because of their genesis in confidence, the plaintiff seeking prohibitory judgment must carry the burden of identifying and isolating the particular products of the mind in which he claims to have a right of private property.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Trade Secrets Law > Federal Versus State Law > **Antitrust Law**

Trademark Law > ... > Unfair Competition > Federal Unfair Competition Law > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

HN9 Intellectual Property, Ownership & Transfer of Rights

Ownership of a trade secret does not give the owner a monopoly in its use, but merely a proprietary right which equity protects against usurpation by unfair means.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Breach of Confidence > Confidential Relationships

HN10 [blue icon] **Types of Contracts, Covenants**

The employer thus has the burden of showing two things: (1) a legally protectable trade secret; and (2) a legal basis, either a covenant or a confidential relationship, upon which to predicate relief.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Breach of Confidence > Confidential Relationships

HN11 [blue icon] **Trade Secrets & Unfair Competition, Trade Secrets**

A basis for the protection of trade secrets is that the recipient obtains through a confidential relationship something he did not previously know.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

HN12 [blue icon] **Trade Secrets & Unfair Competition, Trade Secrets**

The court cannot compel a man who changes employers to wipe clean the slate of his memory.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Trade Secret Determination Factors > Competitive Advantage

HN13 [blue icon] **Trade Secrets & Unfair Competition, Trade Secrets**

Protection should be afforded when, and only when, the information in question has value in the sense that it affords the plaintiff (i.e., ex-employer) a competitive advantage over competitors who do not know of it (i.e., the trade secret), and where the granting of such protection will not unduly hamstring the ex-employee in the practice of his occupation or profession. This simple balancing process will invariably protect all of the pertinent interests -- those of the former employer, of the former employee, and of the public.

Trade Secrets Law > Trade Secret Determination Factors > Business Use

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Trade Secret Determination Factors > Definition Under Common Law

Trade Secrets Law > Protected Information > General Overview

HN14 [blue icon] **Trade Secret Determination Factors, Business Use**

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

205 Cal. App. 2d 279, *279 23 Cal. Rptr. 198, **198 1962 Cal. App. LEXIS 2131, ***1

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Trade Secret Determination Factors > Definition Under Common Law

Trade Secrets Law > Trade Secret Determination Factors > General Overview

HN15 [] Trade Secrets & Unfair Competition, Trade Secrets

An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Protected Information > Know-How

HN16 [] Trade Secrets & Unfair Competition, Trade Secrets

The character of the secrets, if peculiar and important to the business, is not material; but it must, as the term implies, be kept secret by the one who creates it.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

HN17 [] Trade Secrets & Unfair Competition, Trade Secrets

Matters which are completely disclosed by the goods which one markets cannot be his secret.

Trade Secrets Law > Trade Secret Determination Factors > Novelty

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Patent Law > Anticipation & Novelty > Elements

Trade Secrets Law > Trade Secret Determination Factors > Prior Art

Trade Secrets Law > Federal Versus State Law > **Antitrust Law**

Trade Secrets Law > Federal Versus State Law > Patent Law

Trade Secrets Law > Misappropriation Actions > Independent Development

HN18 [] Trade Secret Determination Factors, Novelty

A trade secret may be a device or process which is patentable; but it need not be that. It may be a device or process which is clearly anticipated in the prior art or one which is merely a mechanical improvement that a good mechanic can make. Novelty and invention are not requisite for a trade secret as they are for patentability.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

HN19 [] **Trade Secrets & Unfair Competition, Trade Secrets**

Absent a situation where the device or process is so widely known as to be within the public domain, it is clear that prior art will not be a defense where there is a breach of confidence.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN20 [] **Reviewability of Lower Court Decisions, Preservation for Review**

The mandate of Cal. Civ. Proc. Code § 632 is that the statement of facts found shall fairly disclose the court's determination of all issues of fact in the case.

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1a) [] (1a) **CA(1b)** [] (1b)

Injunctions—Matters Controllable—Trade Secrets.

--An employer is not entitled to an injunction restraining a former employee from using in his new employment knowledge and skill which he had gained prior to his former employment and which did not originate with his former employer but which he had utilized in developing certain products for such employer, since the courts cannot compel a man who changes employers to wipe clean the slate of his memory.

CA(2) [] (2)

Id.—Matters Controllable—Trade Secrets.

--A basis for the protection of trade secrets is that the recipient obtains through a confidential relationship something he did not previously know.

CA(3) [] (3)

Master and Servant — Mutual Duties and Rights — Trade Secrets.

--A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

CA(4) [] (4)

Id.—Mutual Duties and Rights—Trade Secrets.

--In determining whether given information is a trade secret, the court may consider the extent to which the information is known outside the business, the extent to which it is known by employees and others involved in the business, the extent of the measures taken to guard the secrecy of the information, the value of the information to the business and to its competitors, the amount of effort or money expended in developing the information, and the ease or difficulty with which the information could be properly acquired or duplicated by others.

CA(5a) [] (5a) **CA(5b)** [] (5b)

Injunctions—Matters Controllable—Trade Secrets.

--In an action to enjoin the wrongful use and disclosure by a former employee of alleged trade secrets consisting of the design features of certain valves, there was no breach of confidence where it appeared that the alleged trade secrets were completely disclosed in each valve that was sold.

CA(6) [] (6)

Master and Servant — Mutual Duties and Rights — Trade Secrets.

--Matters that are completely disclosed by the goods that one markets cannot be his secret.

CA(7) [] (7)

Injunctions — Matters Controllable — Trade Secrets.

--In an action to enjoin the wrongful use and disclosure by plaintiff's former employee of alleged trade secrets consisting of the design features of certain valves, the prior art of valve manufacture was a defense to plaintiff's claim of exclusive ownership of the alleged trade secrets where there was no breach of confidence, the employee having entered plaintiff's employ carrying with him a good deal of the art, science and mechanics of valve design and manufacture, and a good deal of skill in the application of that knowledge.

CA(8) [] (8)

Id.—Matters Controllable—Trade Secrets.

--In an action to enjoin the wrongful use and disclosure by plaintiff's former employee of alleged trade secrets consisting of the design features of certain valves, the court did not fail to find on the issue of whether the former employee orally agreed not to make competitive use of a certain valve design where the court did find that the former employee, after terminating his employment with plaintiff, neither carried any trust responsibility nor owed any obligation to plaintiff with respect to any of the valve designs involved, and that no contractual relation existed between the former employee and plaintiff after termination of the employment.

CA(9) [] (9)

Id.—Matters Controllable — Trade Secrets — Evidence.

--In an action to enjoin the wrongful use and disclosure by plaintiff's former employee of alleged trade secrets, the trial court's determination that there was no agreement between plaintiff and the former employee under which the latter promised not to make competitive use of the trade secrets involved was supported by the testimony of the

former employee and another employee of plaintiff who was allegedly present when the agreement was made that nothing was said by the former employee at that time as to such an agreement.

Counsel: Gibson, Dunn & Crutcher, Julian O. von Kalinowski and Charles H. Phillips for Plaintiff and Appellant.

Lyon & Lyon, Lewis E. Lyon, R. Douglas Lyon, Whyte & Schiffferman, John Whyte and Robert P. Schiffferman for Defendants and Respondents.

Judges: Fourt, J. Wood, P. J., and Lillie, J., concurred.

Opinion by: FOURT

Opinion

[*281] [**199] This is an unfair competition action brought by Futurecraft Corporation (hereinafter referred to as Futurecraft) for an injunction, damages and an accounting against a former employee, Roderick Koutnik (hereinafter referred to as Koutnik) and Koutnik's new employer, Clary Corporation (hereinafter referred to as Clary), for the wrongful use and disclosure of certain valve designs claimed to be confidential to and the trade secrets of Futurecraft. Futurecraft appeals from a judgment in favor of both defendants entered by the court [**2] below after a trial limited by that court to the following issue: "What, if any, trade secret, embraced within the issues as established by the pleadings, stipulations and pretrial order, became entrusted to the [**200] defendant Roderick Koutnik while he was an employee of the plaintiff?" (Emphasis added.)

The trial of the matter was protracted, extending over a period of 14 weeks, and the reporter's transcript of the proceeding is over 5,200 pages.

On February 23, 1960, the trial judge filed his notice (i.e., memorandum) of decision.¹ [***3] The findings of fact and conclusions [**204] of law,² [***4] and judgment,³ were filed August 8, 1960.

¹ The trial court's memorandum provides in part as follows:

"III

"The first subject to which I address my attention is chosen for priority in order not because it has basic significance, although it has, but only because it can, I think, be disposed of most easily.

"I recognize the fiduciary relationship that exists between an employee and his employer. No conversation between the parties, specifically dwelling upon the subject, was necessary to establish that relationship and the incident duties, they being created and defined by the law. Section 2322 of our Civil Code, being part of an article on the 'authority of agents,' states that '[an] authority expressed in general terms, however broad, does not authorize an agent: . . . 3 To do any act which a trustee is forbidden to do by article two, chapter one, of the last title.' This provision directs us back to the cleanly cut statutory delineation of the 'Obligations of Trustees' found in sections 2228-2239 of the same code.

"These statutes are supplemented by the Labor Code, wherein, in [section 2856](#), the Legislature has decreed as follows:

HN1 [↑] "[§ 2856](#). [Compliance with employer's directions.] An employee shall substantially comply with all the directions of his employer concerning the service on which he is engaged, except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee."

"" [§ 2859](#). [Use of skill possessed.] An employee is always bound to use such skill as he possesses, so far as the same is required, for the service specified.'

"" [§ 2860](#). Ownership of things acquired by virtue of employment. Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment.'

Before making any reference to the facts it will be helpful to bring the problems presented **[**206]** into sharp focus. Plaintiff's case does *not* involve a claim of a trade secret alleged to exist in the know-how; nor the process under

"As pointed out in *Burns v. Clark*, 133 Cal. 634 [66 P. 12, 85 Am. St. Rep. 233], a key phrase in section 2860 is the phrase 'by virtue of his employment.'

"A statement of the law on this subject, law which is really quite elementary, appears in 2 California Jurisprudence 2d at pages 769-774; and having satisfied myself of the fairness and reliability of the statement, I have no hesitancy in citing it as a short-cut to an abundance of precedent.

"In relation to all the foregoing, however, we must have in mind that the relationship and duties of an employee to his employer are one matter, and the duty, if any, of an ex-employee to an ex-employer is quite another.

HN2 "Whether any duty or interdiction, other than the general duties that rest upon us all, hangs over the ex-employee depends on the existence or nonexistence of either or both of two possibilities: (1) a contract yet in force in one or more respects, and to be performed, or a new contract, or (2) an item of private property, which may be a product of the mind, belonging to the ex-employer, in respect to which the ex-employee still carries a trust responsibility, or the ownership of which, as of any other private property, commands by law the respect of, and forbids the invasion, trespass or conversion by, others than the owner. . . .

"IV

". . . I refer to the proposition [i.e., urged by plaintiff's counsel] that by virtue of section 1962, subdivision 2, of the Code of Civil Procedure, the defendant Koutnik is forever bound by recitals contained in the verification of the patent application, Plaintiff's Exhibit 35, and is now estopped to deny the originality, as of the date of that application, of the inventions and the claims in respect thereto stated in the application.

"The pertinent part of section 1962, Code of Civil Procedure, reads as follows:

"" § 1962. [Presumptions; conclusive]. Specification of Conclusive Presumptions. The following presumptions, and no others, are deemed conclusive:

". . . .

HN3 "2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration;"

"In the verification to the patent application, Koutnik and Piet made these statements among others not pertinent here:

". . . that we have read the foregoing specification and claims and we verily believe we are the original, first and joint inventors of the invention or discovery in High Pressure Valve Mechanism described and claimed therein; that we do not know and do not believe that this invention was ever known or used before our invention or discovery thereof, or patented or described in any printed publication in any country before our invention or discovery thereof, or more than one year prior to this application . . ."

"It seems clear to me that the intended effect of Code of Civil Procedure, section 1962, subdivision 2, is a limited effect, and that the presumption applies conclusively only when it is relevant to a controversy that questions 'the obligations or liabilities of the contracting parties' or 'their successors in interest' under the 'written instrument' in which the recitals appeared. I say frankly that I know of no California case stating explicitly what I just have said, but a like view, I believe, is implied or insinuated in:

" Gas Appliance Sales Co., Inc. v. W. B. Bastian Manufacturing Co., 87 Cal.App. 301, 306 [262 P. 452];

" Taylor v. Lundblade, 43 Cal.App.2d 638, 640 [111 P.2d 344];

" Rhine v. Ellen, 36 Cal. 362.

which the valves were made; nor any machine; nor the tools used in the process of manufacture of the valve. This

"The instant action involves no question concerning the liabilities or obligations of the parties under and/or by virtue of the patent application, Exhibit 35, the verification thereof or the assignment to Futurecraft Corporation, and this action is not in any of its causes founded on or claimed to derive from any of or all such instruments.

". . . .

"Exhibit 35 is, of course, in evidence, and I would say rather conspicuously so. I do not deny or question its place in evidence for all pertinent and reasonable purposes and inferences, not all of which are favorable to plaintiff, but I do . . . refuse to set up a *conclusive* presumption or an estoppel against other relevant evidence, as requested and urged by the plaintiff. [Emphasis shown.]

"V

". . . a theme that has been intoned by plaintiff throughout this litigation . . . [is] that the one all-important, basic and critical question in this case, and in any similar case, is whether or not the employee, while in the confidential relationship of servant to his master, received ideas or knowledge from his employer, or through his employment, which, since the end of the employment, he has used to his own advantage and/or to the injury of the former employer.

"This theory . . . has been encouraged by the much quoted detached words of Mr. Justice Holmes in [E. I. Du Pont De Nemours Powder Co. v. Masland, 244 U.S. 100, 102 \[37 S.Ct. 575, 61 L.Ed. 1016\]](#), quoted on page 16 of plaintiff's trial brief:

"Whether the plaintiffs have any valuable secret or not, the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be.'

"We find a similarly isolated statement on page 4 of plaintiff's trial brief, taken from [Fairchild Engine and Airplane Corp. v. Cox, 50 N.Y.S.2d 643, 657 . . .](#):

"Concededly, the field [of prior art] was not entirely virgin. But the plaintiffs' expenditures [sic] of time and money brought results not reached by others. Once we conclude that the work done under Cox's supervision was confidential, and that Cox threatens to breach the confidence, all else is of subordinate importance.'

"The most clarifying way to deal with this theory that confidence is paramount and all else is subordinate is, I believe, by *reductio ad absurdum*. . . .

". . . .

HN4[] "Manifestly and necessarily, when we confront the claimed existence of a trade secret, and a claim that it has been misappropriated, trespassed upon or wrongly converted, we are commanded to an inquiry that is just as vital as that which looks for a confidential relationship, namely, an inquiry into the existence or nonexistence of the element of private property.

". . . .

"California by numerous judicial decisions and by statute long has recognized private property in products of the mind. Examples of the recognition are the following:

"[Civil Code, section 980, subdivision \(b\):](#)

"The inventor or proprietor of any invention or design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the invention or design and the representations or expressions thereof made by him remain in his possession.'

"[Civil Code, section 983, subdivision \(b\):](#)

"If the owner of any invention or design intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this State is concerned.'

"[Civil Code, section 984:](#)

"If the owner of an invention or design does not make it public, any other person subsequently and originally producing the same thing has the same right therein as the prior inventor, which is exclusive to the same extent against all persons except the prior inventor, or those claiming under him.'

is not a know-how case or a case arising out of alleged trade secrets which underlie the manufacture of the valves in issue. Nor does plaintiff complain of any improper disclosure by Koutnik of assertedly confidential information while he was in the employ of plaintiff. The basis of plaintiff's claim for relief is, as set forth in the opening brief, "(1)

"Hence we are not engaged in mere psychic phenomena or pure speculation or the pursuit of mystery when we inquire whether Mr. Koutnik, when he left the employ of plaintiff, carried with him any knowledge or ideas which then were and still are the private property of the plaintiff.

"VI

". . . at least certain of the so-called trade secrets claimed by plaintiff are now, and long have been, in the public domain, or if in any instance, the private property of anyone, then the property of someone other than plaintiff.

"In its courageous effort to efface competition from the defendants by the theory of being exclusive owner of certain trade secrets, plaintiff has confronted three distinct and formidable factual barriers: (1) *Its own sales of its valves in the market that exists for such products, and its sales and promotional efforts and methods, including public displays (meaning, in this case, of course, displays for that part of the public interested in such products).* [Emphasis added.] (2) The prior art, the previously known, published and utilized ideas, principles, devices and methods in valve manufacture. (3) The filing by plaintiff of an application for patent, Plaintiff's Exhibit 35, and the incidental necessary disclosure to the public of all those ideas and features claimed to be secret.

"Although our California statutes defining property rights in products of the mind ([Civ. Code, §§ 980- 985](#)) are not expressly related to the subject of trade secrets, they must be respected as expressions of California's legislative theory, policy and decision. [Civil Code, section 983, subdivision \(b\)](#), not only specifically states a significant principle, but it is freighted with connotations not to be ignored. It says:

[HN5](#) "If the owner of any invention or design intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this State is concerned.'

"The fact that the structure or configuration of a valve is not obvious to external observation or examination is of no significance in a market such as we deal with here. We cannot know the recipe for a jar of jam, either, just from looking at it. As the evidence conclusively has proved, it is no 'trick,' but only a matter of some labor and time, for an engineer or a machinist to cut open a valve and see in bare display all the details of its configuration. *Every time a valve was sold, all the 'secrets' in its design were transmitted to the purchaser, who then was empowered to transmit them to others as he wished or willed.* [Emphasis added.]

"Counsel for defendants have laid a good deal of stress upon the fact -- and it is a fact -- that plaintiff made numerous sales of its valves without imposing or attempting to impose any restriction upon the purchaser as to the use to which the valves might be put or the disposition the purchaser might make of them. It is evident to me that I do not attach so much importance to so-called proprietary notices and notices of restrictive use as counsel for defendants possibly do, and as counsel for plaintiff certainly do.

"I recognize, of course, that as between A, a manufacturer and prospective seller, and B, a prospective or actual buyer, any kind of a lawful agreement they wish to, and do, make will be binding upon them . . . But the effect of this private agreement upon others not privy to it, upon the public, and upon a secret or so-called secret, is quite a different matter . . . And I am not convinced that in the commercial world one can preserve a trade secret by the simple device of telling all to whom he reveals it that he claims it to be a secret and his private property.

"I agree with Mr. Lyon that **[HN6](#)** the patent laws of the United States delimit the only legitimate way by which one can establish a monopoly in the commercial utilization of an original mechanical idea. Were we judicially to authorize the creation of a monopoly by the simple and easy method of attaching 'proprietary' and restrictive notices to products and to the drawings, sales literature, invoices, bills of sale and other papers used in selling and trying to sell them, we would circumvent the patent law and negate the antitrust laws, two chapters of jurisprudence firmly embedded in the public policy of our commonwealth.

"VII

"Facing the prior art in the field of valve manufacture, plaintiff is in the unenviable position of being required to depose or disparage, if he is to surmount the revelation of the evidence, the very doctrine that he must mightily uphold to obtain the relief he seeks or any valuable relief. I refer to the doctrine of equivalence. Plaintiff's own expert witness, Mr. Gregg, utilized and expounded the doctrine. And defendants' expert witness, Mr. Doble, made equally sincere and effective use of the doctrine in displaying the prior art.

that the various *design features* are protectable trade secrets, as such, and (2) that, at any rate, Koutnik had

"I do not mean to imply that the doctrine of equivalence is needed to give relevant meaning to every fact and record produced at the trial from the storehouse of knowledge relative to valve manufacture. Indeed, in many details no translation or interpretation through functional analogy is required.

"But the doctrine of equivalence is vital to plaintiff's case. It might be called the heart of plaintiff's cause of action, if plaintiff has any cause of action.

"The pleadings and statements of counsel and certain of the evidence have made clear to the court that *plaintiff does not contend that either defendant has produced, or threatens to produce, a valve having the exact configuration of any of plaintiff's valves. It is equally clear that plaintiff does not seek injunctive relief which merely would restrain defendants from producing a valve exactly like any of plaintiff's valves. Not only does plaintiff pray for an injunction that would make full play of the doctrine of equivalence, but anything less would be of no value to it.* [Emphasis added.]

"If we were to ask a dozen learned and skillful valve engineers each to work independently of the other, each to avail himself of all accumulated and recorded knowledge of the valve art, and each to design a valve to accomplish a specific function, the probability is that no two of them would produce precisely the same configuration. The point is, as plaintiff well knows and as its pleadings, prayer, evidence and argument all indicate, a valve manufacturer has no advantage over his competitor simply in having a unique configuration, a unique way in which he arranges and uses the commonly held or available knowledge, ideas and mechanical principles relating to the art.

"The court has no choice but to recognize and respect the full significance of the doctrine of equivalence, and doing so, it finds in the prior art, not necessarily alone, but certainly in conjunction with other relevant factors, formidable opposition to plaintiff's claim of private property in the ideas which it seeks to have defendants enjoined from using.

"VIII

HNT "After a person has applied for a patent from the United States Government and has complied with the law pertaining to the public disclosure of his ideas, he is hardly in a position thereafter to claim that any of the ideas so disclosed is a trade secret. If he establishes a claim of invention, he, of course, will have a right of private property as evidenced by, and to the extent granted in, the patent. Thereupon his rights of monopoly will be controlled by the patent laws, not by any equitable or legal principles applicable to the misuse of trade secrets.

"As stated in *Speaker v. Shaler Co., 87 F.2d 985,* (Circuit Court of Appeals, Seventh Circuit; certiorari denied, **301 U.S. 695 [57 S.Ct. 923, 81 L.Ed. 1350]**) concerning the filing of an application for patent:

"The contents thereof were disclosed to the world by filing it [the application] in the patent office. Nothing therein could have remained confidential or secret.'

"....

"IX

"Uncontradicted evidence establishes the fact that when Rodrick [sic] Koutnik entered the employ of plaintiff, he carried with him a good deal of knowledge concerning the art, science and mechanics of valve design and manufacture, and a good deal of skill in the application of that knowledge. We, of course, cannot know precisely what ideas, theories and facts then were lodged in his own brain.

"Much, probably most, of that knowledge had been acquired at the Jet Propulsion Laboratory of the California Institute of Technology, where many young engineers have received not only a theoretical, but an extraordinarily practical, 'post-graduate course.' It is reasonable to conclude that the learning there imbibed by Koutnik was supplemented by his own independent studies and thinking and possibly by contacts and association with engineers from other institutions.

"It would be impossible for me, as I am sure it would for any counsel in the case, to draw a boundary line between the knowledge carried by Koutnik into his employment by plaintiff and any additional knowledge or ideas he may have acquired by virtue of that employment. Indeed, no such boundary line exists, for as new knowledge is acquired it integrates itself with the old. We deal here with a sum total of ideas, theories, facts, principles and skills that we know not how to divide, assuming that a part is attributable to Koutnik's employment by plaintiff.

"*To grant plaintiff the relief requested, or any remedy that would be of value to it, would necessitate enjoining Koutnik from the use of knowledge, a good deal of which certainly is his own or belongs to the public domain, gained by him through his own*

expressly agreed [***5] that he would not utilize these designs (and particularly the paragraph V design) in
industry and intellectual faculties, independently of any association with plaintiff, and inextricably interlaced with any knowledge he may have acquired through his employment by plaintiff. [Emphasis added.]

HN8[↑] "To prevent or to attempt to prevent a person from using his own learning and skill, in respect to which he is under no duty of restraint by virtue of a trust or confidence, would be so plainly an injustice and a social and economic folly, that when we have an actual or possible integration of such knowledge with knowledge or ideas encumbered by a prohibition because of their genesis in confidence, the plaintiff seeking prohibitory judgment must carry the burden of identifying and isolating the particular products of the mind in which he claims to have a right of private property.

"X

"For reasons indicated, I conclude that plaintiff is not entitled to take anything by this action.

". . . ."

² The findings of fact and conclusions of law are in pertinent part as follows:

"Findings of Fact

"1. At no time during the course of his employment by Futurecraft did Koutnik in any way violate the fiduciary relationship which existed between him and Futurecraft because of such employment nor did he do any act which a trustee is forbidden to do under the laws of this state.

"2. When Koutnik reentered the employ of Futurecraft on or about January 31, 1953, said date being not less than five months prior to the development or designing, or the alleged conception or invention, by Futurecraft of any of the valves or valve components referred to in Paragraphs V, VI, VII and IX of the first cause of action of the complaint, Koutnik brought with him much, if not most, of the knowledge and skill concerning the art, science and mechanics of valve design and manufacture which he utilized in designing and developing, or participating in the design or development of, the valves or valve components referred to in Paragraphs V, VI and VII of the first cause of action of the complaint, or which he utilized in designing or developing, or participating in the design or development of, certain progenitors of the valve referred to in Paragraph IX of said cause of action. If Koutnik acquired any part of said knowledge or skill by virtue of his employment by Futurecraft, then plaintiff has not sustained the burden of identifying or isolating that part of said knowledge or skill so acquired. In this connection, during the course of his employment by Futurecraft Koutnik had no knowledge of the design or internal arrangement of the parts of, or the materials used in, the valve referred to in Paragraph IX of the first cause of action of the complaint, and all of the allegations contained in the third sentence of Paragraph IX of said cause of action are untrue.

"3. None of the matters or things allegedly confidential to Futurecraft, as set forth in Paragraphs V, VI, VII and IX of the first cause of action of the complaint and in Answers 4, 8, 34, 57, 104 and 108 of Futurecraft's answers to Clary's interrogatories, is or ever was owned by, or confidential to, or the private property or a trade secret of, Futurecraft. In this connection all of the allegations contained in the third sentence of Paragraph V and in the fourth sentence of Paragraph VI, of Paragraph VII, and of Paragraph IX of the first cause of action of the complaint are untrue.

"4. Each and all of the matters and things hereinabove referred to in Paragraph 3 was in the public domain or a matter of public knowledge or of general knowledge in the trade or industry concerned with the design or manufacture of valves or valve components before any of said matters or things was assertedly conceived, invented, designed or developed by Futurecraft, or in any event before Koutnik terminated his employment at Futurecraft on or about March 17, 1956.

"5. Each and all of the matters and things hereinabove referred to in Paragraph 3 was known in the art relating to the design or manufacture of valves or valve components, that is to say, was known through patents or applications therefor or through published or utilized materials, ideas, principles, devices or methods relating to such art, before any of said matters or things was assertedly conceived, invented, designed or developed by Futurecraft. In this connection all of the allegations contained in the fourth affirmative defense appearing in the respective answers of Koutnik and Clary are true.

"6. If any matter or thing hereinabove referred to in Paragraph 3 was ever confidential to, or a trade secret of, Futurecraft, every element of confidence or secrecy with respect thereto was made public knowledge, or in any event was lost to Futurecraft, either through deliveries or sales by Futurecraft to its customers or prospective customers of the valves and valve components referred to in Paragraphs V, VI, VII and IX of the first cause of action of the complaint, or through some action taken by the customer or prospective customer subsequent to such sale or delivery, or through drawings showing the internal arrangement of the parts and the design of such valves and valve components delivered by Futurecraft to said customers or prospective customers. Said sales or deliveries commenced in or about September 1953 and have continued to a date not earlier than June 1958. Many of the sales and deliveries of each type of valve and valve component mentioned in said Paragraphs V, VI, VII and IX were made

competition with Futurecraft." (Emphasis added.)

by Futurecraft without imposing, or seeking to impose, any restriction or limitation upon the purchaser or recipient thereof with reference to the use to which such valve or valve component could be put or the disposition which the purchaser or recipient could make of the same. In this connection, with certain exceptions the purchasers and/or recipients of said valves, valve components and/or drawings do not stand in any confidential or fiduciary relation toward Futurecraft with reference to any matter or thing disclosed by said valves, valve components or drawings.

"7. Each and all of the matters and things alleged to be confidential to Futurecraft with regard to each of the valves and valve components referred to in Paragraphs V, VI, VII and IX of the first cause of action of the complaint were contained in, and were easily ascertainable from, the valves and valve components so sold and/or delivered as hereinabove mentioned in Paragraph 6.

"8. Each and all of the valves and valve components which were sold by Futurecraft, as hereinabove referred to in Paragraph 6, were sold with Futurecraft's knowledge that the same were purchased by the customer for resale by said customer.

"9. The form of proprietary notice placed by Futurecraft upon certain of its drawings of the valves and valve components referred to in Paragraphs V, VI, VII and IX of the first cause of action of the complaint was not intended by Futurecraft to impose, nor did it impose, any restriction or limitation upon any customer or prospective customer of Futurecraft, or any ultimate customer or prospective customer of any such valve or valve component, with regard to the use to which such valve or valve component could be put or the disposition which the customer or prospective customer could make of the same.

"10. As early as September 1953, Futurecraft publicly sold, without any restriction whatsoever, valves of the type referred to in Paragraph V of the first cause of action of the complaint.

"11. As early as April 1954, Futurecraft publicly sold, without any restriction whatsoever, valve components of the type referred to in Paragraph VI of the first cause of action of the complaint.

"12. As early as December 1957, and thereafter Futurecraft publicly sold, without any restrictions whatsoever, valve components of the type referred to in Paragraph VII of the first cause of action of the complaint.

"13. As early as August 1956, Futurecraft publicly sold, without any restriction whatsoever, valves of the type referred to in Paragraph IX of the first cause of action of the complaint.

"14. After terminating his employment with Futurecraft on or about March 17, 1956, Koutnik neither carried any trust responsibility nor owed any obligation to Futurecraft with reference to any of the valves or valve components mentioned in Paragraphs V, VI, VII and IX of the first cause of action of the complaint or any of the matters or things allegedly confidential to Futurecraft with respect to said valves or valve components, nor did any contractual relation exist between Koutnik and Futurecraft at any time after such termination of employment.

"15. No controversy now exists or ever did exist, between Futurecraft, on the one hand, and Koutnik or Clary, or either of them, on the other, concerning the rights, obligations or liabilities of any party to this action under or by virtue of any portion or claim of, or any amendment to, the application for United States Letters Patent, No. 508,444, or the assignment to Futurecraft of the invention described in said application, which said application and assignment are referred to in Paragraph V of the first cause of action of the complaint; and nothing in said application or assignment prevents Koutnik or Clary from establishing the source of the disclosure in said patent application or the lack of secrecy with respect to said disclosure.

"16. If any matter or thing contained in the application for United States Letters Patent, No. 508,444, mentioned in Paragraph V of the first cause of action of the complaint, or in the application for United States Letters Patent, No. 632,828, mentioned in Paragraph IX of said cause of action, or any amendment to either of said applications, was ever confidential to, or a trade secret of, Futurecraft, Futurecraft elected by sale of valves embodying the disclosure of said applications and the filing of said applications and by taking advantage of the provisions of 35 U.S.C. § 102, to rely upon the patent laws of the United States and is precluded from asserting that the subject matter of said applications, or either of them, constitute a trade secret.

"From the foregoing findings of fact the court draws the following:

"Conclusions of Law

"The court concludes:

"1. In all respects as set forth in the foregoing findings of fact.

"2. Said findings having been made upon issues which are determinative of the cause, any further finding or findings upon issues other than those embraced in the foregoing findings would be immaterial and are not made for that reason.

[*282] Futurecraft and Clary are, and since at least 1953 or early 1954 have been, competitors in the design, manufacture and sale of valves and valve components for guided missiles and rockets for the defense program of the United States. Koutnik was employed by Futurecraft during three separate periods (part-time from 1949 to 1951, and full-time from July 1, 1951, to April 25, 1952, and from January 31, 1953, to March 17, 1956) for the purpose of inventing, designing and developing such valves and valve components.

Koutnik had been employed by the California Institute of Technology at its Jet Propulsion Laboratory from September 15, 1947, to May 11, 1951, and from April 28, 1952, to January 25, 1953.

The trial court stated in his memorandum of decision (footnote 1, par. IX) that when Koutnik entered the employ of Futurecraft, " [*207] he carried with him a good deal of knowledge concerning the art, science and mechanics of valve design and manufacture, and a good deal of skill in the application of that knowledge . . . [and that] [much], [*6] probably most, of that knowledge had been acquired at the Jet Propulsion Laboratory of the California Institute of Technology. . . ." (See finding 2, footnote 2.)

The particular valve designs forming the subject matter of this action are described in paragraphs V, VI, VII and IX of the first amended and supplemental complaint as amended. Essentially these consist of two types of valve mechanisms. The so-called paragraph V valve is a high-pressure valve mechanism embodying an arrangement of resilient entrapped O-rings, annular shoulders and stop means. It is used in the propellant system of rockets and guided missiles. The paragraph IX valve is an adjustable pressure regulator valve in combination with a pressure relief valve. The paragraphs VI and VII mechanisms are modifications of the basic paragraph V valve. Plaintiff had filed patent applications on certain features of its paragraph V and IX valves, both of which applications were still pending at the time judgment was entered below.⁴ The information alleged by Futurecraft to be confidential to it consists of a number of specific design features of the respective valves.

[***7] It was stipulated that the valves which are the subject of the action are sold by plaintiff to rocket and missile contractors and subcontractors of the United States government [*283] for use in, or in conjunction with, rockets, missiles and airplanes and/or components thereof, and that the government has been the ultimate purchaser of these items.

All of the parties to this action have presented scholarly dissertations on the law of trade secrets -- what a trade secret is and the tests which should be utilized to ascertain whether a trade secret exists.

It is appropriately stated in appellant's opening brief:

". . . this Court will be presented with two basically divergent approaches, or viewpoints, on this definitional problem. The defendants successfully urged the trial court to adopt a rigidly narrow and absolutist view, based upon a concept that a trade secret must be 'an item of private property' and that one can have no 'property rights' in an idea if someone else -- anyone else -- knows about it.

"In contrast to defendants' property rights concept, plaintiff urged below and urges here a more realistic, equitable and common sense approach (which is widely accepted [*8] and applied in other jurisdictions), based upon the Restatement view that a trade secret may consist of anything which is '. . . used in one's business, and which gives him an opportunity to obtain an advantage over *competitors who do not know or use it . . .*' (Emphasis added.) *Rest., Torts, § 757, Comment b.*"

"3. Defendants, and each of them, are entitled to judgment that plaintiff take nothing and that its first amended complaint, as amended, be dismissed, and that defendants recover their costs herein incurred."

³ The judgment provides in part as follows:

"It Is Ordered, Adjudged and Decreed that plaintiff take nothing and that its first amended complaint, as amended, be dismissed, and that defendants recover their costs herein incurred in the sum of \$ ____."

⁴ The patent application on certain features of the paragraph V valve subsequently resulted in the issuance of a patent on February 7, 1961.

CA(1a) [↑] (1a) Before turning to the "definitional problem" of what constitutes a trade secret, it is well to mention a basic underlying problem, namely, the legal basis upon which plaintiff predicates its right to relief. This problem stems from the fact that **HN9** [↑] ownership of a trade secret does not give the owner a monopoly in its use, but merely a proprietary right which equity protects against usurpation by unfair means. (See *Wexler v. Greenberg*, 399 Pa. 569 [160 A.2d 430]; 1 Nims, Unfair Competition and Trade-Marks (4th ed. 1947) § 141 et seq.; 2 Callman, Unfair Competition and Trade-Marks (2d ed. 1950) § 51 et seq.; Ellis, Trade Secrets (1953) § 1. See also Restatement, Torts, § 757, com. (a).) It is stated by Justice Musmanno in Spring Steels, Inc. v. Molloy, 400 Pa. 354 [162 A.2d 370, 374] quoting from *Wexler v. Greenberg*, supra, 160 A.2d 430, 434, [***9] that:

". . . **HN10** [↑] The employer thus has the burden of showing two things: (1) a legally **[**208]** protectable trade secret; and (2) a *legal basis*, either a covenant or a confidential relationship, *upon which to predicate relief.*" (Emphasis added.)

The case of *Wexler v. Greenberg*, supra, 160 A.2d 430, deals primarily with the "legal basis . . . upon which to predicate **[*284]** relief" problem. In many respects the *Wexler* case aptly illustrates the situation presented in the case at bar.

In *Wexler*, defendant Greenberg was a qualified chemist in the sanitation and maintenance field. In March of 1949 he was employed by plaintiff as its chief chemist and continued there for approximately eight years. In the performance of his duties he spent approximately half of his working time in plaintiff's laboratory where he would analyze and duplicate competitor's products and then use the resulting information to develop various new formulas. In August 1957 defendant Greenberg left plaintiff and went to work for defendant corporation. Plaintiff sought to enjoin the defendants from disclosing and using certain formulas and processes pertaining to the manufacture **[***10]** of certain sanitation and maintenance chemicals which plaintiff claimed to be its trade secrets. The Chancellor found that the formulas constituted trade secrets and that their appropriation was in violation of the duty that Greenberg owed to plaintiff by virtue of his employment and the trust reposed in him.

The Supreme Court of Pennsylvania assumed that certain of the formulas were trade secrets of the plaintiff but reversed and stated in pertinent part as follows:

"[2] We are initially concerned with the fact that the final formulations claimed to be trade secrets were not *disclosed to Greenberg by the appellees during his service or because of his position.* [Italics shown.] Rather, the fact is that these formulas had been developed by Greenberg himself, while in the pursuit of his duties as Buckingham's [i.e., plaintiff] chief chemist, or under Greenberg's direct supervision. We are thus faced with the problem of determining the extent to which a former employer, *without the aid of any express covenant* [italics shown], can restrict his ex-employee, a highly skilled chemist, in the uses to which this employee can put his knowledge of formulas and methods he **[***11]** himself developed during the course of his former employment because this employer claims these same formulas, as against the rest of the world, as his trade secrets. *This problem becomes particularly significant when one recognizes that Greenberg's situation is not uncommon. In this era of electronic, chemical, missile and atomic development, many skilled technicians and expert employees are currently in the process of developing potential trade secrets. Competition for personnel of this caliber is exceptionally keen, and the interchange of employment is commonplace.* One has but to reach for his daily newspaper **[*285]** to appreciate the current market for such skilled employees. *We must therefore be particularly mindful of any effect our decision in this case might have in disrupting this pattern of employee mobility, both in view of possible restraints upon an individual in the pursuit of his livelihood and the harm to the public in general in forestalling to any extent widespread technological advances.*" (P. 433.) (Emphasis added.)

The court, after noting the fact that there was no covenant between Buckingham and Greenberg and, as indicated above, having assumed **[***12]** that some of the formulas were trade secrets of Buckingham, stated:

". . . The sole issue for us to decide, therefore, is whether or not a confidential relationship existed between Greenberg and Buckingham binding Greenberg to a duty of nondisclosure.

"The usual situation involving misappropriation of trade secrets in violation of a confidential relationship is one in which an employer *discloses to his employee* a pre-existing trade secret (one already developed or formulated) so that the employee may duly perform his work. [Italics shown.] [Footnote reference to the following citations: *Morgan's Home Equipment* [**209] *Corp. v. Martucci* (1957) 390 Pa. 618 [136 A.2d 838]; *MacBeth-Evans Glass Co. v. Schnelbach* (1913) 239 Pa. 76 [86 A. 688]. Cf. *Pittsburgh Cut Wire Co. v. Sufrin* (1944) 350 Pa. 31 [38 A.2d 33]; *Belmont Laboratories v. Heist* (1930) 300 Pa. 542 [151 A. 15]; *Pressed Steel Car Co. v. Standard Steel Car Co.* (1904) 210 Pa. 464 [60 A. 4]; *Witherow Steel Corp. v. Donner Steel Co.* (D.C.W.D.N.Y. 1929) 31 F.2d 157; *Philadelphia Extracting Co. v. Keystone Extracting Co.* (C.C.E.D. Pa. 1910) 176 F. 830; [***13] *Junker v. Plummer* (1946) 320 Mass. 76 [67 N.E.2d 667, 167 A.L.R. 1449]; *Aronson v. Orlov* (1917) 228 Mass. 1 [116 N.E. 951]; *Cincinnati Bell Foundry v. Dodds* (1887) 10 Ohio Dec. Reprint 154; *Colonial Laundries v. Henry* (1927) 48 R.I. 332 [138 A. 47, 54 A.L.R. 343]; cases collected in Annotation, 165 A.L.R. 1453; *Sun Dial Corporation v. Rideout* (1954) 29 N.J. Super. 361 [102 A.2d 90]; *Franke v. Wiltschek* (2 Cir. 1953) 209 F.2d 493; *Smith v. Dravo Corp.* (7 Cir. 1953) 203 F.2d 369.] In such a case the trust and confidence upon which legal relief is predicated stems from the instance of the employer's *turning over to the employee* the pre-existing trade secret. [Italics shown.] It is then that a pledge of secrecy is impliedly extracted from the employee, a pledge which he carries with him even beyond the ties of his employment [*286] relationship. Since it is conceptually impossible, however, to elicit an implied pledge of secrecy from the sole act of an employee turning over to his employer a trade secret which he, the employee, has developed, as occurred in the present case, the appellees must show a different [***14] manner in which the present circumstances support the permanent cloak of confidence cast upon Greenberg by the Chancellor. The only avenue open to the appellees is to show that the nature of the employment relationship itself gave rise to a duty of nondisclosure.

"The burden the appellees must thus meet brings to the fore a problem of accommodating competing policies in our law: the right of a businessman to be protected against unfair competition stemming from the usurpation of his trade secrets and the right of an individual to the unhampered pursuit of the occupations and livelihoods for which he is best suited. There are cogent socio-economic arguments in favor of either position. Society as a whole greatly benefits from technological improvements. Without some means of post-employment protection to assure that valuable developments or improvements are exclusively those of the employer, the businessman could not afford to subsidize research or improve current methods. In addition, it must be recognized that modern economic growth and development has pushed the business venture beyond the size of the one-man firm, forcing the businessman to a much greater degree to entrust [***15] confidential business information relating to technological development to appropriate employees. While recognizing the utility in the dispersion of responsibilities in larger firms, the optimum amount of 'entrusting' will not occur unless the risk of loss to the businessman through a breach of trust can be held to a minimum.

"On the other hand, any form of post-employment restraint reduces the economic mobility of employees and limits their personal freedom to pursue a preferred course of livelihood. The employee's bargaining position is weakened because he is potentially shackled by the acquisition of alleged trade secrets; and thus, paradoxically, he is restrained, because of his increased expertise, from advancing further in the industry in which he is most productive. Moreover, as previously mentioned, society suffers because competition is diminished by slackening the dissemination of ideas, processes and methods." (Pp. 434-435.)

The court then discussed *Extrin Foods, Inc. v. Leighton*, [*287] 202 Misc. 592 [115 N.Y.S.2d 429] and *Wireless Specialty Apparatus Co. v. Mica Condenser Co., Ltd.*, 239 Mass. 158 [131 N.E. 307, 16 A.L.R. 1170], as illustrations [***16] [*210] of the kind of employment relationships in which a court will find that a confidential relationship exists at pages 435-436:

". . . In *Extrin Foods, Inc. v. Leighton* (1952) 202 Misc. 592 [115 N.Y.S.2d 429]. . . . The employee therein, a chemist, was assigned a specific task for which he was given valuable leading information, including pre-existing trade secrets, careful supervision and license to enter into research and experimentation so as to attain the theretofore unobtainable goal which Extrin had been seeking. A similar situation may be found in *Wireless Specialty Apparatus Co. v. Mica Condenser Co., Ltd.* (1921) 239 Mass. 158 [131 N.E. 307, 16 A.L.R. 1170], where defendant engineers were enjoined from disclosing trade secrets they had developed by the Wireless company.

There, the company, in order to remain in business after the close of the war, had assigned its six engineers, including the defendants, to the specific research project of developing a method of manufacturing magneto condensers (the trade secret in issue) and had committed them to six months of extensive research and experimentation solely towards this end under the general [***17] supervision of its chief engineer."

The court concluded that Greenberg was privileged to disclose and use the formulas which he had developed -- they being a part of the technical knowledge and skill that he had acquired by virtue of his employment (p. 437). Therefore, even though the formulas were plaintiff's trade secrets, Greenberg was privileged to use them.

It is apparent that the trial judge in the case at bar did give careful consideration to the "legal basis . . . upon which to predicate relief" problem even though he ultimately held that there was no trade secret. This is evident from the trial court's framing of the issue to be: "What, if any, trade secret . . . became entrusted to the defendant Roderick Koutnik while he was an employee of the plaintiff" and by what was stated in paragraph IX of the notice of decision. (See also findings of fact 1 and 2, footnote 2.)

Appellant asserts in its reply brief that the fact that Koutnik utilized knowledge and skill which he obtained at Jet Propulsion Laboratory in developing the Paragraph V valve design is immaterial. While it might well be immaterial on the "definitional problem" of what constitutes a trade secret, it is [***18] material on the "legal basis . . . upon which to predicate [*288] relief" phase of the problem. In other words, as illustrated by the *Wexler* case, *supra*, plaintiff may well have a trade secret yet defendant Koutnik be privileged to use it by virtue of there being no covenant or breach of confidence.

CA(2)[↑] (2) **HN11[↑]** A basis for the protection of trade secrets is that the recipient obtains through a confidential relationship something he did not previously know. (See *E. I. Du Pont De Nemours Powder Co. v. Masland*, 244 U.S. 100 [37 S.Ct. 575, 61 L.Ed. 1016]; *Larson v. General Motors Corp.*, 52 P.Q. 450, 454, S.D.N.Y. (1941), 58 P.Q. 593, S.D.N.Y. (1943); *De Filippis v. Chrysler Corp.*, 159 F.2d 478; Ellis, *Trade Secrets*, § 18.)

In the *Wexler* case, the defendants were using the very same formulas which Greenberg had developed yet the court held that Greenberg was privileged. (See paragraphs 3, 4 and 5 of paragraph VII of the notice of decision, footnote 1.)

CA(1b)[↑] (1b) **HN12[↑]** The court cannot compel a man who changes employers to wipe clean the slate of his memory. (*Sarkes Tarzian, Inc. v. Audio Devices, Inc.*, 166 F. Supp. 250; *Avocado Sales Co. v. Wyse*, 122 F.**191 Cal.App. 627, 634 [10 P.2d 485].) To grant plaintiff the relief prayed for would in effect restrain Koutnik from the pursuit of his profession. He would be deprived of the use of knowledge and skill which he gained which did not originate with plaintiff. (See *Levine v. E. A. Johnson & Co.*, 107 Cal.App.2d 322 [237 P.2d 309].) If the foregoing is not soundly premised how could a former employee with Koutnik's knowledge and skill obtain future employment?

[**211] Mr. Julian O. von Kalinowski⁵ in an excellent article entitled "Key Employees and Trade Secrets" in 47 Virginia Law Review 583 states in the conclusion of the article at page 599:

HN13[↑] "Protection should be afforded when, and only when, the information in question has value in the sense that it affords the plaintiff [i.e., ex-employer] a competitive advantage over competitors who do not know of it [i.e., the trade secret], and where the granting [***20] of such protection will not unduly hamstring the ex-employee in the practice of his occupation or profession. This simple balancing process will invariably protect all of the pertinent interests -- those of the former employer, of the former employee, and of the public." (Emphasis added.)

CA(3)[↑] (3) Turning to the definitional problem of what constitutes a trade secret it is evident that California has adopted [*289] the broad approach set forth in Restatement, Torts, volume 4, section 757, comment b, page 5, as follows:

⁵ Mr. von Kalinowski, who is counsel for plaintiff, did not cite his article to the court.

"b. *Definition of trade secret.* [HN14](#) A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." (Italics shown.) (See [By-Buk Co. v. Printed Cellophane Tape Co., 163 Cal.App.2d 157, 166 \[329 P.2d 147\]](#).)

Within the same comment however, it is pointed out that [HN15](#) "An exact definition of a trade secret is not possible. [CA\(4\)](#) (4) Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent ***21 to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." Note the comments of the trial judge in paragraph VI of his notice of decision (footnote 1).

It is pointed out in [Ungar Electric Tools, Inc. v. Sid Ungar Co., Inc., 192 Cal.App.2d 398, 403 \[13 Cal.Rptr. 268\]](#) that "[the] [HN16](#) character of the secrets, if peculiar and important to the business, is not material; *but it must, as the term implies, be kept secret by the one who creates it.* ([Riess v. Sanford, 47 Cal.App.2d 244, 246 \[117 P.2d 694\].](#))" (Emphasis added.) [CA\(5a\)](#) (5a) In the instant case it must be remembered that the so-called trade secrets were embodied in each valve that was sold. This case does not involve a claim of trade secret alleged to exist in the know-how; or the process under which the valves are made; or any machine; or the tools used in the process of manufacture ***22 of the valves. It is appellant's position that the design features themselves are trade secrets.

[CA\(6\)](#) (6) It is stated in Restatement, Torts, volume 4, section 757, comment b, page 6:

[HN17](#) "Matters which are completely disclosed by the goods which one markets cannot be his secret [emphasis added]." (See [Sandlin v. Johnson](#) (8 Cir. 1945) [152 F.2d 8](#); [Northup v. Reish](#) (7 Cir. 1953) [200 F.2d 924](#); [Carver v. Harr, 132 N.J. Eq. 207 \[27 A.2d 895\].](#))

Appellant places great reliance upon the case of [Smith \[*290\] v. Dravo Corp.](#) (7 Cir. 1953) [203 F.2d 369](#), for the proposition that the above set forth rule is not valid. A careful reading of the *Smith* case discloses however that the court was more concerned with the manifest and flagrant breach of confidence than the fact that the information could have been obtained through lawful means. (See [Wexler v. Greenberg, supra, 160 A.2d 430.](#)) [CA\(5b\)](#) (5b) Whatever justification existed for the court in the *Smith* case to ***212 disregard the fact that there had been sales of the item embodying the trade secret, there is no breach of confidence in the case at bar and the same policy considerations are not present.

***23 [CA\(7\)](#) (7) In addition to the sales of the valves embodying the alleged trade secrets, the trial court indicated that a second factual barrier to plaintiff's theory of being exclusive owner of said trade secrets was: "(2) The prior art, the previously known, published and utilized ideas, principles, devices and methods in valve manufacture." (See notice of decision, par. VI, footnote 1.)

In discussing "Novelty and prior art" Restatement of the Law of Torts, volume 4, section 757, comment b, pages 6-7, provides in part as follows:

"*Novelty and prior art.* [HN18](#) A trade secret may be a device or process which is patentable; but it need not be that. *It may be a device or process which is clearly anticipated in the prior art* or one which is merely a mechanical improvement that a good mechanic can make. Novelty and invention are not requisite for a trade secret as they are for patentability. These requirements are essential to patentability because a patent protects against unlicensed use of the patented device or process even by one who discovers it properly through independent research. The patent monopoly is a reward to the inventor. But such is not the case with a trade secret. Its ***24 protection is not based on a policy of rewarding or otherwise encouraging the development of secret processes or devices. *The protection is merely against breach of faith and reprehensible means of learning another's secret. For this limited*

protection it is not appropriate to require also the kind of novelty and invention which is a requisite of patentability." (Emphasis added.)

HN19 [↑] Absent a situation where the device or process is so widely known as to be within the public domain, it is clear that prior art will not be a defense *where there is a breach of confidence*. (See *By-Buk Co. v. Printed Cellophane Tape Co.*, 163 Cal.App.2d 157, 166 [329 P.2d 147]; *Head Ski Co. v. Kam Ski Co.* (D.C., D. Md. 1958), 158 F. Supp. 919; *Sun Dial Corporation* [*2911] v. *Rideout* (N.J. 1954) 108 A.2d 442, 445; *Franke v. Wiltschek* (2 Cir. 1953) 209 F.2d 493; *Fairchild Engine & Airplane Corp. v. Cox*, 50 N.Y.S.2d 643.)

In *Fairchild Engine & Airplane Corp. v. Cox, supra*, 50 N.Y.S.2d 643, the court made it quite clear that Cox acquired the knowledge in his confidential capacity, when it was stated at page 653:

"[7] If Cox did not acquire knowledge [***25] of the process from the plaintiffs, in his confidential capacity, where and how and when did he acquire it? Even if others -- such as Gay et al. -- knew it from other sources, the evidence is quite clear that Cox did not learn it through other channels."

It was further stated at page 657 as follows:

"[9] It is quite manifest that after this litigation was projected, the defendant commenced digging in the field of 'prior art' to ascertain what had been done and written about bonding aluminum with ferrous metals. Concededly, the field was not entirely virgin . . . Once we conclude that the work done under Cox's supervision was confidential, and that Cox threatens to breach the confidence, all else is of subordinate importance."

However, as stated in paragraph IX of the trial court's notice of decision (footnote 1), "Uncontradicted evidence establishes the fact that when Rodrick [sic] Koutnik entered the employ of plaintiff, he carried with him a good deal of knowledge concerning the art, science and mechanics of valve design and manufacture, and a good deal of skill in the application of that knowledge."

The position of Koutnik in the case at bar is far different from that [***26] of Cox in the *Fairchild* case.

CA(8) [↑] (8) Appellant's next contention is that it is entitled to relief with respect to the Paragraph V valve design on the basis of Koutnik's oral agreement not to make competitive use of the same and that the trial court erred in refusing to find the existence [**213] of such an agreement or to make any finding at all on such issue.

The trial court did find (finding 14, footnote 2) as follows:

"14. After terminating his employment with Futurecraft on or about March 17, 1956, Koutnik neither carried any trust responsibility nor owed any obligation to Futurecraft with reference to any of the valves or valve components mentioned in Paragraphs V, VI, VII and IX of the first cause of action of the complaint or any of the matters or things allegedly confidential to Futurecraft with respect to said valves or valve [*292] components, nor did any contractual relation exist between Koutnik and Futurecraft at any time after such termination of employment."

The appellant's contention that the trial court failed to find on the issue is without merit.

HN20 [↑] The mandate of *section 632, Code of Civil Procedure*, is that "The statement of facts found shall fairly disclose [***27] the court's determination of all issues of fact in the case."

Appellant's contention that Koutnik made an oral agreement not to make competitive use of the valve design was raised in appellant's complaint and statement of issues incorporated in the pretrial conference order. It is clear that finding 14, *supra*, fairly discloses the court's determination of that issue.

CA(9) [↑] (9) The basic issue is whether there is substantial evidence in the record to support the trial court's determination. There is such evidence.

It is asserted in appellant's reply brief that "the uncontested evidence was to the effect that as early as April 1955 on the occasion of Koutnik's signing of the patent application and assignment on the Paragraph V valve, Piet (as

president of Futurecraft) and Koutnik and two other employees of Futurecraft had an express oral agreement that the designs which were developed at Futurecraft were the sole property of Futurecraft, and belonged to it; that such designs were not to be shown or disclosed to competitors; and that such designs were not to be used by such employees after termination of their employment at Futurecraft."

However, contrary to the above statement, Mr. **[***28]** Chilcoat, one of the "two other employees" referred to above and one of appellant's witnesses, testified: "I do not recall that he [i.e., Koutnik] said anything at the time." Koutnik himself testified that he did not recall it. The trial court under the circumstances was justified in reaching its determination of this issue.

The appellant's remaining contentions either have already been dealt with or are without merit.

For the reasons stated the judgment is affirmed.

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Shasta Douglas Oil Co. v. Work

Court of Appeal of California, Third Appellate District

February 4, 1963

Civ. No. 10457

Reporter

212 Cal. App. 2d 618 *; 28 Cal. Rptr. 190 **; 1963 Cal. App. LEXIS 2889 ***

SHASTA DOUGLAS OIL COMPANY, Plaintiff and Appellant, v. WILLIAM J. WORK et al., Defendants and Appellants

Subsequent History: [***1] A Petition for a Rehearing was Denied February 27, 1963, and the Petition of Defendants and Appellants for a Hearing by the Supreme Court was Denied April 3, 1963.

Prior History: APPEALS from part of a judgment of the Superior Court of Shasta County and from an order taxing costs. J. Everett Barr, Judge.

Action for possession of land and for money due and misappropriated.

Disposition: Judgment reversed with directions. Judgment for defendants reversed with directions.

Core Terms

gasoline, consignment, damages, Cartwright Act, station, conspiracy, sale agreement, real property, cross-complaint, conspirators, products, prices, retail

LexisNexis® Headnotes

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN1 **Jury Trials, Jury Instructions**

In the law of conspiracy, you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2 **Public Enforcement, State Civil Actions**

In private actions under the Cartwright Act, *Cal. Bus. & Prof. Code* § 16600 et seq., the suitor must have suffered damages flowing directly from the violation of the Act.

Torts > Remedies > Damages > Reductions of Damages

HN3 [blue download icon] **Damages, Reductions of Damages**

A person threatened with loss by the wrongful act of another is bound to exercise reasonable care and diligence to avoid loss and cannot recover for losses which might have been prevented by reasonable efforts on his part.

Torts > Remedies > Damages > Reductions of Damages

HN4 [blue download icon] **Damages, Reductions of Damages**

As to losses preventable by reasonable efforts, the law considers them proximately caused by lack of such efforts.

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1) [blue download icon] (1)

Monopolies and Combinations—Cartwright Act—Agreements Prohibited.

--It is lawful for a consignor selling through a consignee to fix the price at which he authorizes the consignee to sell his goods, and such a consignment agreement violates no provision of the Cartwright Act (*Bus. & Prof. Code*, §§ 16720, 16726).

CA(2) [blue download icon] (2)

Conspiracy—Civil Elements.

--There must be two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

CA(3) [blue download icon] (3)

Monopolies and Combinations—Cartwright Act: Sherman Act.

--Federal decisions under the Sherman Act are authoritative in cases under the Cartwright Act (*Bus. & Prof. Code*, § 16700 et seq.).

CA(4) [blue download icon] (4)

Id.—Cartwright Act.

--In private actions under the Cartwright Act the suitor must have suffered damages flowing directly from the violation of the act.

CA(5) [5] (5)

Damages—Mitigation of Loss—Duty of Injured Party.

--A person threatened with loss by the wrongful act of another is bound to exercise reasonable care and diligence to avoid loss and cannot recover for losses which might have been prevented by reasonable efforts on his part. As to losses preventable by reasonable efforts, the law considers them proximately caused by the lack of such efforts, rather than by the act of another.

Counsel: Pickering & Marler, Brobeck, Phleger & Harrison, Moses Lasky and J. Ernest Harty, Jr., for Plaintiff and Appellant.

Halpin, Halpin & Leep, Ben Leep, Sydney Halpin, Leep & Saunders, Garry, Dreyfus & McTernan and Benjamin Dreyfus for Defendants and Appellants.

Judges: Van Dyke, J. * Pierce, P. J., and Schottky, J., concurred.

Opinion by: VAN DYKE

Opinion

[*619] [**192] This is an appeal from a portion of a judgment. Shasta Douglas Oil Company is hereafter referred to as "appellant." The two respondents are hereafter referred to as "Work."

Appellant sued Work for possession of land [***2] and for money due and money misappropriated, totaling over \$ 16,000. Its claims were upheld. Work cross-complained and claimed that by appellant's violation of California's **Antitrust Law** he had suffered damages. The jury awarded him the sum of \$ 33,375. The court trebled the award under the provisions of the statute and, offsetting appellant's claims, gave Work a net judgment for \$ 83,987.94. Appellant appeals from this portion of the judgment.

On November 30, 1956, Work began operating a gasoline service station upon a parcel of real property in Redding [*620] owned by E. B. Hinkle and Son, Inc., a gasoline wholesaler, under an oral arrangement which contemplated that Work would eventually purchase the property. On April 1, 1957, this arrangement was reduced to a written contract whereby Hinkle agreed to sell and Work agreed to buy the property for \$ 85,000, with no down payment, on minimum monthly installment payments, including principal and interest, of \$ 450 per month.

Thereafter, for some 16 months Work bought gasoline from Hinkle and resold it at the station. By August of 1958 Work owed Hinkle some \$ 12,000 on open account for gasoline. At that time Hinkle sold [***3] its business, including the property being purchased by Work, and assigned its contract with Work to appellant.

Hinkle had sold gasoline to Work, and Work had in turn resold to consumers. When appellant purchased the property and took an assignment of the Hinkle-Work contract, a change was made in the handling of gasoline through the service station. Appellant and Work entered into a written consignment agreement which provided that appellant would deliver gasoline to Work, which he would "accept . . . on consignment, and . . . hold and sell . . . in accordance with the terms" of the contract. The contract provided that title to all gasoline delivered should remain in appellant until sold by Work; that he should sell the consigned gasoline at retail prices specified by appellant; that

* Retired Presiding Justice of the District Court of Appeal sitting pro tempore under assignment by the Chairman of the Judicial Council.

title to the proceeds of the sales remained in appellant; and that such proceeds were to be remitted by Work to appellant. Appellant agreed to pay Work a commission on the sale price computed by an agreed formula. The agreement further provided that it might be cancelled by either party at any time upon written notice to the other. Appellant and Work went along under the Hinkle-Work sales agreement, [***4] and under the consignment agreement, until August 1960. The sales agreement contained a provision that if Work became in default and remained so for 30 days, the contract automatically became a lease of the property from Hinkle to Work. All payments made by Work prior to default were to be treated as rental; and the contract would be forfeited and terminated, all monies paid by Work being retained by Hinkle.

In August 1960 appellant served notice on Work of the termination of the sales agreement for default. At that time Work was still indebted for \$ 7,401.64 on the open book account arising out of gasoline purchased from Hinkle. He [*621] had also failed to pay over to appellant, and, as appellant charged, had misappropriated \$ 7,495.82 of proceeds of gasoline consigned to him. In the 46 months he had been in possession of the premises he had paid \$ 6,118 on the principal of \$ 85,000 purchase price of the land. Following the notice of termination of the Hinkle-Work contract, and on September 1, 1960, appellant filed suit against Work to recover possession of the premises, obtained a writ of possession, and on the same day the sheriff installed appellant in possession under [***5] the writ. In order to recover the \$ 7,401.64 due on the open account and the \$ 7,495.82 proceeds of gasoline sold under consignment, appellant filed [**193] action against Work for said sums. By his answers to the several causes of action Work admitted the execution of the two contracts we have referred to, but otherwise merely interposed a general denial. No defense of illegality was interposed, nor was any attempt made to invoke the court's equity powers to relieve Work of his default or to preserve any equity in the property. Instead, Work filed a cross-complaint alleging in substance the following: That by the agreements of sale and consignment aforesaid appellant had unlawfully maintained a maximum schedule of prices for the sale of petroleum products to Work and had unlawfully maintained a minimum schedule of prices for the resale of petroleum products by Work to the general public; that appellant by said agreements had unlawfully required Work to purchase all of his petroleum products from appellant at the schedule prices set by appellant; that appellant in addition to being in the wholesale gasoline distribution business sold gasoline at retail; that by reason of the [***6] foregoing the acts, agreements and arrangements made by appellant were against public policy and were illegal and void as being in violation of section 16600 et seq. of the Business and Professions Code. Work alleged damage as follows: (a) loss of equity in the real property \$ 45,000; (b) loss of past profits \$ 15,000; (c) loss of future profits \$ 100,000.

The jury returned the following verdict: First cause of action, open book account, found for the plaintiff, Shasta Douglas Oil Company, and assessed damages at \$ 7,401.64. Third cause of action, consignment agreement, found for the plaintiff, Shasta Douglas Oil Company, and assessed damages at \$ 7,495.82. Complaint in action No. 25858, payments on property, found for the plaintiff, Shasta Douglas Oil Company, and assessed damages at \$ 413.20. Cross-complaint, [*622] found for the cross-complainants Work and assessed damages as follows: \$ 33,375 for loss of equity in the real property, \$ 0.00 past profits, \$ 0.00 future profits.

In order to discuss the issues raised on the appeal, it is necessary to consider the contractual relations between the parties. By the contract of sale of the real property Hinkle agreed to sell [***7] gasoline to Work to be sold by Work at his service station at the price it was generally sold to other dealers in the area. As to the price at which Work would resell to the public, the contract contained nothing, and Work was free to set his price for sale to the public at any figure that suited him. But when Hinkle assigned the land sales agreement to appellant, Work and appellant changed the relationship through the execution of the consignment agreement. Under that agreement Work did not buy gasoline from appellant. On the contrary, appellant consigned gasoline to Work, retaining title, and Work sold the gasoline to the public as the agent or factor of appellant. He agreed to account for all sales to appellant, and it was his breach of this duty that formed the basis of one of the accounts in the complaint filed by appellant. The consignment agreement, therefore, constituted a modification of the land sales agreement and signally changed the relationships between appellant and Work with respect to the movement of gasoline through Work's station. As to the contractual relationships between Hinkle and Work before Hinkle assigned to appellant, it is not claimed, and could not [***8] be, that this contract in any sense violated the Cartwright Act. It fixed no price for resale and bound Hinkle to sell to Work at a price for Hinkle's products generally prevailing in the area. CA(1)[] (1) The change brought about by the consignment agreement likewise violated no provision of the Cartwright Act, for it is lawful for

a consignor selling through a consignee to fix the price at which he authorizes the consignee to sell the goods of the consignor. (*United States v. Standard Oil Co., 78 F.Supp. 850, 854; Gonzalez v. Derrington* * (Cal.App.) **10 Cal.Rptr. 700**, pp. 710-717; *United States v. General Elec. Co., 272 U.S. 476 [47 S.Ct. I**194] 192, 71 L.Ed. 362;* *Cole Motor Car Co. v. Hurst, 228 F. 280, 283-284* [142 C.C.A. 572]; *Ford Motor Co. v. Benjamin E. Boone, Inc., 244 F. 335, 340* [156 C.C.A. 621].)

The [***9] court in essence told the jury that the consignment [*623] agreement violated the Cartwright Act and thereby committed error. The charge was as follows: "In the event Shasta Douglas Oil Company sells gasoline as a retailer, Shasta Douglas Oil Company cannot enter into a price-fixing agreement with the cross-complainant, Work, and is not excused from the operation of the law with respect to trusts." Appellant was retailing gasoline through its agent, Work. There was evidence also that at another place appellant was selling bulk gasoline to customers requiring such quantities. Taken in context the gist of the instruction was that an agreement (the consignment agreement) between an agent and his principal to sell gasoline for it at the price directed by it violates the Cartwright Act. As we have seen, this was error.

For proof of conspiracy in respect of prices at which appellant sold its gasoline through the Work station, respondents rely upon the following: One Kalbaugh, who shortly after the consignment agreement was entered into became the manager of appellant in the Redding area, testified in substance as follows: He was employed as manager by three individuals, Mr. D. [***10] L. Commons, Mr. George Goggins, and a Mr. Jack Nevius. They have offices in the Douglas Oil Company of California at Los Angeles. Commons is a vice president of that company, Goggins is an executive vice president of that company, and Nevius is director of marketing for that company. The Douglas Oil Company of California is a different corporation from the Shasta Douglas Oil Company. In connection with his duties he reported to Mr. Nevius direct at his headquarters in Los Angeles. As a part of his job he contacted various dealers who distributed Douglas gas in the Redding area. The arranging of commission, or the difference between the retail and wholesale price of gasoline as far as dealers were concerned, was done by instructions from Los Angeles. Mr. Commons and Mr. Nevius controlled the situation and one or both of them would tell him what commission the various dealers were going to be paid. The relationship between appellant and Douglas Oil Company of California was not made clear from the record, and as far as the record shows they are separate and nonconnected companies.

In line with Work's theory that there had been a conspiracy to fix the price of gasoline in the [***11] Redding area, Work requested and the court gave the following instruction: "The two or more persons required to form a trust can be any two persons. They can include a corporation and a private [*624] individual; two corporations or two private individuals. The two persons do not necessarily have to be included as parties to this lawsuit. Furthermore, the two persons can include an employee of a corporation and the corporation itself or a parent corporation and a subsidiary corporation." This instruction was clearly erroneous, and taken in context it told the jury that the conspirators could be appellant and its agent, Work. (*Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914.*) The prejudicial character of this instruction is shown by the occurrences at the trial. Anticipating the instruction would be given, Work's counsel, both in opening and closing arguments to the jury, dwelt on the subject. Thus he said: "Another portion of the instruction . . . is the requirement that there be two or more persons. Judge Barr will instruct you that those two persons can be any two persons. They can include Mr. Kalbaugh and Douglas. They can include Douglas Oil [***12] Company of California and Shasta Douglas. They could even include Shasta Douglas and Mr. Work." And again, "In that connection, Mr. Pickering seemed to suggest that the law required that Douglas conspire with somebody else. The truth of the matter is, these agreements are unlawful, if they are between [**195] Douglas and anybody else, Douglas and Work. It is the agreement itself that is unlawful, and the very assignment of the agreement is by itself a violation of the law."

"Furthermore, the combination that they speak of is two or more persons. Those two or more persons include, and furthermore the Judge will instruct to this effect, 'The two persons can include an employee of a corporation and a corporation itself, or a parent corporation.'"

* A hearing was granted by the Supreme Court on March 29, 1961. The final opinion of that court is reported in *56 Cal.2d 130 [14 Cal.Rptr. 1, 363 P.2d 1]*.

This instruction also was reread at the jury's request. [CA\(2\)](#)^[↑] (2) We quote the following from [Nelson Radio & Supply Co. v. Motorola, Inc., supra, at page 914](#): ". . . It is basic [HN1](#)^[↑] in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. [***13] Here it is alleged that the conspiracy existed between the defendant corporation, its president, Calvin, its sales manager, Kelly, and its officers, employees, representatives and agents who have actively engaged in the management, direction and control of the affairs and business of defendant. This is certainly a unique group of conspirators. . . . [The] conspiracy upon which plaintiff relies consists [*625] simply in the absurd assertion that the defendant, through its officers and agents, conspired with itself to restrain its trade in its own products." [CA\(3\)](#)^[↑] (3) Although we have referred to federal decisions under the Sherman Act, it is well settled that such cases are authoritative in cases under the Cartwright Act. ([Milton v. Hudson Sales Corp., 152 Cal.App.2d 418, 440 \[313 P.2d 936\]](#).)

Although the erroneous instructions given could necessitate reversal and a new trial, we have yet to discuss a fatal flaw in the proceedings relevant to the Work judgment that requires not reversal but an order directing a judgment against Work on the cross-complaint. This has to do with proof of damages, for under the contractual arrangements between appellant and Work, and as a [***14] matter of law on this record, the latter could not conceivably have suffered damages flowing from any violation of the Cartwright Act and arising from the conduct of the parties under the consignment agreement. Briefly, the situation is this. [CA\(4\)](#)^[↑] (4) First, it is basic [HN2](#)^[↑] in private actions under the Cartwright Act that the suitor must have suffered damages flowing directly from the violation of the Act. ([Clark v. Lesher, 106 Cal.App.2d 403, 407 \[235 P.2d 71\]](#) and cases cited.) Work claims that he suffered such damage in the following manner: That he was compelled under the consignment agreement to accept and abide by the commission as set for him by appellant; that he could obtain his gasoline from no other source; and further that he had attempted to get a greater commission and had been refused. The total result, he said, was the collapse of his business and consequentially the loss of his equity in the real property. It was for this loss, and this loss alone, that the jury awarded him damages. The difficulty with that theory of damage is that the consignment agreement is a modification of the sales agreement and carries within itself the seeds of its own destruction. It clearly [***15] states that either party can, at any time, cancel the consignment agreement without notice. Had Work canceled the agreement, as he could have (and if he were being damaged thereby, he should have canceled), he would have gone back to his status under the land sales agreement. By the provisions of that agreement he was entitled to buy from appellant, as successor to Hinkle, all gasoline needed for his station at the price generally prevailing in the Redding area; and he could sell it for whatever figure he pleased. If appellant refused to sell, Work could buy on the market. Actually, therefore, he was not bound to lose by [*626] reason of the consignment agreement. He had the remedy squarely agreed to between the parties and simply for policy reasons of his own did not use it.

[**196] [CA\(5\)](#)^[↑] (5) [HN3](#)^[↑] A person threatened with loss by the wrongful act of another is bound to exercise reasonable care and diligence to avoid loss and cannot recover for losses which might have been prevented by reasonable efforts on his part. [HN4](#)^[↑] As to losses preventable by reasonable efforts, the law considers them proximately caused by lack of such efforts. ([Valencia v. Shell Oil Co., 23 Cal.2d 840, \[***16\] 846 \[147 P.2d 558\]](#))

Work has appealed from an order taxing costs after the net judgment in Work's favor. Since we have reversed this judgment, the appeal of Work becomes moot.

Motion for judgment on the cross-complaint notwithstanding the verdict was made by appellant and denied. That part of the judgment appealed from by appellant and in Work's favor on the cross-complaint is reversed and the trial court is directed to enter judgment thereon that cross-complainant take nothing. This leaves appellant's recoveries on its actions brought against Work to stand.



De Martini v. Department of Alcoholic Beverage Control

Court of Appeal of California, First Appellate District, Division One

May 7, 1963

Civ. Nos. 19938, 20051

Reporter

215 Cal. App. 2d 787 *; 30 Cal. Rptr. 668 **; 1963 Cal. App. LEXIS 2558 ***

DARIO DeMARTINI et al., Plaintiffs and Respondents, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Defendant and Appellant. DARIO DeMARTINI et al., Plaintiffs and Appellants, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Defendant and Respondent

Subsequent History: [***1] The Petitions for a Rehearing were Denied June 3, 1963, and the Petitions of Plaintiffs and Respondents, and Plaintiffs and Appellants for a Hearing by the Supreme Court were Denied July 3, 1963. Schauer, J., and Peters, J., were of the Opinion that the Petition Should be Granted.

Prior History: APPEALS from a judgment of the Superior Court of the City and County of San Francisco and from a writ of mandate. Carl F. Allen, Judge.

Proceeding in mandamus to compel the Department of Alcoholic Beverage Control to vacate its decision suspending an off-sale general liquor license.

Disposition: Appeals from writ dismissed; judgment reversed with directions. Judgment granting writ reversed with directions.

Core Terms

licensees, alcoholic beverage, fair trade contract, retail, open competition, fair trade, prices, brands, contracts, distilled spirits, counts, trial court, products, accusation, delivery, notice, sales, general class, instant case, resale price, provisions, producer, orders, schedules, parties, substantial evidence, administrative record, hearing officer, judicial notice, manufacturer

LexisNexis® Headnotes

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > Remedies > Writs > General Overview

HN1[] Common Law Writs, Mandamus

[Cal. Civ. Proc. Code § 963](#) makes provision for appeals from judgments, orders, or decrees but not from writs.

Governments > State & Territorial Governments > Licenses

HN2 [down] State & Territorial Governments, Licenses

Cal. Bus. & Prof. Code § 24200 in part provides: The following are the grounds which constitute a basis for the suspension or the revocation of licenses: (a) When the continuance of a license would be contrary to public welfare or morals; but proceedings under this section upon this ground are not a limitation upon the Department of Alcoholic Beverage Control's authority to proceed under Cal. Const. art. XX, § 22. (b) Except as limited by Chapters 11 and 12 of this division, the violation or the causing or the permitting of a violation by a licensee of this division, or any rules of the department adopted pursuant to the provisions of this division, or any other penal provisions of law of California prohibiting or regulating the sale of alcoholic beverages or intoxicating liquors. Cal. Const. art. XX, § 22 in part provides: The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals.

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN3 [down] Reviewability, Factual Determinations

In reviewing a constitutionally created agency determination, the trial court is not entitled to exercise its independent judgment on the effect and weight of the evidence as it is permitted to do when reviewing the findings of legislatively created statewide administrative agencies, but is simply called upon to determine whether the findings of the agency are supported by substantial evidence. The trial court in the mandate proceeding should review the evidence and the findings of the agency in the same fashion that an appellate court reviews the findings of trial courts. It is the appellate court's function on appeal from the trial court to determine whether the findings of the agency are supported by substantial evidence. In making this determination the court must resolve all conflicts in the evidence in favor of the agency's decision and indulge in all legitimate and reasonable inferences to support it. This is the proper scope of review. Neither the appellate court nor the trial court may disregard or overturn a finding of fact of the agency for the reason that it is considered that a contrary finding would have been equally or more reasonable.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Trademark Law > Conveyances > General Overview

Trademark Law > ... > Particular Subject Matter > Names > General Overview

HN4 [down] Public Enforcement, State Civil Actions

The Alcoholic Beverage Control Act, Cal. Bus. & Prof. Code §§ 23000-25762, contains special provisions, Cal. Bus. & Prof. Code §§ 24750-24757, regulating fair trade contracts relating to alcoholic beverages. Such provisions, though similar to, are separate from the general provisions for fair trade contracts found in the Fair Trade Act, Cal. Bus. & Prof. Code §§ 16900-16905. Cal. Bus. & Prof. Code § 24750 authorizes fair trade contracts fixing the resale price of alcoholic beverages bearing the trademark, brand, or name of the producer or owner and in fair and open competition with others of the same general class. Cal. Bus. & Prof. Code § 24755 requires all retail sales of

distilled spirits to be made pursuant to fair trade contracts executed pursuant to [Cal. Bus. & Prof. Code §§ 24750-24757](#) and prohibits any violations of such contracts.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[HN5](#) **Public Enforcement, State Civil Actions**

Subdivisions (a), (b) and (f) of former rule 99 of the Department of Alcoholic Beverage Control, Cal. Admin. Code, tit. 4, § 99, subds. (a), (b) and (f), provide in substance that no manufacturer, manufacturer's agent, wholesaler, or rectifier is permitted to sell distilled spirits in containers bearing brands or names of owners except pursuant to fair trade contracts; that copies of such fair trade contracts should be filed with the department, together with copies of minimum resale price schedules; and that no licensee should sell alcoholic beverages at retail at a price less than the minimum resale price fixed by such fair trade contract.

Trademark Law > Subject Matter of Trademarks > Labels, Packaging & Trade Dress

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Trademark Law > Conveyances > General Overview

Trademark Law > ... > Particular Subject Matter > Names > General Overview

[HN6](#) **Subject Matter of Trademarks, Labels, Packaging & Trade Dress**

[Cal. Bus. & Prof. Code § 24750](#) provides: No contract relating to the sale or resale of any alcoholic beverage which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or owner of the alcoholic beverage and which is in fair and open competition with alcoholic beverages of the same general class produced by others violates any law of California by reason of either of the following provisions which may be contained in such contract: (a) That the buyer will not resell the alcoholic beverage except at the price stipulated by the vendor. (b) That the producer or vendee of the alcoholic beverage require, upon the sale of the alcoholic beverage to another, that the purchaser agree that he will not, in turn, resell except at the price stipulated by the producer or vendee.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[HN7](#) **Public Enforcement, State Civil Actions**

The fair trade provisions of the Alcoholic Beverage Control Act, [Cal. Bus. & Prof. Code §§ 23000-25762](#), are a valid and constitutional exercise of the police power. The provisions of the Act in effect constitute a fair trade act for alcoholic beverages, provide a statutory plan for fixing retail prices, and in the case of distilled spirits, impose a system of mandatory fair trading.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[HN8](#) **Public Enforcement, State Civil Actions**

A "vertical" agreement becomes an effective instrument subserving the legislative purpose of preventing price cutting at the retail level, reducing excessive purchases of alcoholic beverages, and, thus, promoting temperance in

their use and consumption. It is only "horizontal" agreements between producers or between wholesalers or between retailers as to sale or resale prices that the fair trade provisions of the Alcoholic Beverage Control Act, [Cal. Bus. & Prof. Code §§ 23000-25762](#), interdict.

Administrative Law > Judicial Review > Standards of Review > General Overview

[HN9](#) Judicial Review, Standards of Review

While a contemporaneous administrative construction of a statute by the agency charged with its enforcement and interpretation is not necessarily controlling, but it is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Criminal Law & Procedure > ... > Alcohol Related Offenses > Distribution & Sale > General Overview

Trademark Law > ... > Particular Subject Matter > Names > General Overview

[HN10](#) Public Enforcement, State Civil Actions

Fair trade agreements authorized by [Cal. Bus. & Prof. Code § 24750](#) must pertain to an alcoholic beverage bearing the trademark, brand or name of the producer or owner, which is in fair and open competition with alcoholic beverages of the same general class produced by others.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[HN11](#) Public Enforcement, State Civil Actions

The Department of Alcoholic Beverage Control is invested with the power of administering and enforcing the liquor laws of California, [Cal. Const., art. XX, § 22; Cal. Bus. & Prof. Code §§ 23049-23051](#), and of carrying out the legislative purposes and objectives of the Alcoholic Beverage Control Act, [Cal. Bus. & Prof. Code §§ 23000-25762](#). Vital to such enforcement and to the achievement of such purposes is the administration and enforcement of the fair trade provisions of the Act. It is to be presumed, therefore, that such official duty has been regularly performed, [Cal. Civ. Proc. § 1963, subd. 15](#). It is also to be presumed that transactions embodied in fair trade agreements are fair and regular, [Cal. Civ. Proc. Code § 1963, subd. 19](#), and that comporting with such presumption the agreements were not designed to impose unlawful restraints on open competition in the market. It is also to be presumed that the law has been obeyed. [Cal. Civ. Proc. Code § 1963, subd. 33](#).

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Evidence > Types of Evidence > Circumstantial Evidence

[HN12](#) Formal Adjudicatory Procedure, Hearings

Under [Cal. Gov't Code § 11513, subd. \(c\)](#), which is applicable to proceedings before the Department of Alcoholic Beverage Control, [Cal. Gov't Code § 11501](#), hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > General Overview

Evidence > Judicial Notice > Adjudicative Facts > General Overview

HN13 [blue icon] Appeals, Appellate Jurisdiction

The courts of California may take judicial notice of matters of common knowledge within the limits of their jurisdiction. An appellate court may properly take judicial notice of any matter of which a trial court may take judicial notice and the failure or refusal of a trial court to take judicial notice of a fact or matter does not preclude an appellate court from giving proper effect thereto. At an administrative hearing, the doctrine of "official" notice, performing in the administrative process the same role as judicial notice in the courts, can be invoked, but only according to procedural rules.

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

HN14 [blue icon] Formal Adjudicatory Procedure, Hearings

Cal. Gov't Code § 11515 in part states: Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN15 [blue icon] Public Enforcement, State Civil Actions

"Fair and open" relates only to the manner of competing, not to the results.

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

HN16 [blue icon] Formal Adjudicatory Procedure, Hearings

Cal. Gov't Code § 11518 provides in part: The decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference thereto. Although administrative findings must conform to the statutes governing the particular agency, they need not be stated with the formality required in judicial proceedings. In connection with the action of an administrative board, the fact that certain action is taken or recommendation made may raise a presumption that the existence of the necessary facts was ascertained and found.

Administrative Law > Judicial Review > Standards of Review > General Overview

HN17 [blue icon] Judicial Review, Standards of Review

A party cannot complain of a lack of finding, where, if made, it would have necessarily been against him.

Administrative Law > Judicial Review > Standards of Review > General Overview

[HN18](#) [] **Judicial Review, Standards of Review**

While full findings are required upon all material issues, a judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon, consistent with the judgment, results by necessary implication from the express findings which are made.

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) [] (1)

Appeal—Decisions Appealable—Prerogative Writs.

--An attempted appeal from a peremptory writ of mandate issued pursuant to a judgment must be dismissed.

[CA\(2\)](#) [] (2)

Intoxicating Liquors—Suspension of License—Review.

--The Department of Alcoholic Beverage Control is an agency on which the Constitution has conferred limited judicial powers ([Const., art. XX, § 22](#)) and, therefore, the superior court is not entitled to exercise its independent judgment on the effect and weight of the evidence as it is permitted to do when reviewing the findings of legislatively created state-wide administrative agencies, but may only determine whether the department's findings are supported by substantial evidence.

[CA\(3\)](#) [] (3)

Id.—Suspension of License—Review.

--On petition for a writ of mandate to compel the Department of Alcoholic Beverage Control to vacate and set aside its suspension of a liquor license, the superior court should review the evidence and findings in the same fashion that an appellate court reviews a trial court's findings.

[CA\(4\)](#) [] (4)

Id.—Suspension of License—Review.

--On appeal from a judgment ordering issuance of a peremptory writ of mandate requiring the Department of Alcoholic Beverage Control to vacate an order suspending a liquor license, it is the function of the appellate court, as it is that of the trial court, to determine whether the findings of the department are supported by substantial evidence.

CA(5) [D] (5)

Id.—Suspension of License—Review.

--In determining whether the findings of the Department of Alcoholic Beverage Control in support of its suspension of a license are supported by substantial evidence, the appellate court must resolve all conflicts in the evidence in favor of the department's decision and indulge in all legitimate and reasonable inferences to support it.

CA(6) [D] (6)

Id.—Suspension of License—Review.

--That the trial court or an appellate court considers a contrary finding as reasonable as, or more reasonable than the finding made by the Department of Alcoholic Beverage Control is not a reason for either court to disregard or overturn the finding made by the department.

CA(7) [D] (7)

Id.—Alcoholic Beverage Control Act—Nature and Purpose.

--The Alcoholic Beverage Control Act ([Bus. & Prof. Code, §§ 23000-25762](#)) contains special provisions regulating fair trade contracts relating to alcoholic beverages (§§ 24750-24757), and such provisions, though similar to, are separate from the general provisions for fair trade contracts found in the Fair Trade Act ([Bus. & Prof. Code, §§ 16900-16905](#)).

CA(8) [D] (8)

Id.—Alcoholic Beverage Control Act—Sales—Fair Trade Contracts.

--Under [Bus. & Prof. Code, § 24750](#), authorizing fair trade contracts fixing the resale price of alcoholic beverages bearing the producer's trademark or name and in fair and open competition with others of the same general class, and former [§ 24755](#), requiring all retail sales of distilled spirits to be made pursuant to fair trade contracts executed pursuant to §§ 24750-24757 and prohibiting any violation of such contracts, and under rule 99, subds. (a), (b), (f) of the Department of Alcoholic Beverage Control in effect before the rule's revision October 15, 1961, (Cal. Adm. Code, tit. 4, § 99, subds. (a), (b), (f)), liquor licensees are prohibited from selling distilled spirits at retail except at prices fixed in fair trade contracts.

CA(9) [D] (9)

Id.—Alcoholic Beverage Control Act—Sales—Fair Trade Contracts.

--An off-sale licensee need not be a party to fair trade contracts filed with the Department of Alcoholic Beverage Control to be subject to the system of mandatory fair trade statutes. ([Bus. & Prof. Code, §§ 24752](#), former 24755, and Cal. Adm. Code, tit. 4, § 99, subds. (a), (b), (f) in effect before the rule's revision October 15, 1961.)

CA(10) [D] (10)

Id.—Suspension of License—Evidence.

--In a suspension proceeding against an off-sale licensee for making retail sales at less than the fair trade price, agreements offered in evidence satisfied the requirements of agreements executed pursuant to the fair trade provisions of the Alcoholic Beverage Control Act ([Bus. & Prof. Code, § 24750](#)) where the agreements were entitled fair trade agreements and related to the sale and resale of distilled spirits bearing on their label or container the trademark or name of the producer or owner, the products covered by the agreements were declared to be those in fair and open competition with products of the same class produced by others, minimum retail resale prices for such products were stipulated by the seller or owner, the agreements provided that the buyer would not resell except at the stipulated price, they bore indorsements of filing with the Department of Alcoholic Beverage Control or its predecessor agency, and appended to them were sworn official certifications that they were copies of fair trade contracts required by law to be filed with the department.

[CA\(11\)](#) [] (11)

Id.—Alcoholic Beverage Control Act—Sales—Fair Trade Contracts.

--Fair trade contracts providing that the buyer shall not resell the alcoholic beverage except at the price stipulated by the vendor serve the legislative purpose of preventing price cutting at the retail level and reducing excessive purchases of alcoholic beverages, thus promoting temperance in their use and consumption; it is only agreements between producers or between wholesalers or between retailers as to the sale or resale prices ([Bus. & Prof. Code, § 24753](#)) that the fair trade provisions of the Alcoholic Beverage Control Act interdict.

[CA\(12\)](#) [] (12)

Id.—Alcoholic Beverage Control Act—Sales—Fair Trade Contracts.

--It is not necessary to the accomplishment of the legislative objectives in passing the fair trade provisions of the Alcoholic Beverage Control Act of preventing price cutting at the retail level, reducing purchases and promoting temperance that fair trade agreements be for the purchase and sale of the liquors involved or that the parties to the agreements stand in a direct and immediate seller-buyer relationship. Though the act is sufficiently comprehensive to embrace fair trade agreements that are also agreements of purchase and sale, the act gives no indication that it is operable only with respect to such agreements.

[CA\(13\)](#) [] (13)

Id.—Alcoholic Beverage Control Act—Sales—Fair Trade Contracts.

--Though the fact that the Department of Alcoholic Beverage Control or its predecessor agency has been consistent for over 11 years in accepting for filing fair trade agreements between producers and retailers, even though such parties were not and under applicable regulations could not be in a lawful seller-buyer relationship, is not necessarily controlling, this fact is entitled to great weight and the courts generally will not depart from such construction, unless it is clearly erroneous or unauthorized.

[CA\(14\)](#) [] (14)

Id.—Alcoholic Beverage Control Act—Sales—Fair Trade Contracts.

--The purpose of fair trade agreements under the Alcoholic Beverage Control Act is to establish fair trade prices. Considered as such, and not as agreements of sale, they are supported by a valid and sufficient consideration; mutual benefits are derived therefrom by the contracting parties in that the manufacturer or producer obtains protection for his trademarks and brands, whereas the retailer is made secure from unfair competition and, more

importantly, the retailer is benefited by entering into the agreement, since without a fair trade agreement, the distilled spirits could not be sold at retail. (Former [Bus. & Prof. Code, § 24755](#).)

[CA\(15a\)](#) [] (15a) [CA\(15b\)](#) [] (15b) [CA\(15c\)](#) [] (15c)

Id.—Suspension of License—Evidence.

--In a proceeding to suspend an on-sale licensee's license, for the retail sale of alcoholic beverages at less than the fair trade price, evidence that the alcoholic beverages covered by fair trade contracts were in fair and open competition with those of the same general class produced by others was substantial where it was shown that the contracts were filed with the Department of Alcoholic Beverage Control; under [Code Civ. Proc., § 1963, subds. 15, 19](#) and [33](#), determination respecting compliance of the agreements with [Bus. & Prof. Code, § 24750](#), satisfactory competitive status of the products and absence of a design for unlawful restraints on competition could be presumed where the agreements would otherwise have offended the Cartwright Anti-Trust Law ([Bus. & Prof. Code, §§ 16700-16758](#)).

[CA\(16\)](#) [] (16)

Evidence—Presumptions—As Evidence.

--The presumptions that official duty has been regularly performed ([Code Civ. Proc., § 1963, subd. 15](#)), that private transactions have been fair and regular ([Code Civ. Proc., § 1963, subd. 19](#)), and that the law has been obeyed ([Code Civ. Proc., § 1963, subd. 33](#)) constitute evidence in the record where the presumptions are applicable to the case. ([Code Civ. Proc., § 1957](#).)

[CA\(17\)](#) [] (17)

Intoxicating Liquors—Suspension of License—Evidence.

--Under [Gov. Code, § 11513, subd. \(c\)](#), applicable to proceedings before the Department of Alcoholic Beverage Control ([Gov. Code, § 11501](#)), hearsay evidence may be used to supplement or explain direct evidence but is not sufficient in itself to support findings, unless it would be admissible over objection in civil actions; therefore, in a proceeding to suspend a liquor license, for retail sales at less than fair trade prices, recitals in fair trade contracts that the alcoholic beverages covered therein were in fair and open competition, being hearsay and not admissible under any recognized exception to the hearsay rule, were not proof that the alcoholic beverages were in fair and open competition where there was no direct evidence for these recitals to supplement.

[CA\(18a\)](#) [] (18a) [CA\(18b\)](#) [] (18b)

Administrative Law—Judicial Review—Review Limited to Record.

--Though under [Gov. Code, § 11515](#), an administrative agency, in reaching a decision at a hearing, may take official notice of any fact that may be judicially noticed by a court, providing the agency follows required procedure, an appellate court's review is limited to the administrative record and the court may not take judicial notice of a matter not officially noted by the agency.

[CA\(19a\)](#) [] (19a) [CA\(19b\)](#) [] (19b)

Intoxicating Liquors — Suspension of License — Evidence: Review.

--In a proceeding to suspend a liquor license, for making retail sales at less than fair trade prices, evidence that the alcoholic beverages covered in the fair trade agreement filed with the Department of Alcoholic Beverage Control are in fair and open competition can be supplied by the department's taking official notice of the fact that there are countless brands of distilled spirits sold in this state that vie with each other for public favor through various outlets; where, however, the record on review does not disclose that official notice was so taken, the appellate court cannot take judicial notice of the fact; its review is limited to the administrative record.

[CA\(20\)](#) [] (20)

Evidence—Judicial Notice.

--Courts may take judicial notice of matters of common knowledge within the limits of their jurisdiction.

[CA\(21\)](#) [] (21)

Appeal—Judicial Notice by Appellate Court.

--An appellate court may properly take judicial notice of any matter of which a trial court may take judicial notice, and the failure or refusal of a trial court to take judicial notice of a fact or matter does not preclude an appellate court from giving proper effect thereto.

[CA\(22\)](#) [] (22)

Id.—Alcoholic Beverage Control Act—Sales—Fair Trade Contracts.

--Rule 99, subd. (b) of the Department of Alcoholic Beverage Control in effect before the rule's revision October 15, 1961, (Cal. Admin. Code, tit. 4, § 99, subd. (b)), regulating the filing of contracts and minimum retail resale prices and price revisions for alcoholic beverages, was designed to give notice to the department and to the retailers who must sell according to the prices.

[CA\(23\)](#) [] (23)

Id.—Alcoholic Beverage Control Act—Sales—Fair Trade Contracts.

--The requirement in the Alcoholic Beverage Control Act that the alcoholic beverages subject to fair trade price agreements filed with the department be in fair and open competition relates only to the manner of competing, not to the results.

[CA\(24\)](#) [] (24)

Id.—Suspension of License—Findings.

--In a proceeding to suspend a liquor license, for retail sale of alcoholic beverages at less than fair trade prices, the findings were sufficient, did not impede judicial review, and did not fail to apprise the licensees of the reason for the action taken against them where, in the language of the pleadings, it was stated that the licensees made sales at less than the stipulated resale price and that the price was set forth in a fair trade contract duly filed with the Department of Alcoholic Beverages Control; no express finding was required that the products covered by the fair trade contracts were in fair and open competition.

[CA\(25a\)](#) [] (25a) [CA\(25b\)](#) [] (25b)**Id.—Suspension of License—Findings.**

--In a proceeding to suspend a liquor license, for retail sale of alcoholic beverages at prices less than the fair trade price, assuming *arguendo* the necessity of a finding that the alcoholic beverages covered by the fair trade contract and involved in the sales were in open and fair competition, the licensees could not complain of the failure to make such a finding where the only evidence on the question was that such distilled spirits were in fair and open competition, the licensees introduced no contrary evidence, and the finding stated that the sales were made at prices less than the minimum sale price provided for in fair trade contracts duly filed with the Department of Alcoholic Beverage Control.

[CA\(26\)](#) [] (26)**Trial—Findings—Where Findings if Made Would Be Adverse.**

--A party cannot complain of a lack of finding where, if made, it would have necessarily been against him.

[CA\(27\)](#) [] (27)**Intoxicating Liquors—Suspension of License—Findings.**

--Fair trade contracts for the sale of alcoholic beverages cannot conform to the requirements of [Bus. & Prof. Code, § 24750](#), authorizing fair trade contracts fixing the resale price of alcoholic beverages bearing the trademark or name of the producer or owner and in fair and open competition with others of the same class, and cannot be filed as required by Department of Alcoholic Beverage Control rule 99(b) in effect before the rule's revision October 15, 1961 (Cal. Admin. Code, tit. 4, § 99, subd. (b)), unless the alcoholic beverages covered by such contracts are in fair and open competition; therefore, a finding that alcoholic beverages were in fair and open competition can be reasonably implied from the finding that the fair trade contracts were duly filed with the department.

[CA\(28\)](#) [] (28)**Id.—Suspension of License—Findings.**

--In a proceeding to suspend a liquor license, for retail sales at less than the fair trade price, a finding of the hearing officer that the fair trade contracts were duly filed with the Department of Alcoholic Beverage Control raised a presumption that "fair and open" competition was ascertained and found by the department.

[CA\(29\)](#) [] (29)**Id.—Suspension of License—Evidence.**

--A finding that a licensee sold and delivered alcoholic beverages to a named vendee pursuant to an order and failed to accompany said order with delivery orders in violation of rule 17(e) of the Department of Alcoholic Beverage Control in effect before the rule's revision October 15, 1961, and thus in violation of [Bus. & Prof. Code, § 24200, subd. \(b\)](#), was supported by substantial evidence where an agent of the department testified that the licensee admitted to him that the delivery in question had not been accompanied with delivery orders or invoices.

CA(30) [] (30)**Id. — Alcoholic Beverage Control — Sales.**

-- To constitute a violation of *Bus. & Prof. Code, § 24200, subd. (b)*, and of rule 17 (e) in effect before the rule's revision October 15, 1961, of the Department of Alcoholic Beverage Control there need be no evidence that the delivery of liquor by a licensee without an accompanying delivery order be wilfully or intentionally done.

Counsel: M. Mitchell Bourquin and William B. Boone for Plaintiffs and Appellants.

Stanley Mosk, Attorney General, and Wiley W. Manuel, Deputy Attorney General, for Defendant and Appellant.

Judges: Sullivan, J. Bray, P. J., and Devine, J., * concurred.

Opinion by: SULLIVAN

Opinion

[*794] [**670] We are presented with cross-appeals from a judgment reviewing a single administrative record. In 1 Civil No. 19938, the Department of Alcoholic Beverage Control [***2] (hereinafter called the Department) appeals from a judgment of the trial court ordering the issuance of a peremptory writ of mandate commanding the Department to vacate and set aside its decision that the off-sale general license of Dario DeMartini and Emilio J. Maionchi (hereinafter called the licensees) be suspended. In 1 Civil No. 20051, the licensees appeal from that part of the above judgment which commands the Department to take such further steps in the proceedings against them as are not inconsistent with the trial court's findings of fact and conclusions of law.

We observe that both the Department and the licensees also separately appeal from the peremptory writ of mandate issued pursuant to the judgment. *HN1* [] *Section 963 of the Code of Civil Procedure* here applicable (*Code Civ. Proc., § 1110*) makes provision for appeals from judgments, orders or decrees but not from writs. (*Butler v. City & County of San Francisco (1951) 104 Cal.App.2d 126, 128 [231 P.2d 75]; Kindig v. Palos Verdes Homes Assn. (1939) 33 Cal.App.2d 349, 355 [91 P.2d 645].*) *CA(1)* [] (1) Each of the attempted appeals from the peremptory writ of mandate must be dismissed.

On February 27, 1957, the Department [***3] filed an accusation in nine counts against the licensees doing business as the Liquor Mart, 264 Kearny Street, San Francisco. The first seven counts charged said licensees with selling to the same vendee on seven specified dates in August, September, October [**671] and November 1956, various brands of alcoholic beverages at retail at prices less than the so-called fair trade price. The eighth count charged that the licensees made sales and deliveries of alcoholic beverages to the vendee designated in the first seven counts and over the period of time embraced thereby, that is from August 28, 1956, through November 30, 1956, "pursuant to an order and did fail to accompany said orders with delivery orders." The ninth count charged that the licensees made sales and deliveries of alcoholic beverages to the vendee and over the period of time designated in the eighth count "pursuant to an order and failed to keep on file a copy of said delivery orders."

[*795] The acts set forth in all nine counts were charged as providing grounds for suspension or revocation of the licensees' license under *article XX, section 22 of the California Constitution* and *section 24200, subdivision (a) [***4] of the Business and Professions Code.*¹ [***5] It was also charged that additional grounds for suspension

* Assigned by Chairman of Judicial Council.

¹ Unless otherwise indicated, all code references hereafter are to the Business and Professions Code.

or revocation under [section 24200, subdivision \(b\)](#),² existed in that the sales set forth in the first seven counts were in violation of [section 24755](#) and of rule 99(f) of the Department's rules (Cal. Admin. Code, tit. 4, § 99(f)).

In response to the Department's accusation, the licensees filed an amended notice of defense in which they: admitted that the sales allegedly made in the first seven counts of the accusation had been made at the prices therein alleged; denied that the "fair trade prices" alleged in said counts were stipulated or fixed in any fair trade contract; alleged that [section 24755](#) and rule 99 were unconstitutional; alleged that the alcoholic beverages subject of said accusation "were not, and are not, in free and open competition with alcoholic beverages of the same general [***6] class produced by others within the meaning of the laws exempting price fixing from the public policy of the state"; that the fair trade contracts involved "were, and are, within the provisions of the Sherman Anti-Trust Act and the Carty Act"; that rule 99 was violative of [section 11374 of the Government Code](#); and that the allegedly fair trade prices were not supported by a valid contract but were the result of compulsory agreements.

[*796] The hearing officer found in terms of the accusation that the allegations of all nine counts were true. The Department, adopting the proposed decision of the hearing officer but increasing the penalty recommended, suspended licensees' license for a total period of 45 days. The licensees appealed to the Alcoholic Beverage Control Appeals Board (hereinafter called the Appeals Board) which affirmed the Department's decision on the first eight counts but reversed it on the ninth count. A petition for writ of mandate was then filed by the licensees in the court below.

[**672] The trial court³ found, so far as is pertinent here, that there was no substantial evidence: that the alcoholic beverages subject to the accusation were in fair [***7] and open competition with alcoholic beverages of the same general class produced by others; that the minimum retail prices of the beverages subject to the first seven counts⁴ and the schedules filed with the Department "were fixed or agreed upon by the manufacturers or brand-owners thereof with the retail licensees party and signatory to the agreements aforesaid" or that said retail licensees were even consulted; that any retail licensee received anything of value from the manufacturers or brand owners who were parties to the agreements; or that the licensees wilfully or with intent to evade the rules or regulations of the Department failed to accompany delivery of the alcoholic beverages with a delivery order. The court concluded that in ordering the suspension of the license without finding that the alcoholic beverages subject of the accusation were in fair and open competition with those of the same class produced by others, the Department proceeded without and in excess of its jurisdiction and not as required by law; that the decision was not supported by the findings nor

[HN2](#)  [Section 24200](#) in relevant part provides: "The following are the grounds which constitute a basis for the suspension or the revocation of licenses: (a) When the continuance of a license would be contrary to public welfare or morals; but proceedings under this section upon this ground are not a limitation upon the department's authority to proceed under [Article XX, Section 22 of the Constitution](#)."

[California Constitution, article XX, section 22](#) in relevant part provides: "The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, . . ."

² [Section 24200](#) provides in relevant part: "The following are the grounds which constitute a basis for the suspension or the revocation of licenses: . . . (b) Except as limited by Chapters 11 and 12 of this division, the violation or the causing or the permitting of a violation by a licensee of this division, . . . or any rules of the department adopted pursuant to the provisions of this division, or any other penal provisions of law of this State prohibiting or regulating the sale . . . of alcoholic beverages or intoxicating liquors."

³ The matter was submitted below on the petition, return, and record of the administrative proceedings had before the Department which included a transcript of the oral proceedings and certain documentary evidence received. The entire administrative file, together with the opinion of the Appeals Board, has been transmitted here.

⁴ The finding did not extend to all items of alcoholic beverages involved. The court found there was substantial evidence that the minimum retail prices of three brands of beverages and the schedules filed with the Department were fixed and agreed upon between the manufacturers or brand owners and retail off-sale licensees.

the findings by the evidence; and granted judgment accordingly, ordering issuance of a peremptory writ of [***8] mandate. This appeal followed.

It is the position of the Department that the findings of the trial court unfavorable to it are not supported by the [*797] administrative record and are therefore erroneous. Specifically, the Department claims that the evidence in such record establishes: (1) that the beverages involved were in fair and open competition; [***9] (2) that the minimum retail price schedules were part of the fair trade contracts;⁵ (3) that the fair trade contracts were valid; and (4) that the licensees were guilty of a violation on the eighth count.⁶ It is the position of the licensees that the findings of the trial court thus attacked were not erroneous and that the judgment below should be affirmed for the additional reason that the hearing officer failed to make findings as required by law that the alcoholic beverages in question were in fair and open competition with alcoholic beverages of the same general class produced by others.

The facts as disclosed by the administrative record can be briefly stated. All sales charged in the first seven counts were of distilled spirits and embraced [***10] various brands of bourbon whiskey, Scotch whiskey and gin. At the hearing, the licensees stipulated that they sold the particular beverages listed in such counts on the dates, to the persons and at the prices alleged therein. There were also received in evidence upon the offer of the Department and over the objections of the licensees,⁷ [***12] certified [**673] copies of certain fair trade contracts and fair trade contract price schedules filed with the Department and covering in the aggregate all of the brands of distilled spirits subject of the foregoing sales.⁸ The general effect of this documentary evidence was to establish the alleged minimum resale prices specified for the respective brands. There [*798] was also testimony introduced by the Department that during the period of time covered by the accusation, the fair trade prices filed with the Department were published in an industry publication and regularly distributed to all licensees at all levels of distribution in the Northern California trading area, including San Francisco where the licensees herein conducted their business. The licensees in the instant case stipulated at the hearing that the fair trade prices [***11] set forth in the various fair trade contracts and schedules received in evidence appeared in specified issues of the above publication. Thus, in summary, the administrative record shows that while the licensees herein admitted that they made the sales in question at the prices alleged and thus in effect at prices less than those set forth in the contracts and schedules, they denied that any "fair trade prices" had been effectively fixed or established by the contracts. This represents the hard core of the record upon which the hearing officer made his findings.

As we have pointed out, the trial court made several findings of its own declaring the insufficiency of the evidence to support the determination of the Department in a number of respects. It is important that we place the latter findings, now under attack, in proper focus and to that end set forth the rules which governed the trial court's function of review and now govern ours. **CA(2)[↑]** (2) It must not be lost sight of that the Department is an agency upon which the Constitution has conferred limited judicial powers. (Cal. Const., art. XX, § 22.) **HN3[↑]** The trial court therefore was not entitled to exercise its independent judgment on the effect and weight of the evidence as it is permitted to do when reviewing the findings of legislatively created statewide administrative agencies, but was simply called upon to determine whether [***13] the findings of the Department were supported by substantial evidence. ([Harris v. Alcoholic Beverage Control Appeals Board \(1963\) 212 Cal.App.2d 106, 112 \[28 Cal.Rptr. 74\];](#)

⁵ As pointed out above (see footnote 4) the relevant finding in the trial court was unfavorable to the Department on all but three items set forth in the accusation.

⁶ The Department makes no argument on the ninth count which was reversed by the Appeals Board.

⁷ It is unnecessary to detail the licensees' meticulous objections to each item of documentary evidence. Generally speaking, they were made on the grounds that the fair trade contracts were not in fact contracts because the parties thereto made no engagement to sell or buy to or from each other; that the contracts created no mutually binding obligations; that the parties signatory to the agreements did not in every instance agree to the fair trade prices revised and appended to the agreements after their execution; and that there was no showing that the beverages listed in the agreements were, at the time of the sales involved, in fair and open competition with alcoholic beverages of the same general class produced by others.

⁸ The certification made under oath by the special assistant to the Director of Alcoholic Beverage Control states that such person is the "legal custodian of the fair trade contracts and fair trade contract price schedules required by law to be filed with the Department. . . ."

Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504, 507 [22 Cal.Rptr. 405]; Benedetti v. Department of Alcoholic Beverage Control (1960) 187 Cal.App.2d 213, 216-217 [9 Cal.Rptr. 525]; Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.App.2d 315 [314 P.2d 807]; Oxman v. Department of Alcoholic Beverage Control (1957) 153 Cal.App.2d 740, 744 [315 P.2d 484].) **CA(3)↑** (3) "[The] trial court in the mandate proceeding should have reviewed the evidence and the findings of the Department in the same fashion that [*799] an appellate court reviews the findings of trial courts." (Brice v. Department of Alcoholic Beverage Control, supra, 153 Cal.App.2d 315, 323.) **CA(4)↑** (4) It is now our function as it was that of the court below to determine whether the findings of the Department are supported by substantial evidence. (Harris v. Alcoholic Beverage Control Appeals Board, supra, 212 Cal.App.2d 106, 113.) **CA(5)↑** (5) In making this determination ***14 we must resolve all conflicts in the evidence in favor of the Department's decision and indulge in all legitimate and reasonable inferences to support it. (Harris v. Alcoholic Beverage Control Appeals Board, supra, 212 Cal.App.2d 106, 113; **674 Morell v. Department of Alcoholic Beverage Control, supra, 204 Cal.App.2d 504, 508; Oxman v. Department of Alcoholic Beverage Control, supra, 153 Cal.App.2d 740, 744; Marcucci v. Board of Equalization (1956) 138 Cal.App.2d 605, 608-609 [292 P.2d 264].) This is the proper scope of our review as it was the proper scope of the trial court's review. (Harris v. Alcoholic Beverage Control Appeals Board, supra.) **CA(6)↑** (6) Neither this court nor the trial court "may disregard or overturn a finding of fact of the Department . . . for the reason that it is considered that a contrary finding would have been equally or more reasonable." (Bowman v. Alcoholic Beverage Control Appeals Board (1959) 171 Cal.App.2d 467, 471-472 [340 P.2d 652].) We will therefore consider the Department's contentions in the light of the foregoing rules.

CA(7)↑ (7) **HN4↑** The Alcoholic Beverage Control Act (Bus. & Prof. Code, div. 9, §§ 23000-25762) ***15 contains special provisions (div. 9, ch. 10, §§ 24750-24757) regulating fair trade contracts relating to alcoholic beverages. Such provisions, though similar to, are separate from the general provisions for fair trade contracts found in the Fair Trade Act (§§ 16900-16905).

CA(8)↑ (8) Section 24750 as it read during the period of time covered by the accusation herein (and as it now reads) authorized fair trade contracts fixing the resale price of alcoholic beverages bearing the trademark, brand or name of the producer or owner and in fair and open competition with others of the same general class. ⁹ ***17 Section 24755 as it read during [*800] the same period of time required all retail sales of distilled spirits to be made pursuant to fair trade contracts executed pursuant to chapter 10 (§§ 24750-24757) and prohibited any violations of such contracts. ¹⁰ Similar requirements and prohibitions obtain under the statute now in effect, as we point out below. Also applicable to the instant case are subdivisions (a), (b) and (f) of former rule 99 of the Department (Cal. Admin. Code, tit. 4, § 99, subds. (a), (b) and (f)) as said rule and subdivisions thereof read at the time covered by the accusation ***16 before us. **HN5↑** Such subdivisions, as they then read, provided in substance that no manufacturer, manufacturer's agent, wholesaler or rectifier was permitted to sell distilled spirits in

⁹ **HN6↑** Section 24750 provides: "No contract relating to the sale or resale of any alcoholic beverage which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or owner of the alcoholic beverage and which is in fair and open competition with alcoholic beverages of the same general class produced by others violates any law of this State by reason of either of the following provisions which may be contained in such contract:

"(a) That the buyer will not resell the alcoholic beverage except at the price stipulated by the vendor.

"(b) That the producer or vendee of the alcoholic beverage require, upon the sale of the alcoholic beverage to another, that the purchaser agree that he will not, in turn, resell except at the price stipulated by the producer or vendee."

¹⁰ Section 24755, at the times here involved, read as follows: "All distilled spirits sold at retail shall be, and any other alcoholic beverage may be, sold pursuant to a contract executed pursuant to this chapter, except that Chapter 11 shall govern the sale of wine in all cases in which that chapter is applicable. No licensee shall violate any of the provisions of any such contract."

The foregoing section was repealed in 1961 (Stats. 1961, ch. 635, § 3) and a new section bearing the same number added (Stats. 1961, ch. 635, § 4), which, in respect to distilled spirits bearing the brand, trademark or name of the owner or person in control, prohibits any retail sale for consumption off the licensed premises unless a minimum retail price has first been filed with the Department pursuant to the section and further prohibits any sale by an off-sale licensee "at any price less than the effective filed price."

containers bearing brands or names of owners except pursuant to fair trade contracts; that copies of such fair trade contracts should be filed with the Department, together with copies of minimum resale price [**675] schedules; and that no licensee should sell alcoholic beverages at retail at a price less than the minimum resale price fixed by such fair trade contract.¹¹

[***18] [HNT](#)[↑]

The fair trade provisions of the Alcoholic Beverage Control [*801] Act were upheld as a valid and constitutional exercise of the police power in *Allied Properties v. Department of Alcoholic Beverage Control (1959) 53 Cal.2d 141 [346 P.2d 737]*. As the court points out in such case, the above provisions of the act in effect constitute a fair trade act for alcoholic beverages, provide a statutory plan for fixing retail prices, and in the case of distilled spirits, impose a system of mandatory fair trading.¹² Under the above law, therefore, the licensees in the instant case were prohibited from selling distilled spirits at retail except at prices fixed in fair trade contracts.

[***19] *Validity of fair trade agreements.*

[CA\(9\)](#)[↑] (9) As we have pointed out, the Department introduced in evidence at the administrative hearing seven fair trade contracts which in the aggregate fixed the minimum retail prices for all of the various brands of bourbon whiskey, Scotch whiskey and gin involved in the first seven counts.¹³ These contracts are variously entitled "California Fair Trade Contracts," "Fair Trade Agreements," "Retailer's Form of California Fair Trade Contract," and, in one instance, "Wholesaler's Form of California Fair Trade Contract." Generally speaking, they were entered into on the one hand by "the seller in California of distilled spirits," or the owner of the trademark, brand or name, or by a party similarly described [*802] and, on the other hand, by a retailer or a retailer referred to as a "purchaser," and, as indicated above, in one instance by a wholesaler.¹⁴ The licensees herein were not parties to any of the seven fair trade contracts, nor was it necessary for them to be parties in order to be subject to the system of mandatory fair trading provided by the statutes heretofore mentioned. (See §§ 24752, [**676] 24755, rule 99; *Allied*

¹¹ Former rule 99, subdivisions (a), (b) and (f) in relevant part provided: "(a) No manufacturer, manufacturer's agent, wholesaler or rectifier shall sell distilled spirits the containers of which bear labels stating the brand or name of the owner or producer, in this State, except pursuant to a fair trade contract, as provided for by [Sections 24750 to 24755](#) of the Alcoholic Beverage Control Act.

"(b) Every manufacturer, manufacturer's agent, wholesaler, or rectifier licensed in this State who owns or controls a brand of distilled spirits, or who is properly authorized to fair trade a brand of distilled spirits in this State, shall file with the department a copy of a fair trade contract, or a notice of the amendment of an existing fair trade contract, and four copies of minimum resale price schedules. . . .

"(f) No licensee shall advertise or offer for sale, or sell, alcoholic beverages at retail at a price less than the stipulated minimum resale price provided for by a fair trade contract filed with the department pursuant to this rule."

(This rule has been revised and recast. As presently in effect, it provides *inter alia* for the filing of a "Distilled Spirits Minimum Retail Price Schedule" and prohibits sales by off-sale licensees at a price less than that filed with the Department unless written permission is granted.)

¹² *Allied Properties* was decided on November 30, 1959, thus disposing of the licensees' contention made in their amended notice of defense filed in the administrative proceedings on November 6, 1957, that [section 24755](#) and rule 99 were unconstitutional. Although the licensees restated this contention in their petition for writ of mandate filed March 29, 1960, subsequent to the *Allied Properties* decision, they have not pressed such contention before us.

¹³ Items involved were: White Horse Scotch, Old Charter straight bourbon, Jim Beam straight bourbon, Paul Jones blended whiskey, Old Crow straight bourbon, Johnny Walker Red Label Scotch whiskey, Old Hermitage blended whiskey, I. W. Harper bonded bourbon, Canada Dry blended whiskey and Canada Dry Gin.

¹⁴ This wholesaler's form of fair trade agreement was introduced in evidence apparently because its attached price list fixed not only the "owners'" prevailing prices to wholesalers and retailers but also the "owners'" resale prices to consumers in California.

Properties [***20] v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 141; cf. Downs v. Benatar's Cut Rate Drug Stores (1946) 75 Cal.App.2d 61 [170 P.2d 88] involving the general Fair Trade Act.)

All of the above fair trade contracts are substantially the same. They recite that the contracting party denominated "seller" or "owner" is the seller in California of distilled spirits bearing on their containers or labels the names, trademarks or [***21] brands of the producers or owners thereof and that such products are in fair and open competition in California with products of the same general class produced by others. In attached price lists, they set forth minimum retail resale prices for the products involved and further provide that the owner or seller may from time to time revise such prices or eliminate or add one or more products from or to the schedules or lists upon giving written notice to the retailer. They also provide: that the retailer shall not sell, advertise for sale, or offer to sell any of the listed products at prices below those specified;¹⁵ [***22] that the retailer shall not give any article of value or grant any discount other than that allowed by the seller resulting in a price below those specified; that in the event of breach or threatened breach by either party, the other shall be entitled to invoke the remedy of injunction in addition to any other available legal remedies; and that the agreement may [*803] be terminated at any time on written notice by either party to the other.¹⁶

CA(10)[↑] (10) Thus a number of circumstances make it clear that the agreements in evidence were executed pursuant to the fair trade provisions of the Alcoholic Beverage Control Act: They are entitled fair trade agreements; they relate to the sale and resale of distilled spirits bearing on their label or container the trademark, brand or name of the producer or owner thereof; the products covered by the agreements are declared to be those in fair and open competition with products of the same general class produced by others; minimum retail resale prices for such products are stipulated by the seller or owner; the agreements contain provisions that the buyer will not resell except at the stipulated price; the agreements bear endorsements of filing with the Department or its predecessor agency, the State Board of Equalization; [***23] and finally, as already pointed out (see footnote 8, *ante*), they have appended to them sworn official certifications that they are copies of fair trade contracts required by law to be filed with the Department. We are therefore satisfied that they are agreements authorized by section 24750.

The licensees contend that the agreements do not comply with the requirements of section 24750. They argue that the parties thereto have not contracted for the sale or resale of any alcoholic beverages, that the agreements are directly between a manufacturer or producer and the ultimate retailer, and that in most instances such persons, under the Alcoholic Beverage Control Act, cannot enter into a valid contract for the purchase and sale of alcoholic beverages.

Section 24750, already set forth (see footnote 9, *ante*) states that "[no] contract [**677] *relating* to the sale or resale of any alcoholic beverage" (italics added) described in the section "violates any law of this State by reason" of the inclusion therein of a provision "[that] the buyer will not resell the alcoholic beverage except at the price stipulated by the vendor." The contracts authorized by the statute are [***24] those "relating" to the sale or resale of the specified beverages. The statute does not require that they be contracts *for* the purchase and sale of such beverages. The contracts before us *relate* to the sale of [*804] alcoholic beverages and provide that "the buyer will not resell the alcoholic beverage except at the price stipulated by the vendor."

CA(11)[↑] (11) It is readily seen that this type of HN8[↑] "vertical" agreement becomes an effective instrument subserving the legislative purpose of preventing price cutting at the retail level, reducing excessive purchases of

¹⁵ Illustrative of the retailer's covenant is the following paragraph from the fair trade agreement fixing the fair trade price for White Horse Scotch Whiskey, an item alleged in the first count of the accusation: "Purchaser agrees that he will not sell, advertise for sale or offer to sell any person, firm or corporation, any of the products named in the Resale Price Schedule as now filed or hereafter amended at prices below those therein specified. Seller further agrees that he will not use any of the products listed in any free deals, or make or offer to make any refunds, discounts or concessions, or make or offer to make combination sales or transactions which shall result in a reduction of the resale prices therein established."

¹⁶ Although there is a variation of language among all agreements, the above is a fair summary of their salient features. It is to be noted that the reserved right in the seller to revise the schedule of prices and the agreement of the buyer to be bound thereby are present in all contracts.

alcoholic beverages and thus promoting temperance in their use and consumption. ([Allied Properties v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 141; Seagram Distillers Co. v. Corenswet \(1955\) 198 Tenn. 644 \[281 S.W.2d 657, 660\]](#).) It is only "horizontal" agreements "between producers or between wholesalers or between retailers as to sale or resale prices" ([§ 24753](#)) that the fair trade provisions of the Alcoholic Beverage Control Act interdict. [CA\(12\)](#)¹⁸ (12) It is not necessary to the accomplishment of the above legislative objectives that fair trade agreements be at the same time agreements for the [\[***25\]](#) purchase and sale of the liquors involved or that the parties to said agreements stand in a direct and immediate seller-buyer relationship to each other. While the language of the statute is sufficiently comprehensive to embrace fair trade agreements which are at the same time agreements of purchase and sale, it gives no indication that it is operable only with respect to such agreements.

Although we have found no California case on the point, nevertheless the contention now made by the licensees that the contracts must be between parties standing in a direct and immediate vendor-vendee relationship has been made and rejected in other jurisdictions. In [General Electric Co. v. Kimball Jewelers, Inc. \(1956\) 333 Mass. 665, 672 \[132 N.E.2d 652, 656\]](#), the court construing provisions of the Fair Trade Law of Massachusetts, almost identical with the general Fair Trade Act of this state ([§ 16902](#)) and with [section 24750](#) here under consideration, said: "A fair trade contract may be made between a producer and a retailer who do not trade directly with each other. The statute applies not only to contracts between the parties, but to any contract 'relating to the sale or resale of [\[***26\]](#) a commodity', whether the sale is between the parties or not, because the object is to protect the trade mark, brand or name of the producer or owner, whoever makes the sale. [Citations.]" In [Kinsey Distilling Sales Co. v. Foremost Liquor Stores, Inc. \(1958\) 15 Ill.2d 182, 197-198 \[154 N.E.2d 290, 297-298\]](#), involving sales of brands of whiskey, [\[*805\]](#) the court relied upon the *General Electric* Co. case to reach the same conclusion with respect to the provisions of the Illinois Fair Trade Act which were practically the same as those in the Massachusetts statute and in [section 24750](#) applicable to the instant case. In [Seagram-Distillers Corp. v. Old Dearborn Distributing Co. \(1936\) 363 Ill. 610, 612 \[2 N.E.2d 940, 941\]](#), the Illinois Supreme Court also observed that contracts were in conformity with the Fair Trade Act of that state which had been executed "between plaintiff and certain numerous Illinois retailers, although plaintiff does not sell beverages direct to any retailer." (See also [Seagram Distillers Co. v. Corenswet, supra, \(1955\) 198 Tenn. 644 \[281 S.W.2d 657, 659\]](#).)

In addition we observe that all of the agreements upon which the [\[***27\]](#) accusation was founded were accepted for filing by the Department or its predecessor agency, the State Board of Equalization, as fair trade agreements authorized by the applicable statute ([§ 24750](#)) required to be filed by [\[**678\]](#) administrative regulation (rule 99(b)) and, under the law ([§ 24755](#)), controlling the price of all retail sales of the distilled spirits involved. The Department asserts that since the inception of fair trading in alcoholic beverages similar contracts "have been uniformly filed by the liquor control authorities and have been the subject of enforcement by these authorities." [CA\(13\)](#)¹⁹ (13) Although this is not a matter contained in the instant record, we note that the agreements which are in the record reflect the uniformity thus asserted and indicate to us that over the period of years covered by them (1947 to 1956), the Department appears to have been consistent in accepting for filing fair trade agreements between producers and retailers, even though such parties were not and under applicable regulations could not be in lawful seller-buyer relationships. [HN9](#)²⁰ While this contemporaneous administrative construction of the statute authorizing fair trade agreements ([§ 24750](#)) [\[***28\]](#) and of the regulation requiring their filing with the Department (rule 99(b)) by the agency charged with their enforcement and interpretation is not necessarily controlling, it "is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." ([Coca-Cola Co. v. State Board of Equalization \(1945\) 25 Cal.2d 918, 921 \[156 P.2d 1\]](#); see also [Select Base Materials, Inc. v. Board of Equalization \(1959\) 51 Cal.2d 640, 647 \[335 P.2d 672\]](#)).¹⁷

[\[*806\]](#) [CA\(14\)](#)²¹ (14) The licensees further contend that the agreements relied upon by the Department are void for lack of consideration and mutuality. The gist of this argument is that the manufacturers did not undertake to sell to the [\[***29\]](#) retailers and the latter did not obligate themselves to buy or accept from the manufacturer any

¹⁷ Our attention has also been directed to the opinion of the Appeals Board in an unrelated case (*Appeal of Moeslein*, No. AB-794) in which it was held that there was no requirement that fair trade contracts be also contracts for the sale of distilled spirits.

alcoholic beverages. Here again the licensees ignore or misconstrue the real nature and purpose of the agreements. As we have pointed out, they are agreements establishing fair trade prices and not agreements of sale. Thus *California Refining Co. v. Producers Refining Corp. (1938) 25 Cal.App.2d 104 [76 P.2d 553]* and *J. A. Folger & Co. v. Williamson (1954) 129 Cal.App.2d 184 [276 P.2d 645]*, relied upon by the licensees, dealing with contracts of sale reserving the right in either party to deliver or accept the subject property according to his own wish, want or desire and therefore illusory in character and void, are not determinative of the question here raised.

When the true nature of the instant agreements is considered, it is clear that they are supported by a valid and sufficient consideration. Mutual benefits are derived therefrom by the contracting parties. The manufacturer or producer obtained protection for his trademarks and brands; the retailer is made secure from cutthroat competition. More importantly, the retailer is benefited by entering into the [***30] agreement in the first place, since without a fair trade agreement the distilled spirits subject thereof could not be sold at retail. (§ 24755.) A number of decisions in other jurisdictions have rejected the licensees' contention and have held that fair trade agreements similar to those before us are supported by a sufficient consideration. (*Houbigant Sales Corp. v. Woods Cut Rate Store (1937) 123 N.J.Eq. 40 [196 A. 683, 686-687]*; *General Electric Co. v. Kimball Jewelers, Inc.* (1956), *supra*, 333 Mass. 665, 670-671 [132 N.E.2d 652, 654-655]; *Kinsey Distilling Sales Co. v. Foremost Liquor Stores, Inc.* (1958), *supra*, 15 Ill.2d 182, 197 [154 N.E.2d 290, 297]; *Seagram-Distillers Corp. v. Old Dearborn Distributing Co.* (1936), *supra*, 363 Ill. 610, 613 [2 N.E.2d 940, 942]; *Seagram Distillers Co. v. Corenswet* (1955), *supra*, 198 Tenn. 644 [281 S.W.2d 657, 660-661]; *General Electric Co. v. S. Klein-On-the-Square (N.Y. 1953) 121 N.Y.S.2d 37, 45-46* and see cases collected at page 46.)

[*807] [**679] We hold therefore that the fair trade agreements received in evidence conformed to the requirements of *section I* [***31] 24750, that they were supported by a consideration, valid and enforceable, and that the trial court's determination to the contrary that nothing of value was received by the retailers signing the agreements was erroneous in the light of the administrative record.

Evidence of fair and open competition.

HN10 [↑] Fair trade agreements authorized by *section 24750* must pertain to an alcoholic beverage bearing the trademark, brand or name of the producer or owner "which is in fair and open competition with alcoholic beverages of the same general class produced by others. . . ." We have already pointed out that in the instant case certified copies of fair trade contracts and fair trade contract price schedules were received in evidence over the objection of the licensees.¹⁸ The Department did not introduce evidence in addition to the above documentary evidence that the products involved in the sale were in fair and open competition. No evidence was introduced or offered by the licensees that the products were *not* in such competition. It is the contention of the licensees, as it was the conclusion of the trial court, that there is no substantial evidence in the record that the alcoholic [***32] beverages in question were in fair and open competition with those of the same general class produced by others. As we stated earlier, our inquiry is not with respect to the trial court's finding, but whether such evidence exists in the administrative record.

The "fair and open competition" clause found in *section 24750* appears in almost identical language in the corresponding section of the general Fair Trade Act (§ 16902). Indeed subdivision (a) of section 16902 and *section 24750* employ precisely the same language except for the use of the word "commodity" in the former and the words "alcoholic beverage" in the latter. Commenting on such clause in section 16902, the Supreme Court in *Scovill Mfg. Co. v. Skaggs etc. Drug* [***33] *Stores (1955) 45 Cal.2d 881, 889 [291 P.2d 936]*, observed: "The clear language of the clause in question contemplates that there are on the market commodities produced by others which are so similar in character to the fair traded items that they provide [*808] competition which is not hampered by unlawful trade restraints." We must therefore determine whether such competitive conditions contemplated by the statute are disclosed by the instant record.

¹⁸ Rule 99(b) required the filing with the Department of a copy of the contract and four copies of minimum resale price schedules. Attached to each of six of the contracts in evidence as part of the exhibits is a schedule of prices entitled "Distilled Spirits Fair Trade Schedule."

As pointed out earlier in this opinion, the system of mandatory fair trading established by the Alcoholic Beverage Control Act prohibits the sale at retail in this state of any distilled spirits unless pursuant to a fair trade contract executed pursuant to [section 24750](#). Rule 99(b) requires the filing of all such contracts with the Department. All of the fair trade contracts and fair trade contract price schedules received in this case were officially certified as those required by law to be filed with the Department. (See footnote 8, *ante*.) [CA\(15a\)](#)[] (15a) The only contracts and schedules which the Department is authorized to accept for filing are those so executed, which thereby constitute the legal and functional basis for fair trading [***34] distilled spirits. [HN11](#)[] The Department is invested with the power of administering and enforcing the liquor laws of this state ([Cal. Const., art. XX, § 22](#); §§ 23049-23051) and of carrying out the legislative purposes and objectives of the Alcoholic Beverage Control Act (§ 23001). Vital to such enforcement and to the achievement of such purposes is the administration and enforcement of the fair trade provisions of the act. ([Allied Properties v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 147-148.](#)) It is to be [**680] presumed therefore that such "official duty has been regularly performed" ([Code Civ. Proc., § 1963, subd. 15](#)) and that the Department, employing its administrative expertise and satisfying itself that the fair trade contracts filed with it were in fact what they purported to be, determined, in accepting them for filing, that they were in fact entered into pursuant to [section 24750](#) and that the products to which they related were in fair and open competition with other distilled spirits of the same general class.

Two other presumptions are also applicable. It is to be presumed that the transactions embodied in the fair trade agreements "have [***35] been fair and regular" ([Code Civ. Proc., § 1963, subd. 19](#)) and that comporting with such presumption the agreements were not designed to impose unlawful restraints on open competition in the market. (Cf. [Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra, 45 Cal.2d 881, 890.](#)) It is also to be presumed "[that] the law has been obeyed." ([Code Civ. Proc., § 1963, subd. 33.](#)) If the products covered [*809] by the agreements in question had *not* been in fair and open competition, the agreements would have offended against the Cartwright [Antitrust Law](#) (§§ 16700-16758) and in particular section 16720 thereof.

In our view all of the three foregoing presumptions have a joint and coordinate application to the instant case. [CA\(16\)](#)[] (16) It is of course well settled that they constitute evidence in the record. ([Code Civ. Proc., § 1957; Smellie v. Southern Pac. Co. \(1931\) 212 Cal. 540 \[299 P. 529\].](#)) It is significant here that the licensees have introduced no evidence whatsoever to controvert them. [CA\(15b\)](#)[] (15b) The effect of the presumptions is to furnish an evidentiary basis for the conclusions that the contracts on which the present charges are predicated are in accord with [section 24750](#)[***36] and relate to products which are in fair and open competition with products of the same general class produced by others.

However, we must reject two additional arguments advanced by the Department to support its determination of fair and open competition. [CA\(17\)](#)[] (17) It is asserted, but without any citation of authority, that the recitals contained in all the contracts to the effect that the alcoholic beverages covered therein were in fair and open competition are proof of the fact that they actually were. Obviously, the recitals are hearsay (19 Cal.Jur.2d, Evidence, § 381, p. 113; [People v. Dewson \(1957\) 150 Cal.App.2d 119, 133 \[310 P.2d 162\].](#)) While [HN12](#)[] under [section 11513, subdivision \(c\) of the Government Code](#), which was applicable to the proceedings before the Department ([Gov. Code, § 11501](#)) "[hearsay] evidence may be used for the purpose of supplementing or explaining any *direct* evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions" (italics added), the record before us does not disclose any basis for the consideration of such hearsay recitals. There is no *direct* evidence for them to supplement, [***37] since the only evidence supportive of the conclusion of fair and open competition is the *indirect* evidence of the foregoing presumptions ([Code Civ. Proc., § 1957](#)). Nor do the recitals fall within any of the recognized exceptions to the hearsay rule so as to constitute hearsay admissible over objection in civil actions.

[CA\(18a\)](#)[] (18a) [CA\(19a\)](#)[] (19a) The Department also asserts that evidence of fair and open competition can be supplied by judicial notice and invites this court to recognize as one of common knowledge the fact that there are "countless brands of distilled spirits [*810] . . . which are sold in California and which vie with each other for public favor." In our view, the existence and operation throughout this state of countless retail outlets selling to the public alcoholic beverages for consumption off the licensed premises is a matter of common knowledge. It is commonly known that such outlets consist of markets, supermarkets, grocery stores, delicatessens, food stores, drugstores,

cigarstands, and the omnipresent liquor store selling such commodity [**681] exclusively; that such outlets are not confined to strictly shopping localities but are found in hotels, public buildings, [***38] transportation terminals and almost every area of our society except where expressly excluded by law; and that whatever the area or type of business establishment, such outlets merchandise numerous brands of bourbon whiskey, Scotch whiskey and gin which, including the brands here involved, are offered to the public throughout a state-wide marketing area.

CA(20)[] (20) HN13[] The courts of this state may take judicial notice of matters of common knowledge within the limits of their jurisdiction. (*Varcoe v. Lee (1919) 180 Cal. 338, 344-345 [181 P. 223]*; see also, for example, *Comunale v. Traders & General Ins. Co. (1958) 50 Cal.2d 654, 659 [328 P.2d 198]*; *Paraco, Inc. v. Department of Agriculture (1953) 118 Cal.App.2d 348, 353 [257 P.2d 981]*; *Bowker v. Baker (1946) 73 Cal.App.2d 653, 665 [167 P.2d 256]*; *Galloway v. Moreno (1960) 183 Cal.App.2d 803, 809 [7 Cal.Rptr. 349]*). **CA(21)[] (21)** An appellate court may properly take judicial notice of any matter of which a trial court may take judicial notice (*Varcoe v. Lee, supra, 180 Cal. 338, 343*) and the failure or refusal of a trial court to take judicial notice of a fact or matter does not preclude an appellate court [***39] from giving proper effect thereto. (*People v. Tossetti (1930) 107 Cal.App. 7, 12 [289 P. 881]*; *Ward Mfg. Co. v. Miley (1955) 131 Cal.App.2d 603, 609 [281 P.2d 343]*; *Varcoe v. Lee, supra; Rogers v. Cady (1894) 104 Cal. 288, 290 [38 P. 81, 43 Am.St.Rep. 100]*.)

CA(18b)[] (18b) CA(19b)[] (19b) In the instant case, however, the court below merely reviewed the evidence in the same way as an appellate court. (See *Brice v. Department of Alcoholic Beverage Control, supra, 153 Cal.App.2d 315, 323* and other authorities *supra*.) At the administrative hearing the doctrine of "official" notice, performing in the administrative process the same role as judicial notice in the courts, could have been invoked but only according to procedural rules. Under *section [*811] 11515 of the Government Code*, the Department in reaching its decision was permitted to take official notice, among other things, of "any fact which may be judicially noticed by the courts of this State" providing it follows required procedure.¹⁹ The record before us does not disclose that official notice was taken of what the Department now claims is a matter of common knowledge, namely the existence of countless [***40] competing brands of distilled spirits throughout the state. We find nothing in the record that the Department invoked such official notice or that the hearing officer proposed to take such notice and that these licensees were informed to that effect.

If we were presently reviewing in the usual manner the record of a court of original jurisdiction we would unhesitatingly give effect through judicial notice to the matter of common knowledge referred to above. However, as we have already made plain, we review the administrative record and are of the opinion [***41] that the procedural restrictions mentioned above persist here. We do not think that under the guise of judicial notice we can incorporate into the administrative record a matter which was not officially noticed by the Department. In the present case, this produces an absurd and unrealistic result calling for a more adequate use of judicial notice. (See 9 Wigmore on Evidence (3d ed.) § 2583, p. 580 et seq.) We feel, nevertheless, that the position we take is more consonant with the principles defining scope of review and with the concepts of fair play that underlie the administrative process.

CA(15c)[] (15c) We hold therefore, although only on the scant evidence of the presumptions, that [**682] there is substantial evidence in the record that the alcoholic beverages covered by the contracts were in fair and open competition. Our conclusion is not reluctantly made in view of the failure of the licensees to offer any evidence at all on this issue.

CA(22)[] (22) Finally, the licensees argue that rule 99 itself nullified fair and open competition; that it effectively foreclosed competition for at least 45 days; and that by permitting the filing of amendments to meet competitive prices, it preserved [*812] [***42] the status quo of the market.²⁰ As we have pointed out, rule 99 regulates the

¹⁹ **HN14[]** *Government Code section 11515* in relevant part states: "Parties present at the hearing shall be informed of the matters to be noticed, and those matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of such refutation to be determined by the agency."

filings of contracts and minimum retail resale prices and of revisions of such prices. Obviously the filing requirement is designed to give notice to the department and to the retailers who must sell according to the prices. We fail to see how this rule per se closes competition. Any authorized person can file the contracts and the prices. Meeting competitive prices by filing amendments would seem to us to have the effect of enhancing rather than curtailing competition. If the licensees herein are complaining about the rule in operation, they have produced no evidence supporting the complaints. [CA\(23\)](#)[↑] (23) Moreover, as the court stated in the *Scovill* case, *supra*, the expression [HN15](#)[↑] "[fair] and open' relates only to the manner of competing, not to the results." ([45 Cal.2d at p. 889.](#))

[***43] *Sufficiency of the findings on the first seven counts.*

The findings on all of the first seven counts were in the same form and expressed in terms of the accusation.²¹ The licensees, while conceding that under the Administrative Procedure Act ([Gov. Code, § 11500 et seq.](#)) findings may be stated in the language of the pleadings or by reference thereto ([§ 11518](#)), contend that such findings are insufficient where they do not allege a fact or circumstance necessary to support the determination of the administrative agency. In the instant case they claim that there is no finding that the "alcoholic beverages, subject of the Accusation . . . were in fair and open competition with alcoholic beverages of the same general class produced by others. . . ."

[***44] [*813] The necessity for findings in the instant case rests upon the statutory requirement of the Administrative Procedure Act. [HN16](#)[↑] [Section 11518 of the Government Code](#), here applicable, provides in part: "The decision shall be in writing and shall contain findings of fact, a determination of the issues presented and the penalty, if any. The findings may be stated in the language of the pleadings or by reference thereto." In [Swars v. Council of City of Vallejo \(1949\) 33 Cal.2d 867, 872 \[206 P.2d 355\]](#) in which the provisions of the above act were considered, although not applicable to the administrative [\[*683\]](#) agency there involved, the court observed: "Although administrative findings must conform to the statutes governing the particular agency, they need not be stated with the formality required in judicial proceedings [citations]. In connection with the action of an administrative board, the fact that certain action is taken or recommendation made may raise a presumption that the existence of the necessary facts was ascertained and found [citations]."

In the instant case, the licensees, contrary to the tenor of their present contention, were not charged with [\[***45\]](#) selling alcoholic beverages which were in fair and open competition. They were charged with violations of [section 24755](#) and rule 99, that is selling alcoholic beverages "at a price less than the stipulated minimum resale price provided for in a fair trade contract duly filed with the Department. . . ." The licensees admitted the sales but in effect denied that the fair trade prices were stipulated in any contract or schedule filed as required by law. The hearing officer found against the licensees on this issue and his finding is supported by substantial evidence. Administrative procedure permitted the licensees to present new matter by way of defense. ([Gov. Code, § 11506, subd. \(a\) \(5\).](#)) In their amended notice of defense they objected to the sufficiency of the allegations of the accusation upon the ground, *inter alia*, that the alcoholic beverages subject thereof were not in fair and open competition. While this appears to have been framed as an objection to the pleading, nevertheless even if it is regarded as an affirmative defense, the licensees offered no evidence whatsoever in support of it. [CA\(24\)](#)[↑] (24)

²⁰ That portion of rule 99(b) relevant here provided as follows: "Amendments to such contracts affecting changes in minimum resale prices for a brand, type and size of container previously filed shall be filed with the department on or before the fifteenth day of any calendar month to become effective on the first day of the second succeeding calendar month. To meet competitive prices for similar distilled spirits, amendments to fair trade contracts may be filed with the department on or before the fifteenth day of any calendar month and such amended competitive price shall become effective at the same time the competitive price for similar distilled spirits shall become effective."

For portions of rule 99 heretofore set forth, see footnote 11, *supra*.

²¹ For example, the finding with respect to Count I was as follows: "It is true that on or about August 28, 1956, the above-named licensee, at the above-mentioned premises, did sell alcoholic beverages, to-wit, Scotch Whiskey, at retail to the W. P. Fuller Company, 301 Mission Street, San Francisco, at a price less than the stipulated minimum resale price provided for in a fair trade contract duly filed with the Department of Alcoholic Beverage Control as follows: . . ." Description of brands and prices follows.

We are of the view therefore that the findings stated in the language of the [***46] pleadings were sufficient. They stated that the licensees had made the sales at less than the stipulated resale price, that the price was set forth in a fair trade contract and that such contract had been [*814] duly filed with the Department. These findings were sufficient to support the "Determination of Issues Presented" ²² namely that the licensees "violated Section 24755 . . . and Rule 99 (f)." No express finding was required that the products covered by the fair trade contracts were in fair and open competition. The findings made neither impede judicial review nor fail to apprise the licensees of the reason for the action taken against them. (See *Swars v. Council of City of Vallejo, supra, 33 Cal.2d 867, 871, 873.*)

CA(25a)[↑] (25a) Nevertheless, assuming *arguendo*, the necessity of a finding that the alcoholic beverages covered [***47] by the fair trade contracts and involved in the sales here under review were in fair and open competition, the licensees cannot prevail for two reasons: First, the only evidence on this question consisting of the presumptions already discussed was that such distilled spirits were in fair and open competition. The licensees introduced no contrary evidence. **CA(26)[↑] (26)** As we observed in *Greenberg v. Hastie (1962) 202 Cal.App.2d 159, 173-174 [20 Cal.Rptr. 747], HN17[↑]* a party "cannot complain of a lack of finding, where, if made, it would have necessarily been against him. (*Miller v. Ambassador Park Syndicate (1932) 121 Cal.App. 92, 97 [9 P.2d 267]; Arsenian v. Meketarian (1956) 138 Cal.App.2d 627, 633 [292 P.2d 293].*)" **CA(25b)[↑] (25b)** Secondly, the findings on all of the first seven counts state that the sales were made at prices less than the minimum resale price provided for in fair trade contracts "duly filed" with the Department. **CA(27)[↑] (27)** As we have already explained, the fair trade contracts involved could not conform to the requirements of section 24750 and could not be filed as required by rule 99(b) unless the alcoholic beverages covered by them were in fair and open competition. The [***48] finding that the alcoholic beverages were in fair and open competition can therefore be reasonably implied from the finding that the fair trade contracts were [**684] duly filed. In *Greenberg v. Hastie, supra, 202 Cal.App.2d 159, 173* we quoted from *Richter v. Walker (1951) 36 Cal.2d 634, 640 [226 P.2d 593]* as follows: **HN18[↑]** "[While] full findings are required upon all material issues a judgment will not be set aside on appeal because of a failure to make an express finding upon an issue if a finding thereon, consistent with the judgment, results by necessary [*815] implication from the express findings which are made." We find no obstacle to the application of this principle to findings in administrative proceedings. **CA(28)[↑] (28)** Paraphrasing the language of the *Swars* case quoted by us above, the fact that the hearing officer in the instant case found that the fair trade contracts were duly filed raises the presumption that the fact of "fair and open" competition was ascertained and found. (See *Swars v. Council of City of Vallejo, supra, 33 Cal.2d 867, 872.*)

The eighth count.

CA(29)[↑] (29) The hearing officer found that, as charged in Count VIII, the licensees sold [***49] and delivered alcoholic beverages to a named vendee "pursuant to an order and did fail to accompany said orders with delivery orders." This finding is substantially supported by the testimony of Agent Reed to the effect that Emilio Maionchi, one of the licensees, admitted to him that the deliveries in question had not been accompanied with delivery orders or invoices. The Department determined that the foregoing established a violation of its rule 17(e). ²³ It is clear that such violation is established by substantial evidence. Indeed the licensees produced no contrary evidence. The trial court, on the other hand, found that there was no substantial evidence that the licensees "willfully or with intent to evade the rules" failed to accompany the deliveries with delivery orders. The record establishes a violation of rule 17(e) and thus of section 24200, subdivision (b). (See footnote 1, *supra*.) **CA(30)[↑] (30)** There is no requirement either in the above statute or the above rule that the delivery of liquor without an accompanying

²² In *Jones v. Maloney (1951) 106 Cal.App.2d 80, 89-90 [234 P.2d 666]*, this court said that such "determination" was comparable to a trial court's "conclusions of law."

²³ Rule 17(e) as it then read provided: "(e) No alcoholic beverage shall leave the premises of an off-sale licensee for delivery to a consumer, except pursuant to an order previously received by such licensee. Such alcoholic beverages shall be accompanied by a delivery order, which order must state the quantity, brand, proof, and price of such alcoholic beverages, and the name and address of the consumer purchaser, and shall have printed or stamped thereon the name and address of such off-sale licensee. A copy of such order shall be kept on file by the off-sale licensee for a period of two years after the date of delivery."

delivery order be wilfully or intentionally done. (*Mercurio v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626, 630 [301 P.2d 474]*). **[***50]** The trial court's finding was error.

We have concluded therefore that the decision of the Department here under review is supported by substantial evidence; that there was no prejudicial abuse of discretion **[*816]** and the Department proceeded in the manner required by law; and that the findings and conclusions of the trial court to the contrary were erroneous. Our disposition of the **[***51]** issues raised in No. 19938 renders unnecessary any separate discussion of the matters raised in No. 20051.

The attempted appeal by the Department in No. 19938 and the attempted appeal by the licensees in No. 20051 from the peremptory writ of mandate issued pursuant to the judgment entered on March 15, 1961, are, and each of them is, hereby dismissed. The judgment is reversed with instructions to the trial court to enter judgment denying the petition for a writ of mandate. The Department shall recover costs on both appeals.

End of Document



Cohon v. Department of Alcoholic Beverage Control

Court of Appeal of California, First Appellate District, Division One

July 16, 1963

Civ. No. 20485

Reporter

218 Cal. App. 2d 332 *; 32 Cal. Rptr. 723 **; 1963 Cal. App. LEXIS 1783 ***

CHARLES COHON et al., Plaintiffs and Appellants, v. THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Defendant and Respondent

Prior History: [***1] APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Edward F. O'Day, Judge.

Proceeding in mandamus to compel the Department of Alcoholic Beverage Control to set aside its decision suspending an off-sale retail liquor license.

Disposition: Affirmed. Judgment denying writ, affirmed.

Core Terms

licensees, prices, open competition, accusation, contracts, fair trade contract, fair trade, beverages, alcoholic, counts, substantial evidence, present case, grounds, notice

LexisNexis® Headnotes

Governments > State & Territorial Governments > Licenses

Governments > Police Powers

HN1 **State & Territorial Governments, Licenses**

Cal. Const. art. XX, § 22, grants to the Department of Alcoholic Beverage Control (California) the power to deny, suspend, or revoke alcoholic beverage licenses for good cause where the granting or continuance of such license would be contrary to public welfare or morals.

Governments > State & Territorial Governments > Licenses

Governments > Police Powers

HN2 **State & Territorial Governments, Licenses**

Cal. Bus. & Prof. Code § 24200(a) provides that when the continuance of a license would be contrary to public welfare or morals it is a ground constituting the basis for suspension or revocation of licenses.

Governments > State & Territorial Governments > Licenses

Governments > Police Powers

HN3 State & Territorial Governments, Licenses

Cal. Bus. & Prof. Code § 24200(b) provides that violation of the rules adopted by the Department of Alcoholic Beverage Control (California) or other penal provisions of the State of California prohibiting or regulating the sale of alcoholic beverages or intoxicating liquors are grounds constituting a basis for the suspension or revocation of licenses.

Copyright Law > ... > Civil Infringement Actions > Elements > General Overview

Trademark Law > Conveyances > General Overview

Governments > State & Territorial Governments > Licenses

Trademark Law > ... > Particular Subject Matter > Names > General Overview

HN4 Civil Infringement Actions, Elements

Cal. Bus. & Prof. Code § 24755 (former version) requires all retail sales of distilled spirits to be made pursuant to fair trade contracts executed pursuant to §§ 24750-24757 and prohibits any violations of such contracts. Former § 24750, and as it now reads, authorizes fair trade contracts fixing the resale price of alcoholic beverages bearing the trademark, brand, or name of the producer or owner and in fair and open competition with others of the same general class.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Torts > Business Torts > Unfair Business Practices > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Governments > State & Territorial Governments > Licenses

HN5 Price Fixing & Restraints of Trade, Vertical Restraints

Department of Alcoholic Beverage Control (California) Rule 99(f), Cal. Code Regs. tit. 4, §§ 99(f), (a), and (b) (former version), provide that no manufacturer, manufacturer's agent, wholesaler, or rectifier is permitted to sell distilled spirits in containers bearing brands or names of owners except pursuant to fair trade contracts; that copies of such fair trade contracts should be filed with the Department of Alcoholic Beverage Control (California), together with copies of minimum resale price schedules; and that no licensee should sell beverages at retail at a price less than the minimum resale price fixed by such fair trade contract.

Evidence > ... > Procedural Matters > Preliminary Questions > General Overview

HN6 [down arrow] **Procedural Matters, Preliminary Questions**

Where a record shows that a document is considered by a trial court and the parties as being in evidence, a reviewing court will not look for technical reasons to exclude from consideration any part of the record the is before the trial court.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN7 [down arrow] **Defenses, Demurrers & Objections, Affirmative Defenses**

Where parties proceed throughout a trial upon a theory that a certain issue is presented for adjudication both parties are thereafter estopped from thereafter claiming that no such issue is in controversy.

Administrative Law > Separation of Powers > Constitutional Controls > General Overview

Governments > State & Territorial Governments > Licenses

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Governments > Police Powers

HN8 [down arrow] **Separation of Powers, Constitutional Controls**

The Department of Alcoholic Beverage Control (California), being an agency upon which is conferred limited judicial powers, Cal. Const. art. XX, § 22, the court is called upon, where there are conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which may be drawn therefrom, to determine whether the findings of the Department are supported by substantial evidence. In this respect the court's function is the same as that of a trial court.

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Administrative Law > Judicial Review > Reviewability > Questions of Law

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN9 [down arrow] **Reviewability, Factual Determinations**

Where there is no factual issue or substantial conflict in the evidence, the question presented is one of law and the conclusions of law of the Department of Alcoholic Beverage Control (California) are not necessarily binding upon an appellate court whose duty it is to make the final determination in accordance with applicable principles of law.

Administrative Law > Judicial Review > Reviewability > Questions of Law

Civil Procedure > ... > Discovery > Methods of Discovery > Stipulations

[**HN10**](#) [blue icon] **Reviewability, Questions of Law**

The applicability of certain statutes to a given situation presented to an administrative agency on stipulated or uncontradicted facts is a question of law, the determination of which devolves upon the court in accordance with applicable principles of law.

Administrative Law > Judicial Review > Reviewability > Questions of Law

Evidence > Admissibility > Statements as Evidence > Parol Evidence

[**HN11**](#) [blue icon] **Reviewability, Questions of Law**

The construction of a written instrument, where no extrinsic evidence is considered in aid of its interpretation, is one of law and the court is not bound by the interpretation of it by the Department of Alcoholic Beverage Control (California). The interpretation placed upon a written instrument by a lower tribunal, where extrinsic evidence is not resorted to, while not binding on appeal, will be accepted by the appellate court if such interpretation is reasonable, or if such interpretation is one of two or more reasonable constructions of the instrument.

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Standard of Review

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

[**HN12**](#) [blue icon] **Standards of Review, Clearly Erroneous Standard of Review**

An administrative interpretation of a statute made by an administrative agency charged with carrying out a particular statute will be accorded great respect by the courts and will be followed if not clearly erroneous.

Criminal Law & Procedure > ... > Alcohol Related Offenses > Distribution & Sale > General Overview

Governments > State & Territorial Governments > Licenses

Criminal Law & Procedure > Criminal Offenses > Alcohol Related Offenses > General Overview

Governments > Police Powers

[**HN13**](#) [blue icon] **Alcohol Related Offenses, Distribution & Sale**

The fair trade provisions of the Alcoholic Beverage Control Act are a valid and constitutional exercise of the police power.

Administrative Law > Separation of Powers > Jurisdiction

Evidence > Inferences & Presumptions > General Overview

Administrative Law > Judicial Review > Reviewability > Preclusion

[**HN14**](#) [blue icon] **Separation of Powers, Jurisdiction**

It is to be presumed that an official duty is regularly performed, [Cal. Civ. Proc. Code § 1963\(15\)](#), when the Department of Alcoholic Beverage Control (California), employing its administrative expertise and satisfying itself that the fair trade contracts filed with it are in fact what they purport to be, determines, in accepting them for filing, that they are in fact entered into pursuant to [Cal. Bus. & Prof. Code § 24750](#) and that the products to which they relate are in fair and open competition with other distilled spirits of the same general class. Two other presumptions are: (1) that it is to be presumed that the transactions embodied in the fair trade agreements are fair and regular, [Cal. Civ. Proc. Code § 1963\(19\)](#), and that comporting with such presumption the agreements are not designed to impose unlawful restraints on open competition in the market; and (2) that it is also to be presumed that 'the law is obeyed, [§ 1963\(33\)](#) because if the products covered by the agreements in question are not in fair and open competition, the agreements would offend against the Cartwright [Antitrust Law](#), [Cal. Bus. & Prof. Code §§ 16700-16758](#) and in particular § 16720 thereof.

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#) [down] (1)

Intoxicating Liquors — Licenses — Suspension — Review.

-- The Department of Alcoholic Beverage Control being an agency on which the Constitution has conferred limited judicial powers ([Const., art. XX, § 22](#)), the appellate court, in reviewing the suspension of a liquor license, is called on, where there are conflicts in the evidence, conflicting interpretations thereof and conflicting inferences that may be drawn therefrom, to determine whether the department's findings are supported by substantial evidence; in this respect, the appellate court's function is the same as that of the court below.

[CA\(2\)](#) [down] (2)

Id.—Licenses—Suspension—Review.

--On appeal from the suspension of a liquor license, where there is no factual issue of substantial conflict in the evidence, the question presented is one of law and the conclusions of the Department of Alcoholic Beverage Control are not necessarily binding on the appellate court whose duty it is to make the final determination in accordance with applicable principles of law.

[CA\(3\)](#) [down] (3)

Id.—Licenses—Suspension—Review.

--On appeal from the suspension of a liquor license, the applicability of certain statutes to a given situation presented on stipulated or uncontradicted facts is a question of law, the determination of which devolves on the appellate court in accordance with applicable principles of law.

[CA\(4\)](#) [down] (4)

Id.—Licenses—Suspension—Review.

--In a proceeding to suspend a liquor license, where no extrinsic evidence was considered by the Department of Alcoholic Beverage Control in aid of its interpretation of a written instrument, the construction is one of law, and the appellate court is not bound by the department's interpretation of the instrument.

CA(5)[] (5)

Id.—Licenses—Suspension—Review.

--In a proceeding to suspend a liquor license, the interpretation placed on a written instrument by the Department of Alcoholic Beverage Control, where extrinsic evidence has not been resorted to though not binding on appeal, will be accepted by the appellate court where such interpretation is reasonable, or where such interpretation is one of two or more reasonable constructions of the instrument.

CA(6)[] (6)

Statutes—Construction—Departmental Construction.

--The administrative interpretation of a statute made by an administrative agency charged with carrying out a particular statute will be accorded great respect by the courts and will be followed if not clearly erroneous.

Counsel: M. Mitchell Bourquin for Plaintiffs and Appellants.

Stanley Mosk, Attorney General, and Wiley W. Manuel, Deputy Attorney General, for Defendant and Respondent.

Judges: Molinari, J. Bray, P. J., and Sullivan, J., concurred.

Opinion by: MOLINARI

Opinion

[*333] [**724] This is an appeal from a judgment denying appellants (hereinafter called the licensees) a peremptory writ of mandate in a proceeding for judicial review of an administrative decision of the Department of Alcoholic Beverage Control (hereinafter called the Department) ordering the suspension of an off-sale retail liquor license issued by the Department.

On March 13, 1959, the Department filed an accusation against the licensees in five counts charging that on five different occasions the licensees sold from their licensed premises cases of distilled spirits under the labels of Ancient Age whiskey and Cyrus [***2] Noble whiskey at sales prices below the applicable fair trade price. The acts set forth in all five counts were charged as providing grounds for suspension or revocation of the licensees' license under [article XX, section 22, of the California Constitution](#),¹ sections 24200, subdivisions [*334] (a)² and (b)

¹ [HN1\[!\[\]\(97ea838cafbb6b742db0821235fc0b4d_img.jpg\)\] Cal. Const., art. XX, § 22](#), in relevant part, grants to the Department the power to deny, suspend or revoke alcoholic beverage licenses for good cause where the granting or continuance of such license would be contrary to public welfare or morals.

² [HN2\[!\[\]\(b58d83b8715ee39b636f76637128756c_img.jpg\)\] § 24200, subd. \(a\)](#), in relevant part, provides that when the continuance of a license would be contrary to public welfare or morals it is a ground constituting the basis for suspension or revocation of licenses.

³ [***3] and [24755](#) ⁴ of the Business and Professions Code, ⁵ and rule 99(f) of the Department's rules. (Cal.Admin. Code, tit. 4, [§ 99, subd. \(f\)](#). ⁶)

[***4] [**725] A notice of defense was filed with the Department in which the licensees admitted that the beverages listed in the five counts were sold by them at the prices alleged. They denied, however, that the "fair trade prices" alleged in the accusation were stipulated to or fixed in any fair trade contract which was filed and posted as required by law and the Administrative Code. ⁷

[***5] [*335] On November 2, 1959, a hearing was held before the Department. At the commencement of the hearing the hearing officer denied the motion to dismiss and overruled the objections set forth in the notice of defense. Counsel for the licensees stipulated that the prices alleged in the accusation as the "Fair Trade Prices" were published in the "Industry Price Book" for the period covered by the accusation, and also stipulated that the prices charged by the licensees for the whiskies in question were as set forth in the accusation. The evidence adduced by the Department consisted of three exhibits. Exhibits No. 1 and No. 2 were fair trade contracts which fixed the minimum retail prices for the two brands of whiskey involved in the five counts of the accusation. ⁸ [***7] Each of the contracts had attached thereto a schedule of prices which listed the case price of the respective whiskies. ⁹ These contracts were duly certified by the custodian of fair trade contracts for the Department. The

³ [HN3](#) [§ 24200, subd. \(b\)](#), in relevant part, provides that violation of the rules adopted by the Department or other penal provisions of this state prohibiting or regulating the sale of alcoholic beverages or intoxicating liquors are grounds constituting a basis for the suspension or revocation of licenses.

⁴ [HN4](#) [§ 24755](#), as it read during the period of time covered by the accusation herein, required all retail sales of distilled spirits to be made pursuant to fair trade contracts executed pursuant to chapter 10 (§§ 24750-24757) and prohibited any violations of such contracts. ([§ 24750](#) as it read during the same period of time, and as it now reads, authorized fair trade contracts fixing the resale price of alcoholic beverages bearing the trademark, brand or name of the producer or owner and in fair and open competition with others of the same general class.)

⁵ Unless otherwise indicated all code references hereafter are to the Business and Professions Code.

⁶ [HN5](#) [§ 99, subd. \(f\)](#), and [subds. \(a\)](#) and [\(b\)](#) of said section, which are also applicable to the instant case, as said rule and subdivisions read at the time covered by the accusation herein, provided in substance that no manufacturer, manufacturer's agent, wholesaler or rectifier was permitted to sell distilled spirits in containers bearing brands or names of owners except pursuant to fair trade contracts; that copies of such fair trade contracts should be filed with the Department, together with copies of minimum resale price schedules; and that no licensee should sell beverages at retail at a price less than the minimum resale price fixed by such fair trade contract.

⁷ Said notice of defense objected to the accusation and requested its dismissal on the following grounds:

- (1) That [Bus. & Prof. Code, § 24755](#) and rule 99 of the Cal. Admin. Code are unconstitutional.
- (2) That the alcoholic beverages subject of the accusation are not in free and open competition with alcoholic beverages of the same general class produced by others within the meaning of the laws exempting price fixing from the public policy of the state.
- (3) That the contracts under which the "fair trade prices" are alleged to have been stipulated or fixed are within the provisions of the Sherman Anti-Trust Act and the Cartwright Act of the State of California.
- (4) That rule 99 of the Cal. Admin. Code is violative of the terms of § 25750 (obviously intended as [§ 24750](#)) of the Bus. & Prof. Code and [§ 11374 of the Gov. Code](#) and is also inconsistent with the provisions of [§ 24200, subd. \(b\) of the Bus. & Prof. Code](#).
- (5) That the fair trade prices are not supported by a valid contract.

⁸ Exhibit No. 1 was a contract entered into between Affiliated Distillers Brands Corp., a distributor of alcoholic beverages bearing the label or brand of Ancient Age whiskey, among others, and Excelsior W. & L., a retailer.

Exhibit No. 2 was a contract entered into between Haas Bros., the owner of the Cyrus Noble label, and P. & S. Liquor Store, a retailer.

authentication of these contracts was not challenged by the licensees, but they were objected to by the licensees on the basis of irrelevancy and immateriality and upon the grounds that these [***6] documents do not purport on their face to be valid contracts and that these contracts were not subjects of the accusation, and upon all of the grounds enumerated in the notice of defense.¹⁰ [***8] Exhibit [**726] No. 3 consisted of an affidavit by the editor of the Beverage [*336] Industry News to the effect that the prices alleged by the Department to be controlling on the licensees during the period covered by the accusation were published in said publication.¹¹ This affidavit was not objected to by the licensees. The Department's case was submitted upon these three exhibits. The licensees, conceding that there were no factual questions involved, did not present any evidence but submitted the matter upon the basis of the objections theretofore made and as stated in the notice of defense.

Thereafter, and on January 5, 1960, the hearing officer rendered his proposed decision wherein he made the following findings of fact: (1) that each of the sales which formed the basis of each of the five counts took place as therein alleged and that in each instance the sale was made at less than the stipulated minimum resale price provided for in the fair trade contracts duly filed with the Department; and (2) that the alcoholic beverages subject to the accusation were, and are, in free and open competition with alcoholic beverages of the same general class produced by others. The hearing officer also determined the legal issues presented and adjudged: that the various statutes and rules applicable to the accusation are constitutional and valid; that the fair trade agreements in question do not violate the Sherman Anti-Trust Act nor the Cartwright Act; and finally, that the fair trade prices were supported by valid contract [***9] and were subject to agreements or contracts sanctioned by law. The hearing officer thereupon recommended that the licensees' license be suspended for 15 days on each count, said suspension to run concurrently.

The Department adopted the hearing officer's decision and [*337] an appeal was thereupon taken by the licensees to the Alcoholic Beverage Control Appeals Board. This appeal posed the same legal questions presented by the licensees before the Department and was based on the grounds upon which the original accusation was defended. In addition, it was alleged that the Department had proceeded in excess of its jurisdiction for each of the reasons and upon the grounds alleged as a basis for the appeal. The Appeals Board rendered its decision affirming the Department. The licensees then filed a petition for writ of mandate in the superior court seeking a judicial review of the administrative adjudication. The writ was sought on the basis that substantial evidence did not exist which would support a finding that the alcoholic beverages which were the subject of the accusation were in fair and open competition. The same legal grounds theretofore urged by the licensees were [***10] again

⁹ These prices were higher than those admittedly charged by the licensees for the two brands to the persons and at the times charged by the accusation.

¹⁰ The record discloses that these exhibits were only received for identification and that the specific objections thereto were never formally ruled upon. No error is assigned by the licensees in respect to such omission. The specific objections interposed upon the presentation of these exhibits were substantially the same as those specified in the notice of defense which the hearing officer overruled. It is also apparent from the hearing officer's proposed decision that the finding against the licensees on the issue to which these exhibits were directed was in effect a ruling overruling the objection. (See *Van Haaren v. Whitmore*, 2 Cal.App.2d 632, 634 [38 P.2d 829]; *Citizens' Bank of Los Angeles v. Jones*, 121 Cal. 30, 33 [53 P. 354].) Moreover, both parties throughout the proceedings below and on this appeal have considered and treated these exhibits as having been admitted into evidence. It is well established that **HNG** where the record shows that a document has been considered by the court and the parties as being in evidence, a reviewing court will not look for technical reasons to exclude from consideration any part of the record which was before the court below. (*Mann v. Mann*, 76 Cal.App.2d 32, 41-42 [172 P.2d 369]; *Estate of Pailhe*, 114 Cal.App.2d 658, 664 [251 P.2d 76]; *Reed v. Reed*, 128 Cal.App.2d 786, 790-791 [276 P.2d 36]; see also *Miller v. Peters*, 37 Cal.2d 89, 93 [230 P.2d 803]; *People v. Nahabedian*, 171 Cal.App.2d 302, 306 [340 P.2d 1053]; and *People v. Lucas*, 155 Cal.App.2d 1, 5 [317 P.2d 104], to the effect that **HNT** where parties proceed throughout the trial upon a theory that a certain issue is presented for adjudication both parties are thereafter estopped from thereafter claiming that no such issue was in controversy.) Furthermore, it should be noted that at the conclusion of the hearing counsel for licensees conceded that there were no factual disparities involved and that the parties were "generally agreed on the factual basis. . . ."

¹¹ As indicated by this affidavit The Beverage Industry News-Section No. 2 is an industry price list or book printed and published monthly in the State of California.

substantially reiterated before the court below. Upon hearing and determination the superior court discharged the alternative writ theretofore issued and denied a peremptory writ of mandate.

Upon this appeal the licensees make the following contentions:

- (1) That the purported fair trade contracts relied upon do not comply with the provisions of [section 24750](#) and do not constitute valid contracts, and in support of this assertion it is further urged: (a) that the contracts are not between the parties authorized to contract by the act; (b) the [**727](#) agreements relied upon are void for lack of mutuality; and (c) the only valid price fixing agreements are those relating to products which are in fair and open competition.
- (2) Open competition does not and cannot exist under the law as presently administered by the Department; and
- (3) The evidence is insufficient to support a finding of fair and open competition, and in support of this claim it is further asserted: (a) that the absent evidence of fair and open competition cannot be supplied by official or judicial notice; and (b) the recitals of the fair trade contracts bind no one but the parties signatory thereto.

[CA\(1\)](#) [↑] (1) The [***11](#) scope of our review in the instant case is governed by certain well-established rules. [HN8](#) [↑] The Department, being an agency upon which the Constitution has conferred limited judicial powers ([Cal. Const., art. XX, § 22](#)), we are called upon, where there are conflicts in the evidence, conflicting interpretations thereof and conflicting inferences [\[*338\]](#) which may be drawn therefrom, to determine whether the findings of the Department are supported by substantial evidence. In this respect our function is the same as that of the court below. ([DeMartini v. Department of Alcoholic Beverage Control, 215 Cal.App.2d 787, 798-799 \[30 Cal.Rptr. 668\]](#); [Harris v. Alcoholic Beverage etc. Appeals Board, 212 Cal.App.2d 106, 113, \[28 Cal.Rptr. 74\]](#).) [CA\(2\)](#) [↑] (2) On the other hand, [HN9](#) [↑] where there is no factual issue or substantial conflict in the evidence, the question presented is one of law and the conclusions of law of the Department are not necessarily binding upon the appellate court whose duty it is to make the final determination in accordance with applicable principles of law. ([Estate of Platt, 21 Cal.2d 343, 352 \[131 P.2d 825\]](#); [Dunning v. Dunning, 114 Cal.App.2d 110, 114-115 \[**12\] \[249 P.2d 609\]](#); [Mangini v. Wolfschmidt, Ltd., 192 Cal.App.2d 64, 73 \[13 Cal.Rptr. 503\]](#).) [CA\(3\)](#) [↑] (3) Accordingly, [HN10](#) [↑] the applicability of certain statutes to a given situation presented on stipulated or uncontradicted facts is a question of law, the determination of which devolves upon us in accordance with applicable principles of law. ([Estate of Madison, 26 Cal.2d 453, 456 \[159 P.2d 630\]](#); [Bodinson Mfg. Co. v. California Emp. Com., 17 Cal.2d 321, 325 \[109 P.2d 935\]](#); [Peterson Tractor Co. v. State Board of Equalization, 199 Cal.App.2d 662, 668 \[18 Cal.Rptr. 800\]](#); [Pacific Pipeline Constr. Co. v. State Board of Equalization, 49 Cal.2d 729, 736 \[321 P.2d 729\]](#); [Bank of America v. State Board of Equalization, 209 Cal.App.2d 780, 793 \[26 Cal.Rptr. 348\]](#).) [CA\(4\)](#) [↑] (4) Similarly, [HN11](#) [↑] the construction of a written instrument, where no extrinsic evidence has been considered in aid of its interpretation, is one of law and we are not bound by the Department's interpretation of it. ([Estate of Platt, supra](#); [Meyer v. State Board of Equalization, 42 Cal.2d 376, 381 \[267 P.2d 257\]](#); [Ziganto v. Taylor, 198 Cal.App.2d 603, 606 \[18 Cal.Rptr. 229\]](#); [Estate](#) [\[*339\]](#) [of Black, 211 Cal.App.2d 75, 83 \[27 Cal.Rptr. 418\]](#).) [CA\(5\)](#) [↑] (5) The interpretation placed upon a written instrument by the tribunal below, where extrinsic evidence has not been resorted to, while not binding on appeal, will be accepted by the appellate court if such interpretation is reasonable, or if such interpretation is one of two or more reasonable constructions of the instrument. ([Prickett v. Royal Ins. Co., Ltd., 56 Cal.2d 234, 237 \[14 Cal.Rptr. 675, 363 P.2d 907\]](#); [Lundin v. Hallmark Productions, Inc., 161 Cal.App.2d 698, 701 \[327 P.2d 166\]](#); [Estate of](#) [\[*339\]](#) [Black, supra](#).) [CA\(6\)](#) [↑] (6) It is likewise true that [HN12](#) [↑] the administrative interpretation of a statute made by an administrative agency charged with carrying out a particular statute will be accorded great respect by the courts and will be followed if not clearly erroneous. ([Bodinson Mfg. Co. v. California Employment Com., supra, p. 325](#); [People v. Southern Pac. Co., 209 Cal. 578, 594-595 \[290 P. 25\]](#).)

The facts in the present case and the questions involved herein are identical with those in [DeMartini v. Department of Alcoholic Beverage Control, supra, 215 Cal.App.2d 787](#), decided by this [***14](#) court [**728](#) on May 7, 1963.

¹² The counsel for the licensees who appeared in all the proceedings below in the present case, and who appears on this appeal, is the same counsel who appeared and represented the licensees in all of the proceedings in *DeMartini*. The Department is represented in both cases by the Attorney General of the State of California. In *DeMartini*, as in the case at bench, the licensees stipulated that they sold the particular beverages listed in the respective counts on the dates, to the persons and at the prices alleged therein. As in the present case, there was also received in evidence upon the offer of the Department and over the objections of the licensees, certified copies of certain fair trade contracts and fair trade contract price schedules filed with the Department and covering in the aggregate all of the brands of distilled spirits subject to the said sales. Again, as in the instant case, testimony was there introduced by the Department that during the period of time covered by the accusation, the fair trade prices filed with the Department were published in an industry publication [*340] and regularly distributed to all licensees [***15] at all levels of distribution in the Northern California trading area, including San Francisco where (as here) the licensees conducted their business. As in the present case, the licensees in *DeMartini* stipulated that the fair trade prices set forth in the various fair trade contracts and schedules received in evidence appeared in specified issues of the above publication. The summary of the administrative record in *DeMartini* and in this case shows that while the licensees admitted that they made the sales in question at the prices alleged and thus in effect at prices less than those set forth in the contracts and schedules, they denied that any "fair trade prices" had been effectively fixed or established by the contracts.

[***16] In *DeMartini* this appellate court was called to determine the validity of the fair trade agreements and whether there was substantial evidence of fair and open competition. The contentions urged here as to the validity of the fair trade contracts and the sufficiency of the evidence were also made and asserted in *DeMartini*. Taking cognizance of [Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal.2d 141 \[346 P.2d 737\]](#), which upheld [HN13](#) the fair trade provisions of the Alcoholic Beverage Control Act as a valid and constitutional exercise of the police power, this court held in *DeMartini* that the fair trade agreements received in evidence conformed to the requirements of [section 24750](#) and that they were supported by a consideration, valid and enforceable. As to the sufficiency of the evidence on the issue of fair and open competition, *DeMartini* held that the evidence supplied by three presumptions ¹³ was sufficient to establish that there was substantial evidence in the record that the alcoholic beverages covered by the contracts were in fair and open competition, particularly in view of the failure of the licensees [**729] to offer any [***17] evidence at all on this issue. (As is the case here.) The rationale of *DeMartini* is that [HN14](#) it is to be presumed "that such 'official duty has been regularly performed'" ([Code Civ. Proc., § 1963, subd. 15](#)) when the Department, "employing its administrative expertise and satisfying itself that the fair trade contracts filed with it were in fact what they purported to be, determined, in accepting them for filing, that they were in fact entered into pursuant to [section 24750](#) and that the products to which they related [*341] were in fair and open competition with other distilled spirits of the same general class." (P. 808.) The other two presumptions found to be applicable were: (1) that "[it] is to be presumed that the transactions embodied in the fair trade agreements 'have been fair and regular' ("Code Civ. Proc., § 1963, subd. 19) and that comporting with such presumption the agreements were not designed to impose unlawful restraints on open competition in the market"; and (2) that it is also to be presumed that "the law has been obeyed" ("Code Civ. Proc., § 1963, subd. 33) because "If the products covered by the agreements in question had not been in fair and open [***18] competition,

¹² Except for licensees involved, the brands of the alcoholic beverages entailed in the accusation, the dates of sale, the prices charged, and the persons to whom sold, the essential facts are almost identical. In *DeMartini* the accusation contained nine counts. The first seven counts involved alleged fair trade violation and the last two counts charged the sale and delivery of the beverages designated in the said first seven counts without accompanying delivery orders and the keeping on file copies thereof. The subject matter of the last two counts is not involved in the instant case. The only other significant point of distinction does not go to the facts but to disposition of the matter by the trial court. In *DeMartini* the trial court ordered the issuance of a peremptory writ commanding the Department to vacate and set aside its decision that the license of the licensees be suspended, and the appeal from such judgment was by the Department. (There was also a cross-appeal by the licensees from that part of the judgment which commanded the Department to take such further steps in the proceedings against them as were not inconsistent with the trial court's findings of fact and conclusions of law.)

¹³ [Code Civ. Proc., § 1963, subds. 15, 19, and 33](#).

the agreements would have offended against the Cartwright Antitrust Law (§§ 16700-16758) and in particular section 16720 thereof." (Pp. 808-809.)

DeMartini also disposed of the contention that rule 99 itself nullifies fair and open competition (in that it effectively forecloses competition for at least 45 days and that by permitting the filing of amendments to meet competitive prices, it preserved the status quo of the market) with this statement: "Any authorized person can file the contracts and the prices. Meeting competitive prices by filing amendments would seem to us to have the effect of enhancing rather than curtailing competition. If the licensees herein are complaining about the rule in operation, they have produced no evidence supporting the complaints. Moreover, as the court stated in the *Scovill* case, *supra*, the expression "[fair] and open" relates only to the manner of competing, not to the results."¹⁴ (P. 812.) [***19]

The principles, considerations and conclusions which are dealt with in detail in *DeMartini* are in all essentials applicable to the present case. The conclusions reached by the Department are in accord with *DeMartini* and with *Allied Properties v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 141*. Upon the authority of *DeMartini*, and for the reasons therein set forth, the judgment in the instant case must be affirmed. In reaching this conclusion we are in accord with the conclusions of law reached by the Department as to the interpretation placed upon the agreements received in evidence and the determination as to their validity. We are also in accord with the conclusions reached as to the [*342] validity and constitutionality of the statutes and the rule which are the subject of this litigation, and of their application to the situation presented by the facts of this case. As [***20] to the question of the sufficiency of the evidence it would appear that because there is no conflict in the evidence it can be said as a matter of law, that, when so considered, no other reasonable conclusion is legally deducible from the evidence in view of the principles announced in *DeMartini*. However, even if we assume that the state of the record is such that different conclusions could rationally be drawn from the evidence by the trier of fact there is substantial evidence in the record, under the authority of *DeMartini*, to support the findings of the Department.

The judgment is affirmed.

End of Document

¹⁴ *Scovill Mfg. Co. v. Skaggs etc. Drug Stores, 45 Cal.2d 881, 889 [291 P.2d 936]*.



Osteopathic Physicians & Surgeons v. California Medical Asso.

Court of Appeal of California, Second Appellate District, Division One

January 28, 1964

Civ. No. 26954

Reporter

224 Cal. App. 2d 378 *; 36 Cal. Rptr. 641 **; 1964 Cal. App. LEXIS 1480 ***

OSTEOPATHIC PHYSICIANS AND SURGEONS OF CALIFORNIA et al., Plaintiffs and Appellants, v. CALIFORNIA MEDICAL ASSOCIATION et al., Defendants and Respondents

Subsequent History: [***1] A Petition for a Rehearing was Denied February 24, 1963, and Appellants' Petition for a Hearing by the Supreme Court was Denied March 25, 1964.

Prior History: APPEAL from a judgment of the Superior Court of Los Angeles County. Robert H. Patton, Judge.

Action to determine the validity of a merger agreement entered into by a state medical association and a state osteopathic association.

Disposition: Affirmed. Motion to dismiss appeal as to certain causes of action denied. Judgment on pleadings for defendants as to first cause of action and dismissing other causes of action after demurrers thereto were sustained without leave to amend, affirmed.

Core Terms

osteopathic, osteopathy, merger agreement, profession, allegations, allopathic, boycott, licensed, medical school, delegates, Surgeons, medical practice, cause of action, medical doctor, first cause, elect, unification, conspiracy, diplomas, barter, suffix, individual plaintiff, restraint of trade, ultra vires, designation, eliminating, parties, osteopathic physician, physicians and surgeons, medical association

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN1[] Regulated Practices, Private Actions

The Cartwright Act is not applicable to restraints on the practice of medicine.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Governments > Courts > Common Law

HN2[] Regulated Practices, Private Actions

There is an established principle at common law that an action will lie where the right to pursue a lawful business, calling, trade, or occupation is intentionally interfered with either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification. Whether there is justification is determined not by applying precise standards but by balancing, in the light of all the circumstances, the respective importance to society and the parties of protecting the activities interfered with on the one hand and permitting the interference on the other.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN3[] Regulated Practices, Trade Practices & Unfair Competition

An agreement to sponsor legislation does not violate antitrust laws.

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] (1)

Judgments—Declaratory Judgments—Pleading—Demurrer.

--In an action for declaratory relief with respect to a unification or merger agreement entered into between the California Medical Association and the California Osteopathic Association, where the proceeding came before the court on demurrer, it was proper for the court, after waiver of notice by plaintiffs, to make a declaration of the parties' rights.

CA(2)[] (2)

Interference—With Trade or Calling: Monopolies—Under Cartwright Act—Remedies of Individuals.

--The Cartwright Act, the antitrust law (*Bus. & Prof. Code, § 16700 et seq.*), does not apply to restraints on the practice of medicine; however, at common law, an action will lie where the right to pursue a lawful calling is intentionally interfered with either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification.

CA(3)[] (3)

***Id.*—With Trade or Calling.**

--An element of the common law action for interference with the right to pursue a lawful business or calling is the intentional interference with that right.

CA(4)[] (4)

Id.—With Trade or Calling: Physicians—Interference With Practice.

--No cause of action was stated under the common law principle regarding interference with a trade or calling where a merger agreement between the osteopathic and medical associations was alleged, but the agreement stated it was not the purpose to alter or diminish the practice rights of individual physicians or to limit their opportunity of future practice and there was no allegation of interference with the practice of any plaintiff, no osteopath being required under the agreement to give up his designation of "D.O." or his practice of osteopathy.

CA(5a) [] (5a) CA(5b) [] (5b)**Id.—With Trade or Calling: Monopolies—Under Cartwright Act—Agreements Prohibited: Physicians—Interference With Practice.**

--Allegations that the osteopathic and medical associations agreed to use their best efforts to secure the adoption of legislation to establish their merger did not show a conspiracy to restrain trade or the competitive practice of medicine; an agreement to sponsor legislation does not violate antitrust laws.

CA(6) [] (6)**Physicians—Power to Regulate Practice.**

--The Legislature has the authority to regulate the practice of medicine.

CA(7a) [] (7a) CA(7b) [] (7b)**Id.—Interference With Practice.**

--In an agreement for merger of the osteopathic and medical associations, a promise by the medical association to guarantee donations of \$ 200,000 to the College of Osteopathic Physicians and Surgeons does not bear the interpretation that the agreement of the college to issue M.D. degrees to licensed osteopaths without examination or attendance at the college was made for the consideration of the guaranty and did not violate statutory provisions prohibiting the barter or sale of medical degrees; the persons to receive the degrees were licensed osteopaths, already authorized to render the same medical services as allopaths and the educational requirements were the same for both.

CA(8) [] (8)**Id.—Statutes and Regulations.**

--The Legislature in amending Bus. & Prof. Code, § 2396, making the use of an M.D. degree by one licensed as a physician and surgeon not unprofessional conduct where the degree was issued by a California medical school prior to September 30, 1962, and approved by the Board of Osteopathic Examiners or the Board of Medical Examiners, impliedly approved the issuance of M.D. degrees to osteopaths by the College of Osteopathic Physicians and Surgeons.

CA(9) [] (9)**Id.—Statutes and Regulations—Validity.**

--[Bus. & Prof. Code, § 2396](#), as amended in 1962, concerning the use of an M.D. degree by one licensed as a physician and surgeon whose degree was issued by a California medical school prior to September 30, 1962, and approved by the Board of Osteopathic Examiners, is not unconstitutional; the class of persons referred to in the legislation is the class holding certificates as physicians and surgeons and holding an M.D. degree from an approved school and is a reasonable classification.

CA(10) [10] (10)

Id.—Professional Organizations.

--The acts of the California Osteopathic Association, in arranging for a merger with the California Medical Association, could not be said to be ultra vires where the merger agreement was authorized by the board of trustees and the association was incorporated for the purpose of maintaining a standard of education and promoting the welfare and influence of the profession of osteopathy.

Counsel: Steinmetz, Murrish & Richman, Steinmetz & Murrish, William B. Murrish, Fred H. Steinmetz and Matthew M. Richman for Plaintiffs and Appellants.

Beardsley, Hufstedler & Kemble, Charles E. Beardsley, Seth M. Hufstedler, Peart, Baraty & Hassard, Howard Hassard, Overton, Lyman & Prince and Holmes E. Hobart for Defendants and Respondents.

Judges: Wood, P. J. Fourt, J., and Lillie, J., concurred.

Opinion by: WOOD

Opinion

[*380] [**642] There are six alleged causes of action in the amended and supplemental complaint, as amended (referred to herein as the [*381] complaint). Defendants' motion for judgment on the pleadings as to the first cause of action (for declaratory relief) was granted, and a declaratory judgment in favor of defendants on that cause of action was entered. Defendants' general demurrers to the five other causes of action were sustained without leave to amend. (When the judge asked if they wished to amend, they did not request such permission.) Judgment of dismissal as to those causes of action was entered. Plaintiffs appeal from the judgment.

The principal basis for the action is the unification or merger agreement entered into between the California Medical Association (referred to as CMA) and the California Osteopathic Association (referred to as COA).

The plaintiffs are Osteopathic Physicians and Surgeons of California, a nonprofit California corporation,¹ and 18 doctors [*381] of osteopathy who were opposed to unification of the two professions.

[***3] The defendants are the California Medical Association, the California Osteopathic Association, the College of Osteopathic Physicians and Surgeons, and several doctors of medicine, doctors of osteopathy, and other persons who were officials or agents of these two associations or of the college.

The first four paragraphs of the complaint, comprising about seven pages of the clerk's transcript, contain allegations relative to the identification of the parties. It is also alleged in those paragraphs that the defendant California Osteopathic Association, which was incorporated in 1900, receives annual dues from its members amounting to approximately \$ 450,000; it has cash reserves in excess of \$ 717,000, and has real property and

¹ Organized in December 1960 -- the new local division of the American Osteopathic Association, which division succeeded the California Osteopathic Association as such local division when it allegedly was expelled by the American Osteopathic Association for entering into the merger agreement.

other personal property of a value in excess of \$ 1,500,000; it was organized and existed until May 1960 (time of merger) for the sole purpose of maintaining a standard of education and promoting the welfare and influence of the profession of osteopathy; all of the individual plaintiffs (except the ones allegedly expelled) are and for many years have been members of said defendant COA and entitled to all the rights and privileges of membership therein.

It was [***4] also alleged in those four paragraphs that defendant College of Osteopathic Physicians and Surgeons was incorporated in 1914 for the principal purpose of maintaining an osteopathic medical and surgical college; from the date of incorporation until May 1961 it accumulated property of the present market value of more than \$ 5,000,000; it receives income from its operation and from investments in excess of \$ 750,000 a year, but its expense of educational operations exceeds \$ 950,000 a year, [**643] requiring other income in the approximate minimum amount of \$ 200,000 a year which is supplied by donations.

It was further alleged therein that the American Medical Association is the national organization of allopathic physicians and surgeons; defendant CMA is the constituent society of AMA for California; the Los Angeles County Medical Association is the subordinate local society under CMA; in California there are approximately 23,000 allopathic physicians [*382] and surgeons of which number approximately 17,000 are members of AMA. The American Osteopathic Association represents the profession of osteopathy in the United States; osteopathic physicians and surgeons in California [***5] are eligible for membership in AOA, and all the individual plaintiffs and defendants who are osteopaths are and have been members of AOA.

The first cause of action alleges, among other things, that: The allegations of the first four paragraphs of the complaint are realleged therein. An actual controversy exists between plaintiffs and defendants (except certain trustees of the college -- COPS) concerning the construction and validity of the purported merger agreement. That agreement was signed by officers of COA and CMA about March 11 and 18, 1961, respectively, and purportedly ratified by the CMA delegates on May 3, 1961, and by the COA delegates on May 17, 1961. Defendant COPS (college) accepted the agreement by resolution of its board of trustees on May 24, 1961. Osteopathy is a separate school of the healing art and profession, embracing education equal in scope in all respects to allopathic medicine, but differing fundamentally therefrom by force of vital features of special emphasis, including emphasis on functions of musculoskeletal structure, and on natural curative resources, and manipulative therapy. The provisions of California law governing physicians and surgeons [***6] are equally applicable to osteopaths and allopaths, except that under a 1922 initiative measure the licensing and discipline of osteopaths is vested in the Board of Osteopathic Examiners rather than in the Board of Medical Examiners. One out of every twenty physicians and surgeons in the United States is an osteopath, and in California the ratio is about one in ten. (There are allegations regarding: osteopathy as nationally organized; the number of osteopathic hospitals in the United States and in California; the osteopathic schools which are being operated; comparable standards of osteopaths and allopaths in certifying hospitals and medical specialists; comparable publications and research of the two professions; the similarities and differences in the teaching of the two professions; the degree of D.O. being granted by osteopathic schools, and the degree of M.D. being awarded by medical schools; the public significance of those degrees with respect to the amount of training and education required to obtain them; competition and elimination of osteopathy have been threatened and [*383] attempted by the activities of defendants herein complained of.)

Since 1959 all defendants [***7] (except certain COPS trustees) have conspired and agreed to do the following things in California: to eliminate the osteopathic profession; to prevent competition in the practice of medicine and to control and monopolize such practice, by combining their capital and power; to restrain the trade and property rights of all osteopathic doctors, teachers of osteopathy, and schools and hospitals teaching osteopathy, who might decline to join the concert of action of defendants; to cause to be eliminated as an osteopathic medical college the only osteopathic medical school in California, the defendant COPS, and to convert it to an allopathic medical college; to cause said college to issue, barter and sell medical degrees; to all such ends to employ funds and properties of COA in manners violating its charter and violating law. Said conspiracy is one to restrain and to monopolize trade within the meaning of division 7, part 2, chapter 2, of the Business and Professions Code (SS 16700 et seq. -- entitled "Combinations in [**644] Restraint of Trade"). From the outset of osteopathy in 1871 the AMA, on behalf of the allopathic profession, has falsely branded the osteopathic profession as [***8] a "cultist" medical practice, and has condemned all osteopathic doctors as pseudopractitioners, inadequately educated, and

unfit to be regarded as physicians and surgeons. Since the inception of osteopathy, the allopathic profession, including AMA and CMA, has publicly demanded and advocated: public distrust of osteopathic medical care; legal refusal of licensure rights to osteopathic doctors; and a complete professional boycott against all osteopathic doctors by all medical doctors. Although CMA and certain of its coconspirators may have believed that osteopathy was "cultist" and educationally inferior to allopathic medicine, none of them has had such belief for many years and since an unknown date prior to 1953, and notwithstanding such lack of belief, they have persisted in maintaining said boycott on the pretext that osteopathy is cultist and educationally inferior, and CMA has conditionally offered and agreed to relax the boycott only as to presently certificated California osteopaths. By force of rules of ethics of the allopathic profession, virtually all members of AMA and CMA have been constrained to refuse all professional association [*384] with any osteopathic doctor; [***9] and the boycott with respect to hospitals has been virtually total, except for government owned hospitals. By force of the nonassociation boycott, not more than 5 per cent of the hospitals permit an osteopathic doctor to admit any patient thereto for his care. Although such boycott has hindered and harassed osteopathic doctors, it has not succeeded in eliminating competition by osteopaths or achieving for the allopathic profession a total monopoly of the business of medical care. Osteopathy has made substantial progress in public acceptance, number of practitioners and patients, and educational and hospital facilities. Over a period of more than 10 years, there developed within the AMA a considerable body of opinion which favored an accommodation between the two professions by reason of such factors as: increased awareness of the falsity of the AMA campaign against osteopathy; increased legal status of osteopaths; and realization that the boycott has failed to accomplish its purpose of eliminating osteopathy and securing a monopoly for the allopathic profession. As early as 1951, at meetings of AMA delegates, state delegations have proposed relaxation of the AMA boycott and the [***10] adoption of a policy of toleration of the osteopathic profession. The AMA made no change in its policy toward osteopathy until June 1961 when it acted to delegate to its state organizations the enforcement of its boycott, and thereby it encouraged adoption of the "California Plan." That plan is a negation of all previous proposals for accommodation between the professions on a mutually tolerant basis, and that plan provides that practicing osteopaths shall abandon osteopathy, and shall practice as allopaths under the "M.D." description under color of such fictitious degrees to be procured for them, conceal their osteopathic background, join the CMA, dissolve their own COA, transfer its assets to COPS (college), and cause COPS to convert to an allopathic medical school. In 1953 an AMA committee, after meeting with an AOA committee, recommended to the AMA delegates that it declare that it does not classify the teaching of osteopathy as the teaching of a cultist healing. The delegates rejected the recommendation. In 1955 the AMA delegates approved a report that all voluntary professional association with osteopaths is unethical, and that it was incumbent on AMA members to observe [***11] the existing policy of nonassociation. Since the emergence of the "California Plan" of eliminating osteopathy, [*385] national negotiations with respect to promoting mutual toleration have made no progress.

The said first cause of action alleges further: that the "Merger Agreement" provides that: COA agrees to change its name to Forty-first Medical Society or some other approved name, to apply to CMA for a [**645] charter therefor, and later to dissolve and to transfer its assets to COPS which by that time will have been converted to an allopathic school. Defendant CMA will amend its organization papers to provide for taking members of COA into membership. COA will negotiate a contract with COPS whereby it will change its name by eliminating the word "osteopathic," and will issue the "M.D." degree to licensed California osteopaths without any examination and without attending the college, and such degree will be recognized as an M.D. degree issued by an accredited medical school for all purposes. Defendant COA for itself and its successor agrees for a period of five years to make financial contributions of at least \$ 225,000 annually to COPS. Defendant CMA guarantees [***12] to COPS that during the five-year period following the merger the annual minimum contribution of \$ 225,000 will be received by COPS. The parties agree that the existing boycott shall be lifted only as to California osteopathic doctors who acquire the M.D. degree. The parties agree to promote legislation to terminate the licensing of osteopathic doctors in California, to repeal the Osteopathic Initiative Act and abolish the Board of Osteopathic Examiners, and to require doctors holding both the M.D. and D.O. degrees to make an election to practice under one of them exclusively.

The first cause of action alleged further: The continued enforcement of the AMA boycott during the negotiations for and the execution of the merger agreement constituted a material and inducing cause thereof. The California Plan appeared to represent an opportunity for California osteopaths to escape from the continuing enforcement of the boycott, although the plan was upon conditions imposed by CMA whereby the osteopaths were required to

renounce osteopathy, join the conspiracy of AMA, and to aid in a program of eliminating osteopathy in California. In 1959, while the merger agreement was being negotiated, [***13] the AMA Judicial Council made a report to the AMA delegates recommending that it should not be considered unethical for members of the AMA to associate with physicians, other than doctors of medicine, [*386] who were licensed to practice the healing art without limitation; nor to teach students of osteopathic medicine who seek to improve their ability to provide better medical care. At the urging of the CMA delegation the recommendation regarding association was rejected, and the other recommendation was modified to read that it shall not be unethical for doctors of medicine to teach students in an osteopathic college which is being converted to an approved medical school. Said action of the AMA delegates was taken for the purpose of maintaining the pressure of the boycott on COA and California osteopaths in order to induce them to accept the merger agreement. The effect of the actions of AMA is that the boycott remains in effect, and that California osteopaths who elect not to acquire M.D. degrees and practice thereunder as provided in the merger agreement will remain subject to the boycott, except that if the agreement is performed the boycott will be enhanced by the fact [***14] that osteopathic doctors who do elect to acquire such degrees and join CMA will be required to join the boycott and refrain from association with their former associates, and those osteopathic doctors who do not so elect will be excluded from former osteopathic hospitals whose staffs include former osteopathic doctors. For the purpose of escaping the boycott and of practicing as doctors in a manner tolerated by AMA and CMA, the officers of COA decided in 1959 or early in 1960 to abandon osteopathy, to join the conspiracy, to promote acceptance of the agreement, and to use the property and franchise of COA in aid of the program of eliminating competition by osteopaths in California. The board of trustees of COA approved the merger agreement on March 11, 1961. The delegates of COA ratified the agreement on May 17, 1961. Thereafter, COA induced COPS to agree to the merger, to eliminate the word "osteopathic" from its name, and to begin conversion to a medical school. Because COA participated [**646] in such program, the AOA revoked the charter of the defendant COA on November 20, 1960, and issued a charter to plaintiff Osteopathic Physicians and Surgeons of California as the [***15] California divisional society of AOA for the purpose of protecting osteopathy in California. Certain of the individual plaintiffs joined plaintiff OPSC. With the purpose of preventing opposition to the merger agreement and discouraging membership in OPSC, the trustees of COA on January 3, 1961, adopted "rule 41" which provides for expulsion from [*387] membership anyone who retains membership in any California osteopathic organization having policies contrary to COA. Under such rule COA has purported to expel certain individual plaintiffs herein. Such expulsion subjects such persons to discriminatory exclusion from osteopathic hospitals.

The first cause of action alleged further: The acts of COA and its officers were ultra vires and in excess of the corporate powers of COA as defined in its articles of incorporation adopted in 1900. In May 1961, after ratification of the merger agreement, the COA delegates purportedly amended said articles by initiating steps to add a provision stating: "The . . . purpose includes the unification of all those medical practitioners . . . in one medical association, the promotion of the accreditation of the College of Osteopathic Physicians [***16] and Surgeons as an approved medical school . . . and the free interchange of ideas . . . among all licensed physicians and surgeons in . . . California." Since the execution of the merger agreement, the CMA has threatened to interpret the agreement as requiring further training and examinations of all osteopaths as a condition to granting of "M.D." degrees by COPS. Defendants CMA and COPS accepted and entered into the agreement after this action was commenced and with knowledge of its pendency. The agreement, the negotiations leading up to it, and the performance thereof constituted the purchase, sale, and barter of medical degrees and diplomas; constituted the use of purchased diplomas within the meaning of [sections 2386](#) and [2427 of the Business and Professions Code](#); constituted the selling and bartering of diplomas within the meaning of section 29012 of the Education Code; constituted conspiring to obtain by barter diplomas within the meaning of section 29013 of the Education Code; constituted the use, in connection with a profession, of degrees or diplomas which have been obtained by barter within the meaning of section 29014 of the Education Code; and constituted, within the [***17] meaning of section 29015 of the Education Code, the giving and using, in connection with a profession, diplomas evidencing the completion of a course of study, when in fact such course was not undertaken or completed. The use of the suffix "M.D." by persons who have not received a degree of doctor of medicine after completion of a full course of study as prescribed by an approved medical school is unlawful under [section 2430 of the Business and Professions Code](#) [*388] and constitutes unprofessional conduct within the meaning of [section 2396](#) of said code. The amendment of said [section 2396](#) in 1961 is ineffective to authorize the use of the suffix "M.D." by osteopathic doctors as contemplated by the agreement. It is contemplated by the agreement that osteopaths who obtain the degree of

"M.D." as provided in the agreement will in connection with their practice hold themselves out to the public as doctors of medicine. That such use of that degree and diploma will be misleading within the meaning of section 17500 of the Business and Professions Code. Plaintiffs contend that: the merger agreement is unlawful and void under the Cartwright Antitrust Law (Bus. & Prof. Code, §§ 16700 ~~***181~~ *et seq.*), as well as under the common law, both as a product of past restraints of trade and as a device for continuing restraints of trade; the agreement is ultra vires as to COA; the agreement constitutes unlawful purchase, barter and sale of medical degrees; the agreement provides for the "unlawful misuse" of the suffix "M.D."; and provides for the making of misleading statements to **[**647]** the public concerning professional services. The defendants contest the foregoing contentions. Plaintiffs desire a declaration of their rights and duties with respect to defendants in relation to the existing controversy, including a determination of the construction and validity of the merger agreement.

The second cause of action alleges, among other things, that: The allegations of the first cause of action are realleged therein, except allegations regarding ultra vires, and selling and using degrees and diplomas. Each defendant (except certain trustees of COPS who disagree with the conspiracy) has intended to accomplish the objectives alleged herein and the overt acts committed and threatened to effectuate the conspiracy, and has acted wilfully in all such respects. As a proximate **[***19]** result of said conspiracy and acts in furtherance thereof, including the boycott, each individual plaintiff has suffered damage to his professional practice in an amount which is at least \$ 10,000. Under section 16750 of the Business and Professions Code, each individual plaintiff is entitled to recover treble damages. Defendants have been guilty of oppression, fraud, and malice toward the individual plaintiffs who are entitled to recover \$ 5,000 exemplary damages. Unless plaintiffs are granted injunctive relief they will suffer irreparable damage and injury.

The third cause of action alleges, among other things, that: **[*389]** The allegations of the first cause of action are realleged therein, except allegations regarding desirability of declaration of rights. The individual plaintiffs, as members of COA, are authorized under section 803 of the Corporations Code, to bring an action to enjoin the doing of unauthorized business by COA.

The fourth cause of action alleges, among other things, that: The allegations of the first cause of action are realleged therein, except allegations regarding ultra vires and selling degrees and diplomas. The individual plaintiffs, as persons **[***20]** holding physicians' and surgeons' licenses, being more than 10 in number, are authorized by section 2436 of the Business and Professions Code to apply for an injunction to restrain any acts which constitute an offense against chapter 5, division 2, of the Business and Professions Code.

The fifth cause of action, which is labeled "(Misuse of Term or Suffix 'M.D.')" realleges the allegations of the first cause of action, except allegations regarding ultra vires, and false representations as to diplomas.

The sixth cause of action, which is labeled "(Fraudulent Representations Concerning Professional Services)," realleges the allegations of the first cause of action, except allegations regarding ultra vires, and selling and misuse of degrees.

The merger agreement is attached to the complaint and marked exhibit "Cl." ²

² The merger agreement (omitting the schedules and signatures) is as follows:

"This Agreement is made and entered into this -- day of May, 1961, by and between the California Medical Association, an unincorporated association, hereinafter sometimes called the 'CMA' and the California Osteopathic Association, a California corporation, hereinafter sometimes called the 'COA,' to be effective at the time, and upon the terms and conditions as hereinafter set forth below.

"A. General.

1. *Purposes.* This agreement is made and entered into for the primary purposes of improving the health services available to the citizens of the State of California, and expanding medical teaching facilities in the State. The 'Governor's Committee on the Study of Medical Aid and Health' has urged immediate expansion of 'medical educational capacity in private and public institutions' and the establishment of new medical schools. These purposes are to be further accomplished by the unification,

consonant with the desires of individual practicing physicians within the State of California, of the separate organizations which have heretofore existed in parallel structure in the State of California for the practice of medicine and surgery by persons who hold the degree of Doctor of Osteopathy and those who hold the degree of Doctor of Medicine. By accomplishing such unification, the parties hereto intend to remove any distinction among the individuals practicing medicine and surgery that is not related to skill and ability, to make available to the public at large efficient and adequate hospital facilities, and to improve the educational facilities available for those persons engaged in the practice of medicine and surgery. It is also a primary purpose of the parties hereto that upon the students at the present College of Osteopathic Physicians and Surgeons in Los Angeles or its successor becoming eligible to be licensed by the State Board of Medical Examiners, no new or additional physician and surgeon's certificates shall thereafter be issued by the State Board of Osteopathic Examiners, whether applied for under Articles 5, 6 or 11 of Chapter 5, Division 2, of the California Business and Professions Code. It is not the purpose of any party to this agreement to alter or diminish in any way the practice rights of individual physicians, or to limit their opportunity of future practice.

"2. *Execution and effective date.* Upon approval of this agreement by the governing boards of the respective parties hereto, this agreement shall be executed by the Chairman of such board and its Secretary. Said signatures shall indicate the approval of that board only.

"This agreement shall become binding and effective when it has been ratified by the House of Delegates of each of the parties hereto, in accordance with the appropriate rules and regulations of each respective organization.

"The parties hereto recognize and acknowledge that the consummation of this agreement will require certain amendments to be made to the constitution of the CMA, and that the constitution requires that a proposed amendment, after introduction, lay on the table for a period of one year prior to its final adoption and effectiveness. This agreement, however, shall become effective upon its initial ratification by both houses as above set forth, subject only to the conditions hereinafter set forth.

"3. *Reference to COA.* As hereinafter provided, the COA agrees to change its name, and may in the course of the transition period change its organic structure. References to COA shall thus include such organization, although its name shall be changed, and its organic structure may be changed.

"B. Matters Related to the Structure of California Medical Association.

"1. *Amendments to Constitution and By-Laws.* The Council of the CMA shall propose to its House of Delegates two amendments to the constitution, and one amendment to the by-laws of the CMA, as set forth on Exhibits A, B, and C, respectively, attached hereto and made a part hereof by reference.

"The House of Delegates of the CMA shall, as a condition precedent to the effectiveness of this contract, approve and adopt said amendments.

"2. *Issuance of new charter to component society.* Upon said amendments becoming finally effective, the COA agrees (a) to change its name to the Forty-First Medical Society or such other name as may be jointly approved by the Board of Trustees of the COA and the Executive Secretary of CMA, and thereafter, (b) to apply for a charter as a component society of the CMA. The CMA agrees to issue such charter. The terms and conditions of the charter to be applied for, and to be issued, shall be as set forth on Schedule D attached hereto, and made a part hereof by reference.

"3. *Dissolution of COA.* The parties hereto acknowledge that the structure herein agreed upon for the issuance of a charter to a statewide organization under such new name is intended only as an interim measure. It is the intention of both parties hereto that all persons who are members of such society shall become members of their respective county medical societies as soon as possible. However, such arrangement requires the consent of each of the respective county medical societies. When the county medical societies "throughout the State of California agree to take into membership in the respective appropriate county medical society each of the members of such society, it shall be dissolved. Upon such dissolution, all of the assets then remaining of such society shall, so far as is legally possible, be transferred and conveyed to the College of Osteopathic Physicians and Surgeons, or its successor.

"C. Practice of Medicine and Use of Degree.

"The parties hereto contemplate that individual members of the COA who hold physicians and surgeons certificates in the State of California will obtain a degree of Doctor of Medicine from the College of Osteopathic Physicians and Surgeons or its successor. The CMA agrees to accept such procedures which may be agreed upon by the Advisory Educational Committee, created by the joint action of the parties hereto, as to the manner in which said degrees shall be granted, provided, however, that

the agreed procedures do not jeopardize accreditation of the College. Both parties hereto agree to recognize such degrees as an M.D. degree issued by an accredited medical school.

"D. Statutory Amendments.

"1. *Use of Degree.* Both parties hereto agree to use their best efforts to have adopted by the legislature of the State of California statutory amendments as set forth in Exhibit E attached hereto and made a part hereof by reference. The parties hereto contemplate that where persons hold a degree of Doctor of Medicine and a degree of Doctor of Osteopathy, such person shall be required to elect to practice under one or the other of such degrees, and to advise both the Board of Medical Examiners and the Board of Osteopathic Examiners of such election.

"2 *Boards of Examiners.* Both parties agree to use their best efforts to have adopted by the California Legislature the statutory amendments relating to the structure of the Board of Medical Examiners of the State of California and regarding the reciprocity statutes affecting such board, as set forth on Schedule F, attached hereto and made a part hereof.

"3. *Initiative Act.* Both parties hereto agree to use their best efforts to have adopted by the legislature and by the people of the State of California, the proposal set forth on Exhibit G attached hereto and made a part hereof, regarding the initiative act establishing the Board of Osteopathic Examiners.

"E. College of Osteopathic Physicians and Surgeons.

"1. *Agreement with College.* The COA agrees to negotiate a contract with the College of Osteopathic Physicians and Surgeons covering the matters hereinafter set forth. In the event that the COA is unable to enter into such an agreement, the CMA shall have its option to declare this contract entirely null and void. Said contract shall contain:

"(a) A procedure for the issuance of degree of Doctor of Medicine to doctors of Osteopathy presently licensed as physicians and surgeons in the State of California.

"(b) An agreement that said College shall use its best efforts to obtain approval by the Council on Medical Education and Hospitals and membership in the Association of American Medical Colleges.

"(c) The name of the College shall be changed, so that neither the word 'osteopathic' nor any similar word shall be used therein.

"2. *Agreements relating to College.*

"(a) The parties hereto shall jointly use their best efforts to secure appropriate administrative rules or statutory changes to permit students currently enrolled in the College of Osteopathic Physicians and Surgeons to be eligible for examination by the licensing board of their choice: and

"(b) The parties hereto shall agree with each other, and with the College of Osteopathic Physicians and Surgeons as follows:

"(i) The COA shall continue to contribute to the College fund for its operation at the rate of a minimum of \$ 225,000.00 per year until one year from the time all conditions set forth in this agreement are met. Thereafter, for an additional four years, COA and its successor shall allocate to the College at least Fifty Dollars (\$ 50.00) per regular member per year, payable from the annual dues it charges its members (not including therein dues it pays to the CMA and the American Medical Association).

"Regular member' shall not include persons granted reduced rate of dues for any reason. The CMA and the COA shall jointly guarantee to the College that it shall receive funds in at least said amount of \$ 225,000.00 per year payable quarterly from the sources herein indicated for an additional period of four years thereafter. As between the CMA and the COA, the CMA will agree to supply said funds to said amount during said four year period to the extent that the COA or its successor does not do so. The funds to be supplied under this paragraph may come from said organization "directly, or may come from contributions from public or private sources, from funds or foundations, or otherwise, so long as they are arranged directly by the persons associated with and acting for the COA or the CMA.

"(ii) In the event that adequate arrangements for the financing of the College have not been concluded after said period, the COA and the CMA jointly declare their intention of seeing that the College has adequate operating funds to make up for the loss of funds which otherwise might have been paid by the COA had this agreement not been entered into. However, this expression of intention is made without binding obligation on the parties hereto at this time.

"(c) *Accreditation.* Both parties hereto shall use their best efforts to see that the College of Osteopathic Physicians and Surgeons, or its successor, is accredited as a medical school as soon as possible.

"F. Practice Rights.

"1. *General.* As hereinabove set forth, both parties hereto acknowledge and declare that this agreement is not intended in any way to limit the practice rights of individual physicians.

"2. *Hospitals.* The parties hereto shall join in a joint statement of policy with respect to practice rights and hospital privileges of physicians, to be forwarded to all hospitals in the State of California. A copy of such joint declaration is attached hereto marked 'Exhibit H' and made a part hereof by reference.

"3. *Specialty Rights.* The parties hereto shall issue a joint declaration with respect to the specialty privileges of individual physicians, a copy of which joint statement is attached hereto marked 'Exhibit I' and made a part hereof by reference. A copy of such declaration shall be forwarded to all hospitals, and to all physicians and surgeons in the State of California.

"4. *Removal of Distinctions.* Both parties hereto shall use their best efforts, on a continuing basis, to remove any distinction between or among persons holding a certificate as physician and surgeon in the State of California and a degree of Doctor of Medicine, where such distinction is based solely upon the ground that any such person previously held or now holds a degree of Doctor of Osteopathy.

"5. *Evaluation Groups.* The CMA agrees that the COA may continue for the purpose of serving its own members, such specialty and other evaluation groups as may have been established by it on or before April 1, 1961, and whose criteria shall be not less than those shown in a separate document entitled: 'Criteria of Evaluation Groups, California Osteopathic Association' heretofore delivered to the CMA by the COA. All records of such evaluation and specialty groups shall be made available to the Commission on Medical Education of the CMA for examination and review.

"G. Time Schedule and Conditions.

"1. *Conditions Precedent.* As hereinabove set forth, this agreement shall become effective upon ratification by the House of Delegates of both of the parties hereto. However, this agreement shall have no force or effect of any kind, unless the following conditions are met within the time periods hereinafter set forth.

"(a) *Final adoption of constitutional amendments.* The final adoption of the constitutional amendment set forth on Exhibits A and B attached hereto shall take place on or before May 15, 1962.

"(b) *Approval of College of Osteopathic Physicians and Surgeons.* The College of Osteopathic Physicians and Surgeons or its successor shall be approved by the State Board of Medical Examiners on or before May 15, 1962.

"(c) *Hospitals.* On or before May 15, 1962, assurance from the Joint Commission on Accreditation as follows:

"(i) That hospitals presently approved by the COA Committee on Hospitals will be evaluated by them upon application.

"(ii) That Doctors of Osteopathy who have received a degree of Doctor of Medicine from the College of Osteopathic Physicians and Surgeons, or its successor under the procedure to be determined upon, will be recognized as persons holding degrees of Doctor of Medicine from an approved medical school for all purposes connected with the approval of hospitals.

"In the event that any of said conditions have not been met by the time herein set forth, the COA shall have the option of waiving such condition and continuing this agreement in effect, or of terminating this agreement and declaring it to be entirely void and of no effect.

"When all of such conditions have been either met, or waived by the COA, whether before or at the time limit set forth herein, each party shall immediately undertake performance of all things to be performed by it herein.

"5. *Time table.* The parties shall immediately begin their efforts to have those legislative amendments set forth on Schedule E adopted and approved.

"The parties shall attempt to have those legislative and initiative measures approved as set forth on Schedules F and G as soon as all of the conditions precedent in this agreement have been met. The parties contemplate that such conditions shall all be met on or before May 15, 1962.

"H. Miscellaneous.

[***21] [*390] [**648] The declaratory judgment as to the first cause of action provides in part: The merger agreement is legal and valid [*391] as against all the contentions of plaintiffs. The agreement is not illegal or void by virtue of any of the allegations of plaintiffs. [*392] [**649] The facts alleged show no conspiracy among defendants or any of them, to prevent competition in or to control or monopolize the practice of medicine in California, or to restrain [*393] the trade or property rights of persons or institutions who oppose the [**650] merger agreement or who refuse to practice as doctors [*394] of medicine. The acts of defendants as alleged are legal and valid. The agreement does not restrain trade or create or tend to create a monopoly under the Cartwright **Antitrust Law**, nor is the [**651] same unlawful under the common law as a restraint of trade. The agreement does not provide for restraints against doctors of osteopathy who refuse to become doctors of medicine or who oppose the merger. The agreement [*395] is not ultra vires as to COA. It does not provide for or constitute the unlawful purchase, barter, or sale of [***22] medical degrees. It does not provide for or intend any unlawful use of the suffix M.D., and particularly is not in violation of sections 2396 and 2430 of the Business and Professions Code. It does not provide for or intend the making of misleading statements to the public concerning professional services. The provisions of the agreement relating to COPS, and particularly those regarding the accreditation of the college as a medical school are legal and valid.

CA(1) [↑] (1) In this proceeding which came before the court on demurrer, it was proper under the circumstances here for the court (after waiver of notice by plaintiffs) to make a declaration of rights under the first cause of action for declaratory relief. (See Essick v. City of Los Angeles, 34 Cal.2d 614, 624 [**652] [213 P.2d 492]; Wilson v. Board of Retirement, 156 Cal.App.2d 195, 199-200 [319 P.2d 426].)

Appellants contend that the allegations of the complaint show that defendants entered into a conspiracy to restrain trade and competitive practice of medicine by eliminating the practice of medicine by plaintiffs and others as identified osteopathic physicians and surgeons. They argue that defendants conspired [***23] and agreed: to eliminate the osteopathic [*396] profession and the medical theory represented thereby; to prevent competition in, and to control and monopolize the practice of medicine by combining their capital and power; to eliminate as an osteopathic college the only osteopathic college in California, by converting it into an allopathic college; to cause the college to barter and sell medical degrees; and to accomplish such things by employing funds and property of the California Osteopathic Association in manners which violate its charter. They argue further that the issues involve not only freedom of competition as to economic activities but also involve freedom of competition regarding ideas as between two opposed schools of thought. Appellants alleged in the complaint that the merger agreement is unlawful and void under the Cartwright Act (antitrust law -- Bus. & Prof. Code, §§ 16700 et seq.). **CA(2)** [↑] (2) **HN1** [↑] The "Cartwright Act is not applicable to restraints on the practice of medicine." (Willis v. Santa Ana etc. Hospital Assn., 58 Cal.2d 806, 810 [26 Cal.Rptr. 640, 376 P.2d 568].) In the *Willis* case, however, it was said: **HN2** [↑] "There is an established principle at common [***24] law that an action will lie where the right to pursue a lawful business, calling, trade, or occupation is intentionally interfered with either by unlawful means or by means

"1. *Phraseology*. The phraseology included herein in connection with the proposed amendments to the constitution and by-laws of the CMA, proposed statutory enactments and initiative enactment, is used for the purpose of setting forth the general intention of the parties hereto, and a change in the terminology used shall not be deemed to alter the effect or interfere with the performance of this agreement in any way, so long as it accomplishes the underlying intention of the respective provisions involved.

"2. *Further documents and acts*. Each party hereto agrees to execute such other documents and agreements, and to undertake such other steps as may be necessary, in good faith, to carry out the underlying purpose of this agreement.

"In Witness Whereof, the parties hereto have executed this agreement the day and year first written above, and ratify it as hereinafter set forth.

"The Agreement Is Hereby Approved by the respective governing boards, subject to ratification as hereinabove set forth.

[SEE ILLUSTRATION IN ORIGINAL]

The within agreement has been ratified by the respective Houses of Delegates, on the dates indicated below:

[SEE ILLUSTRATION IN ORIGINAL]

otherwise lawful when there is a lack of sufficient justification. . . . Whether there is justification is determined not by applying precise standards but by balancing, in the light of all the circumstances, the respective importance to society and the parties of protecting the activities interfered with on the one hand and permitting the interference on the other." Appellants state that they did not base the antitrust aspect of the conspiracy charge on the Cartwright Act alone, but also based it on common law antitrust principles. [CA\(3\)](#)[↑] (3) As stated in the *Willis* case, an element of such an action at common law is intentional interference with the right to pursue a business or calling. [CA\(4\)](#)[↑] (4) The merger agreement, which is a part of the complaint, states that it is not the purpose of the parties to alter or diminish in any way the practice rights of individual physicians, or to limit their opportunity of future practice. The complaint does not allege interference with the practice of any plaintiff. Under the agreement [**25] and the law, a doctor of osteopathy may continue his practice and use the designation "D.O." -- he is not required to give up his designation of "D.O." nor the practice of osteopathy. The complaint does not allege a cause of [*397] action under such common law principle regarding interference with a trade or calling.

[CA\(5a\)](#)[↑] (5a) As shown by the complaint, the doctors of osteopathy receive training and education equal in all respects to allopathic medicine. Under the law (Medical Practice Act), licensed osteopaths and allopaths have the same authority in the practice of their professions -- they are authorized, by virtue of their licenses, to administer drugs, perform surgery, and to use all other methods of treatment of diseases and injuries of human beings. Although each profession has the same authority, the Medical Practice Act is administered by two boards, the Board of Osteopathic Examiners, and the Board of Medical Examiners. The merger agreement states that the "[Agreement] is made . . . for the primary purposes of improving the health services available . . . and expanding medical teaching facilities. . . . These purposes are to be further accomplished by the unification, [**26] consonant with the desires of individual practicing physicians within . . . California, of the separate organizations which [**653] have heretofore existed in parallel structure . . . for the practice of medicine and surgery by persons who hold the degree of Doctor of Osteopathy and those who hold the degree of Doctor of Medicine. By accomplishing such unification, the parties hereto intend to remove any distinction among the individuals practicing medicine and surgery that is not related to skill and ability, to make available to the public . . . adequate hospital facilities, and to improve the educational facilities. . . ." The merger agreement also provided that the parties would use their best efforts to have certain statutory amendments adopted by the Legislature, such proposed amendments as those set forth in schedules attached to the agreement. One such amendment was to the effect that under certain circumstances a licensed osteopath would be authorized to use the designation "M.D.," provided he elected not to use the designation "D.O." Another proposed amendment was to the effect that the Board of Osteopathic Examiners shall enforce the statutory provisions relating [**27] to licensed osteopaths, except that such board shall have no authority over osteopaths who elect to use the designation "M.D." The merger agreement provided further that the parties would use their best efforts to have a certain proposal adopted by the Legislature and by the People, regarding the 1922 Initiative Act which established the Board of Osteopathic Examiners. That proposal [*398] was to the effect that said Initiative Act may be amended by the Legislature; and that when the number of persons who are subject to the jurisdiction of the Board of Osteopathic Examiners reaches 10 or less (later this was changed to 40 or less), the Legislature may repeal the act and transfer all the functions of said board to the Board of Medical Examiners.

[HN3](#)[↑] An agreement to sponsor legislation does not violate antitrust laws. (See [Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 \[81 S.Ct. 523, 5 L.Ed.2d 464\]](#).)

The proposed amendments above referred to, and other amendments, were adopted by the Legislature. The proposal with reference to the 1922 Osteopathic Initiative Act, known as Proposition 22, was approved by the People at the election in [**28] November 1962. It may be stated generally that the matters covered by legislation are: the authorization to use the "M.D." designation, and the prohibition against using the "D.O." designation if an osteopath elects to use the "M.D.;" the prohibition on licensing osteopaths (from other states) by reciprocity ([Bus. & Prof. Code, §§ 2310 and 2492](#)) or by the Board of Osteopathic Examiners (Proposition 22 -- by the People); and the eventual dissolution of the Board of Osteopathic Examiners, under certain conditions, by the Legislature (Proposition 22). It thus appears that the public policy of the state has been declared or established in favor of the principal matters involved in the merger or unification agreement. The People, in approving Proposition 22, authorized the Legislature to terminate the separate administrations of the Medical Practice Act, by discontinuing

the Board of Osteopathic Examiners under certain conditions above indicated. In other words, it appears that the principal matters involved in the merger agreement have been accomplished by legislation. **CA(6)** (6) The Legislature has authority to regulate the practice of medicine. (See Gamble v. Board of Osteopathic Examiners [***29] , 21 Cal.2d 215, 219 [120 P.2d 382].) **CA(5b)** (5b) It appears that the California Osteopathic Association decided that the best interests of the association would be served through unification. (According to statements in respondents' brief, 2,000 persons [licensed as osteopaths] transferred, under provisions of the new legislation, from the Board of Osteopathic Examiners to the Board of Medical Examiners; approximately 453 such persons are still subject to the jurisdiction of the Board of Osteopathic Examiners; [*399] some of the 453 persons do not reside in California; 94 of the remaining persons have limited licenses [**654] [such as drugless practitioners] and are not eligible to obtain M.D. degrees; the other 220 persons are practicing osteopathy in California and presumably object to the unification.) The allegations of the complaint do not show that defendants entered into a conspiracy to restrain trade or competitive practice of medicine.

CA(7a) (7a) Appellants contend further that the defendants in contracting for the issuance of M.D. degrees by the College of Osteopathic Physicians and Surgeons violated statutory provisions prohibiting barter or sale of medical degrees. The merger [***30] agreement provided that the parties contemplate that osteopaths will obtain M.D. degrees from the college; and that the California Medical Association agrees to accept such procedures regarding this as may be agreed upon by a certain committee; that the college would convert to an allopathic college, would be accredited as such, and would issue M.D. degrees to licensed California osteopaths without any examination and without attending the college. Another provision of the merger agreement is that CMA guarantees that the college will receive the annual contribution of \$ 225,000 to be made by COA for four years. The merger agreement stated in effect that COA would continue to pay to the college a minimum of \$ 225,000 a year for four years; that CMA and COA jointly guarantee that the college will receive that amount. The complaint alleged in effect that the annual income of the college was \$ 750,000, and that a minimum of \$ 200,000 a year additional had been required for expenses and that that amount had been supplied by donations. Appellants assert that the guaranty by CMA was in effect illegal barter and sale of degrees. The merger agreement does not bear an interpretation that [***31] the agreement of the college to set up a procedure regarding the degrees was made the consideration for the guaranty. The provisions of the merger agreement relating to the college were an integral part of the agreement between COA and CMA. COA had given more than \$ 200,000 a year to the college for five years before the complaint was filed. The persons who were to be considered as ones to receive degrees were osteopaths who already had been licensed by the state, and their licenses authorized them to render the same medical services as allopaths, and the educational requirements were the same as to both professions. [*400]

CA(8) (8) The Legislature in amending section 2396 of the Business and Profession Code gave implied approval of the issuance of such degrees. That amendment was to the effect that the use of an M.D. degree by a person licensed as a physician and surgeon was not unprofessional conduct where his degree was issued by a medical school in California at any time prior to September 30, 1962, and approved by the Board of Osteopathic Examiners or the Board of Medical Examiners. **CA(7b)** (7b) In view of all the circumstances, including those just mentioned, it cannot be said that the [***32] issuing of the degrees violated any statute.

CA(9) (9) Appellants contend further that the issuance of M.D. degrees under section 2396 of the Business and Professions Code, as amended, was illegal for the reason the section is unconstitutional. Their argument is to the effect that it was special legislation applicable to certain persons (osteopaths) who have not completed a full course of study required by an approved medical school, whereas other persons are required to complete such a course.

At the time the agreement was made said section 2396 provided: "Unless the holder of any certificate provided for in this chapter . . . has been granted the degree of doctor of medicine after the completion of a full course of study as prescribed by an approved medical school . . . the use of the term or suffix 'M.D.' constitutes unprofessional conduct within the meaning of this chapter." In 1961 the section was amended by adding thereto: "However, any person holding a physician's and surgeon's certificate under the jurisdiction of the Board of Osteopathic Examiners of the State of California and a degree of Doctor of Medicine issued by a medical school located in the State of California at any time [***33] [**655] prior to September 30, 1962, and approved either by the Board of Osteopathic Examiners of the State of California or the Board of Medical Examiners of the State of California at the

time of the issuance of such degree, shall be authorized to use the term or suffix 'M.D.,' and such use shall not be unprofessional conduct, so long as such person, on or before October 31, 1962, advises both the Board of Medical Examiners and the Board of Osteopathic Examiners, in writing, that he has elected to use the term or suffix 'M.D.,' and has elected not to use the term or suffix 'D.O.' In the event of such election the use of the term or suffix 'D.O.' constitutes unprofessional conduct within the meaning of this chapter." (In [*401] 1962 the section was further amended by substituting the date, December 31, 1962, in place of October 31, 1962.) The class of persons referred to in that legislation is the class or group holding certificates as physicians and surgeons and holding an M.D. degree from a school which has been approved. This is not an unreasonable classification. Appellants argue further that this section is invalid because it grants to the college (COPS) a special [***34] privilege with respect to the issuance of M.D. degrees. The section provides that it is applicable to an approved "medical school located in the State of California." The college was not granted a special privilege. The section as amended is not unconstitutional or invalid.

CA(10)[] (10) Appellant also contends that the acts of COA with respect to the merger agreement constituted acts ultra vires the articles of incorporation, particularly the provision therein that COA was incorporated for the following stated purpose: "To maintain a standard of education and to promote the welfare and influence of the profession of osteopathy." The complaint alleges that COA amended its articles about May 1961, purporting to provide: "The aforesaid purpose includes the unification of all those medical practitioners licensed by . . . California as physicians and surgeons in one medical association. . . ." It seems that the argument assumes that osteopathy must be maintained as a profession separate and distinct from allopathy. As above stated, COA was incorporated in 1900, when the two professions were very different. In 1901 an osteopath was not authorized to prescribe drugs or to perform surgery. As shown [***35] by the complaint, and according to law, both professions now have, and for many years have had, the same authority -- to use all methods of treatment. It appears that COA decided that its interests and the interests of the public would be more efficiently served by unification. Section 803, subdivision (b), of the Corporations Code provides: "No limitation upon the . . . powers of the corporation . . . contained in . . . the articles . . . shall be asserted as between the corporation or any shareholder and any third person." Subdivision (c) of that section provides: "Any contract . . . made in the name of a corporation which is authorized or ratified by the directors . . . binds the corporation. . . ." The complaint shows that the board of trustees of COA ratified the agreement. The contention regarding alleged ultra vires acts is not sustainable.

[*402] In view of the above conclusions, it is not necessary to discuss other contentions on appeal.

Respondents have made a motion to dismiss the appeal as to the judgment on the fourth and fifth causes of action (re alleged sales of degrees, and alleged misuse of "M.D." designation). The motion is upon the ground that 12 [***36] of the 18 plaintiffs have indicated by their conduct that they no longer support the position taken in the complaint. It is asserted that 15 of the plaintiffs have received M.D. degrees and 12 are now practicing under that designation; that only 6 plaintiffs are in a position to proceed to attack the issuance of the degrees, but they lack standing to do so because a minimum of 10 is required. The motion to dismiss is also made on the ground that the said 12 plaintiffs have received the benefit of the judgment from which they are appealing. The two causes of action are based on [section 2436 of the Business \[**656\] and Professions Code](#). That section provides, in part, that ". . . the superior court . . . on application of the board or of 10 or more persons holding physician's and surgeon's . . . certificates . . . may issue an injunction. . . ."

Appellants state in effect, in opposition to the motion, that the acts of the plaintiffs who applied for and received the degrees were coerced and not voluntary -- for the reason that under [section 2396 of the Business and Professions Code](#) they were required to elect, before December 31, 1962, whether they would apply for the degree. [***37] They assert that since they were faced with the "time-coercion" of such requirement by law, and in order to preserve their freedom to practice as doctors of medicine if the challenged program should ultimately be held proper, they applied for and obtained the degrees. Appellants also assert that the remaining plaintiffs have the right to maintain the action; and that in any event that the organizational plaintiff (OPSC) has the right to prosecute the action. The motion to dismiss is denied.

The judgment is affirmed.

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People v. Santa Clara Valley Bowling Proprietors' Ass'n

Court of Appeal of California, First Appellate District, Division Two

November 19, 1965

Civ. No. 22156

Reporter

238 Cal. App. 2d 225 *; 47 Cal. Rptr. 570 **; 1965 Cal. App. LEXIS 1134 ***; 1966 Trade Cas. (CCH) P71,639

THE PEOPLE, Plaintiff and Appellant, v. SANTA CLARA VALLEY BOWLING PROPRIETORS' ASSOCIATION et al., Defendants and Respondents

Prior History: [***1] APPEAL from a judgment of the Superior Court of Santa Clara County. Edwin J. Owens, Judge.

Action against bowling proprietors' associations to enjoin alleged restraints of trade.

Disposition: Affirmed in part and reversed in part with directions. Judgment for plaintiff affirmed in part and reversed in part with directions.

Core Terms

bowling, tournaments, league, bowlers, modified, eligibility rules, establishments, affiliated, conspiracy, percent, Cartwright Act, prior rule, membership, restraint of trade, Proprietors', trial court, associations, sponsored, boycott, rule of reason, organizations, regional, courts, prices, Sherman Act, dealer, secondary boycott, defendants', injunctive, antitrust

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Defenses

Criminal Law & Procedure > Defenses > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN1 [down arrow] Sherman Act, Defenses

When the Sherman Act, [15 U.S.C.S. §§ 1, 2](#), incorporated the common-law principles on restraint of trade into federal statutory law, it imported both the principle that restrictions on competition are illegal and also the principle that in some circumstances a showing of reasonableness will legalize restrictions on competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

[**HN2**](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Among the practices which the courts have deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

[**HN3**](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The "per se" doctrine means that a particular practice and the setting in which it occurs is sufficient to compel the conclusion that competition is unreasonably restrained and the practice is consequently illegal. In the "rule of reason" category, however, the conclusion does not follow from the mere showing of the conduct and its setting, but requires the complicated and prolonged economic investigation to produce evidence that warrants an inference that the purpose of the actor or the actual or probable consequences of the act was to hinder competition, as well as on probable competitive effects. The difference between the per se and rule of reason categories lies in the kind and quantum of evidence required to establish violations.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

[**HN4**](#) Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The innate illegality of a boycott, like that of a conspiracy, springs from the fact of combination, the agreement to do collectively that which any one acting alone and independently, could do without violating the law so that any factual showing of the effect on competition was not relevant.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

[**HN5**](#) Monopolies & Monopolization, Actual Monopolization

In judging whether acts are anticompetitive, exclusivity is not the determinative factor. The basic issue is whether a particular practice is objectionable because, by nature, it generally tends to lessen competition and create monopoly.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[**HN6**](#) Regulated Practices, Price Fixing & Restraints of Trade

The gravamen of the offense against the Cartwright Act, [Cal. Bus. & Prof. Code §§ 16720](#) and [16727](#), is the mere formation of the combination or conspiracy for the unlawful purpose of restraining trade.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

[**HN7**](#) Monopolies & Monopolization, Conspiracy to Monopolize

When defendants are shown to have entered into a conspiracy in violation of the antitrust laws, the courts will not assume that it has been abandoned without clear proof.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[HN8](#)[] Regulated Practices, Price Fixing & Restraints of Trade

Under the Cartwright Act, [*Cal. Bus. & Prof. Code §§ 16720*](#) and [*16727*](#), it is enough to show that either the purpose of the combination or the means used were unlawful.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[HN9](#)[] Regulated Practices, Price Fixing & Restraints of Trade

In resolving doubts as to the desirability of including provisions designed to restore future freedom of trade, courts should give weight to the fact of total conspiracy as well as the other circumstances under which the illegal acts occur. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

[CA\(1\)](#)[] (1)

Monopolies—Under Cartwright Act—Agreements Prohibited.

--Cases decided under the federal Sherman Anti-Trust Act and the common-law policy against restraint of trade apply to problems arising under the Cartwright Act ([*Bus. & Prof. Code, § 16700 et seq.*](#)), but cases based on the Clayton Act do not apply, since that act is broader in its scope and prohibitions.

[CA\(2\)](#)[] (2)

Id.—Definitions.

--With respect to monopolies, the "per se" doctrine means that a particular practice and the setting in which it occurs compel the conclusion that competition is unreasonably restrained and that the practice is thus illegal.

[CA\(3\)](#)[] (3)

Id.—Under Cartwright Act—Agreements Prohibited.

--With respect to combinations in the "rule of reason" category, the conclusion that competition is unreasonably restrained does not follow from the mere showing of particular conduct and its setting, but requires complicated and prolonged economic investigation to produce evidence that warrants an inference of the actor's purpose or of the actual or probable consequences of an act to hinder competition, as well as on probable competitive effects.

CA(4)[] (4)**Id.—Under Cartwright Act—Agreements Prohibited.**

--The difference between the per se and rule of reason categories applied to monopolies lies in the kind and quantum of evidence required to establish violations of the antitrust laws.

CA(5)[] (5)**Id.—Under Cartwright Act—Agreements Prohibited.**

--To determine whether an agreement violates the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), the basic issue is whether a particular practice is objectionable because, by nature, it generally tends to lessen competition and create monopoly.

CA(6)[] (6)**Id.—Under Cartwright Act—Offenses.**

--The gravamen of an offense against the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) is the mere formation of a combination or conspiracy for the unlawful purpose of restraining trade.

CA(7a)[] (7a) CA(7b)[] (7b) CA(7c)[] (7c)**Id.—Under Cartwright Act—Agreements Prohibited.**

--Where the court found that the original rules of defendant bowling associations were adopted primarily to induce league bowlers to cease bowling in nonmember houses and thus suppress competition, but that after the filing of a complaint under the Cartwright Act, a modified rule was adopted to induce league bowlers to bowl in member houses without requiring them to cease bowling in nonmember houses, but there was no evidence that the modified rule was adopted after abandonment of the conspiracy, the trial court erred in applying the "rule of reason" to the modified rule and in concluding that it was not a secondary boycott and tie-in similar to the prior rules.

CA(8)[] (8)**Id.—Under Cartwright Act—Offenses—Evidence.**

--When defendants are shown to have conspired in violation of the antitrust laws, the courts will not assume the conspiracy was abandoned without clear proof.

CA(9)[] (9)**Id.—Under Cartwright Act—Offenses—Evidence.**

--To prove an offense under the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), it is enough to show that either the purpose of defendants' combination or the means used were unlawful.

CA(10a) [↓] (10a) CA(10b) [↓] (10b)

Id.—Under Cartwright Act—Offenses.

--Where the original rule of defendant bowling associations, which was designed to induce league bowlers to cease bowling in nonmember houses, was modified, after commencement of suit, into one requiring for tournament eligibility that participants bowl regularly in at least one membership house league, the decree of the trial court, which passed the "modified rule" as reasonable, had to be modified to enjoin defendants from adopting any eligibility rule requiring that a bowler must bowl all or any of his league play in membership establishments.

CA(11) [↓] (11)

Id.—Under Cartwright Act—Offenses.

--In resolving doubt as to the desirability of including provisions in a decree designed to restore future freedom of trade, courts should give weight to the fact of total conspiracy, as well as the other circumstances under which illegal acts occur.

CA(12) [↓] (12)

Id.—Under Cartwright Act—Agreements Prohibited.

--The character and effect of a conspiracy alleged to be in violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) are not to be judged by dismembering the conspiracy and reviewing its separate parts, but only by looking at it as a whole.

Counsel: Thomas C. Lynch, Attorney General, Wallace Howland, Assistant Attorney General, Mervin R. Samuel, Deputy Attorney General, and Keith E. Pugh, Jr., for Plaintiff and Appellant.

Doyle & Clecak and William P. Clecak for Defendants and Respondents.

Judges: Taylor, J. Shoemaker, P. J., and Agee, J., concurred.

Opinion by: TAYLOR

Opinion

[*227] [571]** The sole question presented on this appeal is the adequacy of the injunctive relief afforded to the state in its action against restraints of trade by defendants, the Santa Clara Valley Bowling Proprietors' Association (hereafter called Santa Clara), the Northern California Bowling Proprietors' Association (hereafter called Norcal), and naming as coconspirator the Bowling Proprietors' **[**572]** Association of America (hereafter called BPA). Although the complaint, filed in 1960, charged defendants with conspiring **[**2]** in several types of restraints of trade, including price-fixing and bid-rigging, in violation of sections 16720 and 16727 of the Business and Professions Code (hereafter called the Cartwright Act), only the bowling tournament eligibility rule adopted in 1961 (hereafter called the modified eligibility rule) is in issue here.

The trial court found that defendants had conspired to violate the Cartwright Act and granted the state all of the equitable relief requested except an injunction against the use and enforcement of the modified eligibility rule. The findings of fact and conclusions of law establish that defendants' practices of fixing prices by agreement, bid-rigging, and adopting a code of ethics with enforcement provisions, were unreasonable restraints of trade, and that

the former tournament eligibility rules (hereafter called the former Norcal rule and the BPAA rule, respectively), constituted a group boycott, secondary boycott and tie-in agreement, in violation of the Cartwright Act.

As defendants have abandoned their appeal, we are concerned only with paragraph V of the judgment.¹ The state argues that the trial court erred in failing to provide therein that defendants [***3] were to be enjoined from adopting any eligibility [*228] rule requiring that a bowler must bowl all or any of his league play in member establishments and that, therefore, the injunction in its present form is inadequate to enforce the judgment rendered.

[***4] While a full exposition of all matters treated in the briefs might serve better to illuminate the controversy, this could be accomplished only by extending this opinion beyond readable limits. Inasmuch as questions of law only are presented, it will be sufficient to state generally the salient facts about the defendant and coconspirator organizations, the bowling business, and the nature and effect of the modified eligibility rule.

Defendants and the coconspirator are nonprofit corporate associations established to promote the common interests of owners and operators of bowling establishments. Defendant Santa Clara, the local organization, has a membership of all but two (87 per cent) of the bowling establishments in the San Jose area of Santa Clara County; defendant Norcal, the regional organization, a membership of 210 (88 per cent) of the 240 bowling establishments in the geographic area bounded by the Oregon border on the north and Pismo Beach and Delano on the south. Both Santa Clara and Norcal are affiliated with BPAA, the national organization, which, with a membership of 5,488 bowling establishments in the United States and Canada and with its various affiliates, owns [***5] or controls fairly close to 90 per cent of all bowling lanes in the United States. BPAA promulgated by-laws, tournament rules and regulations which are binding on its members and affiliated associations.

One of the purposes of BPAA is to foster the formation of state, city and district bowling proprietor associations and to urge their affiliation with the national organization on the condition that each affiliate require its members to become members of BPAA. Membership in Norcal is limited to proprietors who are members in good [**573] standing of local associations. Under BPAA by-laws, no affiliate organization has authority to accept a proprietor for local or state membership only, as members of affiliated organizations must become [*229] members of BPAA. Loss of membership in the local association results in loss of membership in the regional association; in turn, loss of membership in the regional association results in the loss of membership in the national association. The board of directors of BPAA is composed of members selected by its affiliated organizations, including Norcal.

In February 1960, Norcal adopted its former rule limiting eligibility to participate [***6] in tournaments approved by Norcal to bowlers who confined their league and tournament bowling exclusively to BPAA member establishments and to bowlers who signed agreements to desist immediately from participating in organized bowling in any and all competing bowling establishments not members in good standing of Norcal or other BPAA affiliated associations. In June 1960, BPAA amended its by-laws to include a rule providing that no adult bowler was eligible to participate in tournaments sponsored or conducted by BPAA or any of its affiliated associations unless such bowler confined his league tournament and advertised exhibition bowling exclusively to establishments who were members in good standing of BPAA. In June 1960, Norcal adopted the BPAA rule in place of its own prior rule. In June of 1961, BPAA removed the above mentioned rule from its by-laws and limited its applicability to the six national tournaments it conducted or sponsored annually in northern California.

Thereafter, on July 14, 1961, Norcal adopted the modified eligibility rule here in issue. This rule, used in all tournaments sponsored or sanctioned by Norcal and its affiliates after that date, reads as follows: [***7] "All bowlers who bowl regularly in at least one league in a membership house (21-game established average required) shall be eligible to participate in tournaments conducted by Northern California Bowling Proprietors' Association and

¹ "Each defendant is perpetually enjoined and restrained from directly or indirectly or in any manner adopting, advertising, participating in, adhering to, applying or enforcing any by-law, rule, regulation, agreement, contract, understanding, practice, procedure or arrangement of any kind or nature whatsoever which has the purpose or effect, directly or indirectly, of requiring as a condition of eligibility to participate in or to receive a prize or award in any bowling tournament, bowling contest, bowling program or bowling activity that a bowler must bowl all of his or her league play or other bowling activities in establishments which are members of BPAA, Northern Association, Santa Clara Association, or any other bowling proprietors' association."

its members; this rule shall apply to all tournaments given Blue Ribbon and General approval and also to those tournaments for which members display posters, advertising or otherwise solicit the support of fellow members."

A brief description of the bowling business is necessary for an understanding of the issue here presented. Bowlers who bowl individual games are engaged in "open play." A substantial number of bowlers engage in competition as members [*230] of various leagues.² A league is composed of six to forty teams with four or five bowlers per team. Leagues generally enter into agreements³ with bowling establishments for each season⁴ and bowl periodically, usually weekly, during such time. League bowling is essential to the profitable operation of a bowling establishment and constitutes 50 per cent or more of the total lineage bowled in an average establishment. In addition, league bowlers bowl about one-third of all the "open [***8] play" in an establishment and are a major source of bar and restaurant revenue.

A number of bowlers, both as individuals and as members of league teams, participate in bowling tournaments that are generally [**574] of two types: [***9] "house tournaments" sponsored or conducted by bowling proprietors, including members of defendants' organizations, and tournaments sponsored or conducted by nonprofit organizations. Both types of tournaments produce business for the bowling establishments in which they take place. "House tournaments" often provide substantial cash prizes for the winners from a prize fund created from the entry fees paid by the participating bowlers or, in some instances, from contributions of the individual bowling establishment, or the affiliated association conducting the tournament, or the BPAA.

BPAA annually sponsors or conducts six national tournaments in northern California. The elimination rounds for the national tournaments are conducted by Norcal through its members. In addition, Norcal conducts four regional tournaments of its own and approves some of the tournaments of its individual members.⁵ Many members of Norcal, however, conduct their own tournaments without requesting the approval of Norcal.

[***10] [*231] Virtually all of the over seven million league bowlers in the United States belong to one of two nonprofit associations of bowlers: the American Bowling Congress, the men's organization (hereafter called ABC); and the Women's International Bowling Congress (hereafter called WIBC). Neither ABC nor WIBC has any interest in the financial success of any bowling establishment. Their primary purpose is to standardize the bowling conditions and equipment under which their members bowl throughout the country. Both, through their local associations, "certify" and "sanction" the leagues and tournaments. Eighty-five per cent of all tournaments and 90 per cent of the leagues are so sanctioned. Both ABC and WIBC record, tabulate and publish established bowling averages for all of their members.

Approximately 80 per cent of league bowlers in the Santa Clara area bowl in only one league per season.⁶ Twenty-five per cent of league bowlers are interested in engaging in the local or regional tournaments. Of this 25 per cent of league bowlers interested in engaging in local or regional tournaments, the great majority are to be found in the 20 per cent of league bowlers who bowl [***11] in more than one league. Those bowlers interested in tournaments consider it important to their status to be eligible to participate in tournaments.

² Sixty-five per cent of all leagues are formed by trade, professional or fraternal groups; the remainder by bowling establishments for revenue-producing purposes.

³ The contract specifies the price to be paid for the league's bowling, the period of time during which the league undertakes to bowl, and the hour and location of its bowling with the establishment. The individual bowler is under an obligation to bowl the complete season for which the contract is made. He can withdraw from the league only if he provides a replacement bowler. Failure to provide a replacement subjects him to possible suspension from membership in the bowlers' associations.

⁴ The winter season of 30-33 weeks lasts from September through May; the summer season of 12 weeks from May until August.

⁵ In 1959, Norcal approved 30 such tournaments; in 1962, 48; during the first 8 months of 1963, 34.

⁶ As a league season consists of about 100 games, usually three games per week in each of the 30-33 weeks of the season, there are obvious practical limitations in the number of leagues any one bowler can participate in. A national survey made by ABC in 1956-57, indicated that 89 per cent of its then 2.5 million members bowled in only one league.

The court here specifically found that the tournament eligibility rules of both BPAA and Norcal, either as originally stated or as subsequently modified, had and have no adverse effect on nonmember competition in Santa Clara County, but concluded that the former Norcal rule and the BPAA rule were secondary boycotts and tie-ins in violation of the Cartwright Act. The court, however, found that the modified eligibility rule did not constitute a violation of the Cartwright Act as it imposed only a reasonable requirement [***12] for participation in tournaments sponsored or approved by Norcal and its members.

The state contends that the modified eligibility rule is not substantially different from its predecessors, is likewise a secondary boycott and tie-in agreement and, as such, is illegal per se. Defendants contend that the so-called "rule of [*232] reason" must be applied to determine whether the modified eligibility rule imposes unreasonable restraints of trade in violation of the Cartwright Act. Thus, the question presented is one of law ([Roberts v. Fuquay-Varina Tobacco Board of Trade, Inc., 223 F.Supp. 212, 214](#)), namely, whether the trial court applied the proper standard to [**575] essentially undisputed facts.⁷ ([United States v. Parke, Davis & Co., 362 U.S. 29, 44-45 \[80 S.Ct. 503, 4 L.Ed.2d 505\]](#).)

[***13] **CA(1)↑** (1) Cases decided under the federal Sherman Anti-Trust Act⁸ and the common law policy against restraint of trade are applicable to problems arising under the Cartwright Act ([People v. Building Maintenance etc. Assn., 41 Cal.2d 719 \[264 P.2d 31\]](#); [Speegle v. Board of Fire Underwriters, 29 Cal.2d 34 \[172 P.2d 867\]](#); [Shasta Douglas Oil Co. v. Work, 212 Cal.App.2d 618, 625 \[28 Cal.Rptr. 190\]](#); [Tatkin v. Superior Court, 160 Cal.App.2d 745, 757 \[326 P.2d 201\]](#); [Milton v. Hudson Sales Corp., 152 Cal.App.2d 418, 440 \[313 P.2d 936\]](#); [Rolley, Inc. v. Merle Norman Cosmetics, Inc., 129 Cal.App.2d 844, 849, 851 \[278 P.2d 63, 282 P.2d 991\]](#)).

HN1↑ When the Sherman Act incorporated the common-law principles on restraint of trade into federal statutory law, [***14] it imported both the principle that restrictions on competition are illegal and also the principle that in some circumstances a showing of reasonableness will legalize restrictions on competition. When the question was first presented to the United States Supreme Court under the Sherman Act, it was held that the justification of reasonableness was not available as a defense to a combination which had the effect of restraining trade ([United States v. Joint Traffic Assn. \(1898\) 171 U.S. 505 \[19 S.Ct. 25, 43 L.Ed. 259\]](#); [United States v. Trans-Missouri Freight Assn. \(1897\) 166 U.S. 290, 328 \[17 S.Ct. 540, 41 L.Ed. 1007\]](#)), and it was intimated that the question of reasonableness was not open to the courts in these actions at common law. ([Addyston Pipe & Steel Co. v. United States \(1899\) 175 U.S. 211, 237-238 \[20 S.Ct. 96, 44 L.Ed. 136\]](#)). However, in the classic cases of [Standard Oil Co. v. United](#) [¹*233] [States, 221 U.S. 1 \[31 S.Ct. 502, 55 L.Ed. 619, 34 L.R.A. N.S. 34\]](#), and [United States v. American Tobacco Co., 221 U.S. 106 \[31 S.Ct. 632, 55 L.Ed. 663\]](#), the U. S. Supreme Court established the celebrated so-called "rule of reason" [***15] by holding that not all restraints of interstate commerce are within the ambit of the Sherman Act, but only those restraints that are undue or unreasonable, and it has been held by our Supreme Court that the broad prohibitions of the Cartwright Act are subject to an implied exception similar to the one that validates reasonable restraints of trade under the Sherman Act ([People v. Building Maintenance etc. Assn., 41 Cal.2d 719, 727 \[264 P.2d 31\]](#)).

In response to the attempts of antitrust defendants to justify every restrictive combination on the ground that, in the light of all the economic facts and conditions, the particular practice assailed was reasonable, the federal cases have developed a doctrine of so-called "per se" violations, i.e., acts which are held to be prohibited by the antitrust laws regardless of any asserted justification or alleged reasonableness ([Las Vegas Merchant Plumbers Assn. v. United States, \(9th Cir. 1954\) 210 F.2d 732](#), cert. denied, 348 U.S. 817 [75 S.Ct. 29, 99 L.Ed. 645]). Although for convenience and brevity, the courts have used the "illegal per se" terminology, an analysis indicates that it does not denote an arbitrary rigid classification, [***16] but rather encompasses certain practices that normally tend to

⁷ Defendants erroneously characterize the issue as one of fact, i.e., the sufficiency of the evidence to sustain the court's findings and conclusions about the modified eligibility rule. Since defendants have abandoned their appeal, the sufficiency of the evidence is not in issue and must be presumed.

⁸ Cases based on the Clayton Act, however, are not applicable since that act is broader in its scope and prohibitions ([Rolley, Inc. v. Merle Norman Cosmetics, Inc., 129 Cal.App.2d 844 \[278 P.2d 63, 282 P.2d 991\]](#)).

eliminate competition. As the United States Supreme Court recently stated in [Northern Pac. Ry. Co. v. United States, 356 U.S. 1 \[78 S.Ct. 514, 2 L.Ed.2d 545\]](#): "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise [****576**] that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition." (P. 4.)

"However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as [***234**] to the precise harm they have caused or the business excuse for their use. This principle [*****17**] of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken. [HN2](#)[] Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210 \[60 S.Ct. 811, 84 L.Ed. 1129\]](#); division of markets, [United States v. Addyston Pipe & Steel Co., 85 F. 271](#) [29 C.C.A. 141, 46 L.R.A. 122]; affd., [175 U.S. 211 \[20 S.Ct. 96, 44 L.Ed. 136\]](#); group boycotts, [Fashion Originators' Guild v. Federal Trade Com., 312 U.S. 457 \[61 S.Ct. 703, 85 L.Ed. 949\]](#); and tying arrangements, ⁹ [International Salt Co. v. United States, 332 U.S. 392 \[68 S.Ct. 12, 92 L.Ed. 20\]](#)." (P. 5.)

[*****18**] The "*per se*" doctrine means that a particular practice and the setting in which it occurs is sufficient to compel the conclusion that competition is unreasonably restrained and the practice is consequently illegal. [CA\(3\)](#)[] (**3**) In the "rule of reason" category, however, the conclusion does not follow from the mere showing of the conduct and its setting, but requires the complicated and prolonged economic investigation to produce evidence that warrants an inference that the purpose of the actor or the actual or probable consequences of the act was to hinder competition, as well as on probable competitive effects. [CA\(4\)](#)[] (**4**) As one eminent commentator has pointed out, the difference between the *per se* and rule of reason categories lies in the kind and quantum of evidence required to establish violations (Loevinger, *The Rule of Reason in Antitrust Law* (1964) 50 Va.L.Rev. 23, 34).

[***235**] The question here presented is whether the modified eligibility rule is a practice of the same nature and occurs in the same setting as its predecessor eligibility rules and likewise compels the conclusion that it is illegal. Defendants' contention that there is no such "*per se*" category under the Cartwright Act [*****19**] is negated by [People v. Inland Bid Depository, 233 Cal.App.2d 851 \[44 Cal.Rptr. 206\]](#), which likewise involved the effectiveness of the injunctive relief granted by the court below.

It is unnecessary for us to set forth the public policy against group boycotting in great detail (see [Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 \[68 S.Ct. 996, 92 L.Ed. 1328\]](#); [Silver v. New York Stock Exchange, 373 U.S. 341 \[83 S.Ct. 1246, 10 L.Ed.2d 389\]](#); [People v. Sacramento Butchers' Protective Assn., 12 Cal.App. 471, 481 \[107 P. 712\]](#); [Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 \[33 S.Ct. 9, 57 L.Ed. 107\]](#); [United States v. Socony-Vacuum Oil Co., 310 U.S. 150 \[60 S.Ct. 811, 84 L.Ed. 1129\]](#); [Northern Pac. Ry. Co. v. United States, 356 U.S. 1 \[78 S.Ct. 514, 2 L.Ed.2d 545\]](#); and [People v. Building Maintenance etc. Assn., 41 Cal.2d 719, 727 \[264 P.2d 31\]](#)). Group boycotts are illegal *per se* (see [Klor's, Inc. v. Broadway-Hale Stores, Inc.,](#)

⁹ Although [Timken Roller Bearing Co. v. United States \(1951\) 341 U.S. 593 \[71 S.Ct. 971, 95 L.Ed. 1199\]](#), and [White Motor Co. v. United States \(1963\) 372 U.S. 253 \[83 S.Ct. 696, 9 L.Ed.2d 738\]](#), indicate that only certain tying arrangements are in the *per se* category, the court indicated in the *Northern Pac.* case, at page 6, that tying agreements "are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."

359 U.S. 207 [79 S.Ct. 705, 3 L.Ed.2d 741]; United States v. Frankfort Distilleries, 324 U.S. 293 [65 S.Ct. 661, 89 L.Ed. 1***20 951]; Associated Press v. United States, 326 U.S. 1 [65 S.Ct. 1416, 89 L.Ed. 2013]; Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 [81 S.Ct. 365, 5 L.Ed.2d 358]; Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600 [34 S.Ct. 951, 58 L.Ed. 1490, L.R.A. 1915A 788]; Overland Publishing Co. v. H. S. Crocker Co., 193 Cal. 109 [222 P. 812]; Speegle v. Board of Fire Underwriters, 29 Cal.2d 34 [172 P.2d 867].

The leading and controlling case (also followed in People v. Inland Bid Depository, supra) is Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 [79 S.Ct. 705, 3 L.Ed.2d 741]. In that case, the plaintiff, a retail radio, television, and appliance dealer in San Francisco, alleged a conspiracy of a number of important suppliers, together with a retail competitor, either not to sell to the plaintiff or to sell to him only at discriminatory prices and highly unfavorable terms. It was further alleged that the retail competitor, a chain of stores with one located close to the plaintiff's store, had used [*236] "monopolistic" buying power to bring about these results. [***21] No reason, purpose, or motive for the combination was alleged. No specific effects were stated other than damage to the plaintiff. The conclusionary allegation averred that the conspiracy was in "restraint of trade" and monopolistic, contrary to sections 1 and 2 of the Sherman Act, and that competition in commerce in the particular products involved was substantially lessened, limited, and restrained. The defendants moved for a summary judgment and argued that the matters alleged constituted no violation because the affidavits indicated that there were numerous other dealers in the same appliances in the market area and many other brands of the same types of products, not covered by the conspiracy were available to the public. The defendants prevailed below on the grounds that no per se offense was alleged and that it was incumbent on the plaintiff to show some substantial restriction of competition or that the public could conceivably suffer injury (Klor's, Inc. v. Broadway-Hale Stores, Inc. (9th Cir. 1958) 255 F.2d 214, 236).

The Supreme Court reversed unanimously and ordered the case to trial. The court held that the complaint alleged a boycott and that this boycott [***22] was within the per se category regardless of whether elimination of the plaintiff would have any significant economic effect. The court said at pages 212 and 213: "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.' Fashion Originators' Guild v. Federal Trade Com., 312 U.S. 457, 466, 467-468 [61 S.Ct. 703, 85 L.Ed. 949]. Cf. United States v. Trenton Potteries Co., 273 U.S. 392 [47 S.Ct. 377, 71 L.Ed. 700, 50 A.L.R. 989]. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213 [71 S.Ct. 259, 95 L.Ed. 219], 'such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' Cf. United States v. Patten [***23] , 226 U.S. 525, 542 [33 S.Ct. 141, 57 L.Ed. 333, 44 L.R.A. N.S. 325].

" [**578] Plainly the allegations of this complaint disclose such a boycott. This is not a case of a single trader refusing to deal [*237] with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its 'nature' and 'character,' a 'monopolistic tendency.' As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, [***24] one at a time, as it can by driving them out in large groups."

The court in Klor emphasized the fact that HN4 the innate illegality of a boycott, like that of a conspiracy, springs from the fact of combination, the agreement to do collectively that which any one acting alone and independently, could do without violating the law (Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600,

[614 \[34 S.Ct. 951, 58 L.Ed. 1490\]](#), L.R.A. 1915A 788]; [Overland Publishing Co. v. H. S. Crocker Co., 193 Cal. 109, 121 \[222 P. 812\]](#)), so that any factual showing of the effect on competition was not relevant. The holding of the *Klor* case was recently reaffirmed in [White Motor Co. v. United States, 372 U.S. 253, 259 \[83 S.Ct. 696, 9 L.Ed.2d 738\]](#).

Thus the trial court's finding in the instant case that the modified eligibility rule had no effect on competition is not relevant. It made the same finding concerning the effect of the prior rules. The application of this finding to both prior and modified rules only serves to emphasize the fact that the court properly applied the *per se* doctrine in nullifying the prior rules and improperly applied the "rule **[***25]** of reason" in approving the modified eligibility rule.

The court here concluded that the BPAA rule and former Norcal rules were secondary boycotts as they constituted agreements to coerce bowlers to refrain from dealing with non-BPAA members. It also concluded that they resulted in an arrangement which tied and conditioned the sale of participation **[*238]** in proprietor tournaments upon the purchase from a BPAA member establishment of a bowler's entire requirement of league (or league, tournament and advertised exhibition) bowling. Defendants argue that the trial judge correctly held the modified eligibility rule dissimilar because it does not require that a bowler bowl *all* of his league games in a member establishment, but only those in one league in which he participates. Admittedly, since the majority of bowlers interested in local and regional tournaments are found in the 20 per cent ¹⁰ of all league bowlers who bowl in more than one league, a somewhat smaller amount of league play is affected by the modified rule. [HN5↑](#) But exclusivity is not the determinative factor. [CA\(5\)↑ \(5\)](#) As indicated in *Klor*, the basic issue is whether a *particular practice* is objectionable because, **[***26]** by nature, it generally tends to lessen competition and create monopoly.

The matter was most perceptively stated in [Osborn v. Sinclair Refining Co. \(4th Cir. 1960\) 286 F.2d 832](#), cert. denied, 366 U.S. 963 [81 S.Ct. 1924, 6 L.Ed.2d 1255], wherein a gasoline distributor required its dealers to buy substantial quantities of Goodyear tires, batteries and accessories as **[**579]** a condition to the purchase of the gasoline. The court said: "Nor do we think a tie-in escapes condemnation as an unreasonable *per se* restraint of trade because the buyer is not obligated to obtain all his requirements of the tied product from **[***27]** the seller. . . . *It is the restrictive nature of the agreement, not the fact of exclusivity, which is objectionable.*" (P. 838.) "It matters not that the plaintiff was not forced to purchase his entire requirements in Goodyear merchandise. Certainly, *insofar as he and other dealers were compelled to carry Goodyear, to that extent competition in TBA was curbed.*" (P. 839.) (Italics supplied.)

[CA\(6\)↑ \(6\)](#) [HN6↑](#) The gravamen of the offense against the Cartwright Act is the *mere formation of the combination or conspiracy for the unlawful purpose of restraining trade* ([People v. Sacramento Butchers' Protective Assn., 12 Cal.App. 471, 492 \[107 P. 712\]](#)). [CA\(7a\)↑ \(7a\)](#) As to purpose, the court found that the prior rules were adopted for the primary purpose of inducing **[*239]** league bowlers bowling in leagues in nonmember houses to cease doing so and thus suppress the competition from nonmember establishments, while the modified eligibility rule had, as one of its purposes, to induce league bowlers bowling in nonmember houses to bowl in member houses without, however, requiring them to cease bowling in nonmember houses. Thus the distinction between the modified and prior rules is one **[***28]** of degree only and not of purpose.

Since the findings and conclusions of the trial court affirming the conspiracy of defendants and their other illegal acts are not in question, the modified eligibility rule must be viewed as a part of the total conspiracy and not as an isolated element. [CA\(8\)↑ \(8\)](#) [HNT↑](#) When defendants are shown to have entered into a conspiracy in violation of the antitrust laws, the courts will not assume that it has been abandoned without clear proof ([United States v. Oregon State Medical Soc., 343 U.S. 326, 333 \[72 S.Ct. 690, 96 L.Ed. 978\]](#); [United States v. Parke, Davis & Co., 362 U.S. 29 \[80 S.Ct. 503, 4 L.Ed.2d 505\]](#)).

¹⁰ As the parties agree that there are approximately 190,000 men and women league bowlers in northern California, about 152,000 bowl in only one league; 38,000 in more than one league; the number interested in local or regional tournaments is 47,000; the great majority of the 47,000 interested in local or regional tournaments are to be found in the 38,000 who bowl in more than one league.

CA(7b) [↑] (7b) The fact that the prior rules were adopted in furtherance of the conspiracy cannot be questioned. The uncontested evidence indicated that the modified rule was adopted at a meeting of the Norcal board of directors on July 14, 1961, some seven months after the filing of the complaint herein. Under such circumstances, it is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform especially when abandonment seems timed to anticipate suit and there is probability of resumption ([***29] United States v. Oregon State Medical Soc., supra, at p. 333). The record is devoid of any evidence indicating that the modified rule was adopted after an abandonment of the conspiracy that tainted the prior rules. In fact, the only inference that can be drawn from the record is to the contrary. We refer particularly to BPAA's November 1960 Member Service Bulletin which urged members to accentuate the positive aspects of the tournament eligibility rules and "let them figure out the consequences for themselves." The wording of the modified eligibility rule adopted a few months later is in the affirmative, while all of the prior rules were worded negatively.

When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be [*240] closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention (International Salt Co. v. United States, 332 U.S. 392, 400 [68 S.Ct. 12, 92 L.Ed. 2d]). **CA(9)** [↑] (9) Thus HN8 [↑] under the Cartwright Act, it is enough to [***30] show that either the purpose of the combination (People v. Sacramento Butchers' Protective Assn., 12 Cal.App. 471, 492 [107 P. 712]) or the means used (Overland Publishing Co. v. H. S. Crocker Co., 193 Cal. 109 [222 P. 812]) were unlawful.

[**580] **CA(7c)** [↑] (7c) We agree, therefore, with the state's argument that the modified eligibility rule does not provide any legally significant basis for different treatment than the prior rules, as the only factual difference between them is in the amount of bowling which each requires from a bowler who wishes to participate in the various tournaments sponsored by the members or affiliates of the defendant organizations. We think that the trial court erred in applying the "rule of reason" to the modified eligibility rule and in concluding that it was not a secondary boycott and tie-in like the prior rules.

CA(10a) [↑] (10a) The determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court. Its opportunity to know the record and to appraise the need for prohibitions or affirmative actions normally exceeds that of any reviewing court. Notwithstanding our adherence to trial court responsibility [***31] in the molding of a decree as the wisest practice and the most productive of good results, the question is not simply one of abuse of discretion subject only to reversal for gross abuse. Rather, reviewing courts have felt an obligation to intervene in this most significant phase of the case when they conclude that there are inappropriate provisions in the decree. **CA(11)** [↑] (11) HN9 [↑] In resolving doubts as to the desirability of including provisions designed to restore future freedom of trade, courts should give weight to the fact of total conspiracy as well as the other circumstances under which the illegal acts occur. **CA(12)** [↑] (12) ". . . [The] character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. United States v. Patten, 226 U.S. 525, 544 [33 S.Ct. 141, 57 L.Ed. 333, 44 L.R.A. N.S. 325]. . . ." (Continental Ore Co. v. Union Carbide etc. Corp. (1962) 370 U.S. 690, 699 [82 S.Ct. 1404, 8 L.Ed.2d 777].)

[*241] The proper disposition of antitrust cases is obviously one of great public importance and their remedial phase, more often than not, is crucial. For the suit has been a futile exercise [***32] if the government proves a violation but fails to secure a remedy adequate to redress it. Where such is the case, the state has won a lawsuit and lost a cause. **CA(10b)** [↑] (10b) Accordingly, paragraph V of the decree must be modified to enjoin defendants from adopting any eligibility rule requiring that a bowler must bowl all or any of his league play in establishments that are members of defendants' organizations.

The judgment is affirmed in all respects except as to paragraph V, which is reversed. The trial court is directed to modify its decree to conform to the views expressed in this opinion.



Reimel v. Alcoholic Beverage Control Appeals Board

Court of Appeal of California, First Appellate District, Division One

November 21, 1967

Civ. No. 22905

Reporter

256 Cal. App. 2d 158 *; 64 Cal. Rptr. 26 **; 1967 Cal. App. LEXIS 1839 ***

JAMES O. REIMEL, as Director, etc., Plaintiff and Appellant, v. ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD, Defendant and Respondent; CHARLES COHON et al., Real Parties in Interest and Respondents. [And 5 other cases.] *

Subsequent History: [***1] [Rehearing Denied 256 Cal. App. 2d 158 at 176.](#)

Prior History: APPEALS from judgments of the Superior Court of the City and County of San Francisco. Joseph Karesh, Judge.

Proceeding in mandamus to review decisions of the Alcoholic Beverage Control Appeals Board revoking decisions of the Department of Alcoholic Beverage Control to suspend and revoke several liquor licenses for alleged violation of minimum price fair trade regulations.

Disposition: Reversed with directions. Judgments denying writs reversed with directions.

Core Terms

licensees, retailer, branded, minimum retail price, schedules, notice, distilled spirits, license, open competition, price schedule, trade journal, producer, actual notice, effective, appeals, package, words, fair trade contract, general circulation, legislative intent, minimum price, retail price, provisions, suspension, prices, mail, alcoholic beverage, make public, cases

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Licenses

Trademark Law > Subject Matter of Trademarks > Labels, Packaging & Trade Dress

Governments > State & Territorial Governments > Licenses

* James O. Reimel v. Alcoholic Beverage Control Appeals Board (Jack Dorian et al.), Civ. No. 22906; James O. Reimel v. Alcoholic Beverage Control Appeals Board (Catherine Carella et al.), Civ. No. 22994; James O. Reimel v. Alcoholic Beverage Control Appeals Board (Michael Carella et al.), Civ. No. 22995; James O. Reimel v. Alcoholic Beverage Control Appeals Board (Charles Cohon et al.), Civ. No. 23282; James O. Reimel v. Alcoholic Beverage Control Appeals Board (Fred Lancelotti et al.), Civ. No. 23401.

Trademark Law > ... > Particular Subject Matter > Names > General Overview

HN1 [down arrow] Conveyances, Licenses

[Cal. Bus. & Prof. Code § 24755](#) provides that no package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this state for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section. A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof. Such schedule shall be filed by the owner of the brand (or any of certain other designated persons). No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package.

Governments > State & Territorial Governments > Licenses

HN2 [down arrow] State & Territorial Governments, Licenses

Under the authority of [Cal. Bus. & Prof. Code § 24757](#) the department adopted its Rule 99(k), Cal. Admin. Code, tit. IV, § 99k, which provides that the person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof.

Criminal Law & Procedure > ... > Alcohol Related Offenses > Distribution & Sale > General Overview

Governments > State & Territorial Governments > Licenses

Criminal Law & Procedure > Criminal Offenses > Alcohol Related Offenses > General Overview

HN3 [down arrow] Alcohol Related Offenses, Distribution & Sale

A state has particularly wide powers with respect to the traffic in alcoholic beverages and may provide for their prohibition or impose such conditions and regulations as it may deem proper.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Governments > State & Territorial Governments > Licenses

HN4 [down arrow] Fundamental Rights, Procedural Due Process

Unlike the rule with respect to the right to deal in ordinary commodities there is no inherent right in a citizen to sell intoxicants and a license to do so is not a proprietary right within the meaning of the due process clause of [Cal. Const., art. I, § 13](#), nor is it a contract; it is but a permit to do what would otherwise be unlawful.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

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Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

Governments > State & Territorial Governments > Licenses

HN5 Separation of Powers, Legislative Controls

Cal. Bus. & Prof. Code § 24755 does not require as an element of its violation that a sale below the effective minimum retail price schedule be made knowingly. A strict liability is imposed on those exercising the privilege of selling alcoholic beverages. The duty to enforce and administer the act is vested in the Department of Alcoholic Beverage Control, and it has a broad range of power and discretion in carrying out this duty.

Governments > State & Territorial Governments > General Overview

Governments > Legislation > Effect & Operation > Operability

HN6 Governments, State & Territorial Governments

To publish is defined as to disclose, reveal, proclaim, circulate or make public and to proclaim, to advertise.

Governments > Legislation > Effect & Operation > General Overview

HN7 Legislation, Effect & Operation

Publish is not synonymous with communicate or to divulge or to make known. Inseparable from the term is the idea of publicity and circulation. The thought running through all the uses of the words is an advising of the public or the making known of something to the public for a purpose.

Governments > Legislation > Interpretation

HN8 Legislation, Interpretation

If reasonably possible, conflicting provisions of a statute should be reconciled and brought into harmony with each other. In doing so, effect and meaning should be given to each word and phrase under consideration. A construction should be avoided which implies that the legislature was ignorant of the meaning of language employed, or that it used words in vain, the legal intendment being that each and every clause was inserted for some useful and reasonable purpose. The use of a word with settled legal meaning is some indication that such meaning was intended.

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Standard of Review

HN9 Standards of Review, Clearly Erroneous Standard of Review

The court is required to accord great respect to a statutory interpretation by the Department of Alcoholic Beverage Control. It must be followed unless it appears to be clearly erroneous.

Governments > State & Territorial Governments > Licenses

[**HN10**](#) [blue download icon] State & Territorial Governments, Licenses

[*Cal. Bus. & Prof. Code § 24875*](#) relates to minimum price schedules for wine. That section provides for publishing by the person filing the schedules in a trade journal of general circulation among affected licensees. It then recites: instead of publishing, such person may mail his price schedule or any changes therein to licensees affected.

Governments > Legislation > Interpretation

[**HN11**](#) [blue download icon] Legislation, Interpretation

It is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law.

Governments > Legislation > Interpretation

[**HN12**](#) [blue download icon] Legislation, Interpretation

When the scope and meaning of words or phrases in a statute have been repeatedly interpreted by the courts, there is some indication that the use of them in a subsequent statute in a similar setting carries with it a like construction.

Governments > Legislation > Interpretation

[**HN13**](#) [blue download icon] Legislation, Interpretation

The intention of the legislature must be ascertained, if possible, and, when once ascertained will be given effect, even though it may not be consistent with the strict letter of the statute.

Governments > Legislation > Effect & Operation > General Overview

[**HN14**](#) [blue download icon] Legislation, Effect & Operation

All statute-directed publications of notice are made in privately owned newspapers or journals.

Governments > Legislation > Interpretation

[**HN15**](#) [blue download icon] Legislation, Interpretation

While an intention to change the law is usually inferred from a material change in the language of the statute, the circumstances may indicate merely a legislative intent to clarify the law.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

[**HN16**](#) [blue download icon] Regulated Practices, Price Fixing & Restraints of Trade

Fair and open competition is a positive requirement of the Cartwright **Antitrust Law**, **Cal. Bus. & Prof. Code, §§16700-16758**. Minimum retail price schedules resulting from any combination for the purpose of stifling fair and open competition would be an offense against that law.

Administrative Law > Judicial Review > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > Stipulations

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Governments > State & Territorial Governments > Licenses

HN17[] **Administrative Law, Judicial Review**

Cal. Bus. & Prof. Code § 23095 provides, in part, as follows: whenever a decision of the department suspending a license for 30 days or less becomes final, whether by failure of the licensee to appeal the decision or by exhaustion of all appeals and judicial review, the licensee may, before the operative date of such suspension, petition the department for permission to make an offer in compromise.

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Governments > State & Territorial Governments > Licenses

HN18[] **Formal Adjudicatory Procedure, Hearings**

In administrative matters, consideration of prior disciplinary proceedings is entirely proper, and the prior record of a licensee is relevant and material evidence of his knowledge of and compliance with the pertinent laws.

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] (1)

Intoxicating Liquors—Alcoholic Beverage Control Act—Offenses.

--*Bus. & Prof. Code, § 24755*, relating to minimum price schedules for branded distilled spirits and providing sanctions for sales below such prices, does not require as an element of its violation that a sale below the effective minimum retail price schedule be made knowingly; and a strict liability is imposed on those exercising the privilege of selling alcoholic beverages.

CA(2)[] (2)

Id.—Alcoholic Beverage Control Act—Duty of Enforcement.

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--The duty to enforce and administer the Alcoholic Beverage Control Act ([Bus. & Prof. Code, §§ 23000-25762](#)) is vested in the Department of Alcoholic Beverage Control, and it has a broad range of power and discretion in carrying out this duty.

CA(3) [] (3)

Words and Phrases—"Publish."

--In cases dealing with statutory requirements of publication in a newspaper, "publish," is defined as to disclose, reveal, proclaim, circulate, or make public, to proclaim, to advertise; the word is not synonymous with communicate, to divulge, or to make known, and inseparable from the term is the idea of publicity and circulation.

CA(4) [] (4)

Statutes—Construction—Giving Effect to Statute.

--In construing a statute, if reasonably possible, conflicting provisions should be reconciled and brought into harmony with each other, and in doing so, effect and meaning should be given to each word and phrase under consideration.

CA(5) [] (5)

Id.—Construction—Giving Effect to Statute.

--Statutory construction should be avoided which implies that the Legislature was ignorant of the language employed, or that it used words in vain, the legal intendment being that each and every clause was inserted for some useful and reasonable purpose.

CA(6a) [] (6a) **CA(6b)** [] (6b)

Intoxicating Liquors—Alcoholic Beverage Control Act—Suspension of License.

--The Legislature intended in [Bus. & Prof. Code, § 24755](#) (prior to amendment effective November 8, 1967), relating to minimum price schedules for branded distilled spirits and publication thereof, and providing sanctions for sales below such prices, the common accepted meaning of the word "publish"; and the Department of Alcoholic Beverage Control in its interpretation of the statute gave the word "publish" its accepted meaning in concluding that the Legislature intended that price schedules be published in a manner most likely to give notice to affected licensees, and thus required publication in a trade journal of general circulation.

CA(7) [] (7)

Statutes—Construction—Aids to Construction—Departmental Construction.

--A court is required to accord great respect to the interpretation of a statute by the Department of Alcoholic Beverage Control which must be followed unless it appears to be clearly erroneous.

CA(8) [] (8)

Id.—Construction—Reference to Other Laws.

--In construing a provision of any code, reference may properly be made to other codes or statutes for clarification; and when the scope and meaning of words or phrases in a statute have been repeatedly interpreted by the courts, there is some indication that the use of them in a subsequent statute in a similar setting carries with it a like construction.

CA(9)[] (9)**Id.—Construction—Departure From Literal Meaning.**

--If necessary, in order to give meaning to words contained in a statute, a court can depart from a literal construction of the words employed; the intention of the Legislature must be ascertained, if possible, and, when once ascertained will be given effect, even though it may not be consistent with the strict letter of the statute.

CA(10)[] (10)**Intoxicating Liquors—Alcoholic Beverage Control—Licensing Agency—Rules and Regulations.**

--A determination of the Department of Alcoholic Beverage Control that the words requiring publication of minimum price schedules for branded distilled spirits "in a manner which will result in each retailer being advised of [its] contents" in the context of the Alcoholic Beverage Control Act and Bus. & Prof. Code, § 24755, indicated a legislative intent that the price schedules be published in a manner most likely to give notice to the affected licensees, was reasonable and correct, as was its requirement that such schedules be published in a trade journal of general circulation in the trading area affected.

CA(11)[] (11)**Id.—Alcoholic Beverage Control Act—Construction.**

--The circumstances that the Legislature used the word "published" in the 1961 amendment to Bus. & Prof. Code, § 24755, did not indicate that publication of minimum price schedules for branded distilled spirits be discontinued in favor of actual notice to licensees where for many years prior to the amendment such schedules had been published in a trade journal of general circulation by rules of the Department of Alcoholic Beverage Control and its predecessor, but rather indicated an intent to confirm the practice of publication by placing express directions therefor in the act.

CA(12)[] (12)**Statutes—Construction—Change of Language.**

--While an intention to change the law is usually inferred from a material change in the language of a statute, the circumstances may indicate merely a legislative intent to clarify the law.

CA(13)[] (13)**Intoxicating Liquors—Alcoholic Beverage Control Act—Revocation and Suspension of License—Sufficiency of Evidence.**

--In proceedings against licensees for sanctions for violations of [Bus. & Prof. Code, § 24755](#), relating to minimum price schedules for branded distilled spirits and publication thereof and providing sanctions for sales below such prices, in selling at less than minimum prices contained in the schedules, the Department of Alcoholic Beverage Control sustained its burden of proving publication of minimum price schedules as required by [Bus. & Prof. Code, § 24755](#), by proof of publication in accordance with its reasonable and not erroneous interpretation of the publication provisions of the act.

[CA\(14\)](#) [] (14)

Id.—Alcoholic Beverage Control Act—Validity.

--To the extent that the retail price maintenance provisions of the Alcoholic Beverage Control Act enable a producer to control the bargaining process between those who sell and those who buy his own product, the Legislature could reasonably assume that competition among producers, coupled with the bargaining power of those low-overhead retailers who desire lower retail prices, would provide a safeguard against excessive prices.

[CA\(15\)](#) [] (15)

Id.—Alcoholic Beverage Control Act—Validity.

--The former statutory requirement that a producer establish a minimum price for his product by securing a fair trade contract with at least one retailer before it became binding on all retailers was not in substance or practical effect different from the requirement of [Bus. & Prof. Code, § 24755](#), relating to minimum prices for branded distilled spirits, that the producer unilaterally fix such price, so as to constitute an unlawful delegation of legislative power without necessary guide lines and safeguards against excessive prices.

[CA\(16\)](#) [] (16)

Id.—Alcoholic Beverage Control Act—Validity.

--The absence from [Bus. & Prof. Code, § 24755](#), relating to minimum price schedules for branded distilled spirits, of the specific requisite that brands be in fair and open competition with alcoholic beverages of the same general class produced by others, creates no constitutional infirmity in the act, such fair and open competition being a positive requirement of the Cartwright [Antitrust Law](#) ([Bus. & Prof. Code, §§ 16700-16758](#)), where minimum retail price schedules resulting from any combination for the purpose of stifling fair and open competition would be an offense against the latter law.

[CA\(17\)](#) [] (17)

Id.—Alcohol Beverage Control Act—Validity.

--[Bus. & Prof. Code, § 24755](#), relating to minimum price schedules for branded distilled spirits, publication thereof, and providing sanctions for sale below such prices, and rule 99 of the Department of Alcoholic Beverage Control (Cal. Admin. Code, tit. 4, § 99 (adopted in furtherance thereof)) are not violative of the due process clauses of the federal and state Constitutions.

[CA\(18\)](#) [] (18)

Id.—Alcoholic Beverage Control Act—Revocation and Suspension of License—Evidence.

--In a proceeding before the Department of Alcoholic Beverage Control to impose sanctions on a licensee for violations of [Bus. & Prof. Code, § 24755](#), relating to minimum prices for branded distilled spirits, the department did not err in considering four previous accusations against the licensee as final determinations and considering them in fixing penalties where in each of the previous cases it was decided that the license be suspended for 30 days; and where, as to each decision, administrative or judicial review was pending when the parties stipulated to a penalty compromise under Bus. & Prof. Code, § 23905, the compromise stipulation providing that one case would be permitted to become final, while suspensions in the other proceedings were merged.

[CA\(19\)](#) [] (19)

Id.—Alcoholic Beverage Control Act—Revocation and Suspension of License.

--In a proceeding before the Department of Alcoholic Beverage Control to impose sanctions on a licensee for violations of [Bus. & Prof. Code, § 24755](#), relating to minimum prices for branded distilled spirits, consideration of prior disciplinary proceedings is entirely proper, and the prior record of the licensee is relevant and material evidence of his knowledge of and compliance with the pertinent laws.

[CA\(20\)](#) [] (20)

Id.—Alcoholic Beverage Control Act—Review.

--On appeal from proceedings before the Department of Alcoholic Beverage Control to impose sanctions on a licensee for violations of [Bus. & Prof. Code, § 24755](#), providing for minimum prices for branded distilled spirits, points relating to questions of fact or mixed questions of law and fact not raised before the Department of Alcoholic Beverage Control, the Alcoholic Beverage Control Appeals Board, or the superior court, may not be urged for the first time on appeal from a decision of the superior court.

[CA\(21\)](#) [] (21)

Id.—Alcoholic Beverage Control Act—Grounds for Revocation and Suspension.

--[Bus. & Prof. Code, § 24755.1](#), providing that the license of a Department of Alcoholic Beverage Control licensee shall not be suspended or revoked for a violation of [Bus. & Prof. Code, § 24755](#), and establishing monetary penalties as sanction for such violations, does not apply to a license suspension or revocation preceding its effective date and cannot be given retroactive application to such proceedings.

[CA\(22\)](#) [] (22)

Id.—Alcoholic Beverage Control Act—Judicial Review.

--The rule that a party is not permitted to change his position and adopt a new and different theory on appeal is applicable to appeals from decisions of the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board. (Opinion on denial of rehearing.)

Counsel: Thomas C. Lynch, Attorney General, and L. Stephen Porter, Deputy Attorney General, for Plaintiff and Appellant.

Charles P. Just and Robert Martin for Defendant and Respondent.

J. Bruce Fratis, Saveri & Saveri, Richard Saveri, Barbagelata, Broderick, Carmazzi & Arnold and Rinaldo A. Carmazzi for Real Parties in Interest and Respondents.

Judges: Elkington, J. Sims, Acting P. J., and Christian, J., * concurred.

Opinion by: ELKINGTON

Opinion

[*163] [**28] These consolidated appeals primarily concern the interpretation of [Business and Professions Code section 24755](#) as amended in 1961 which relates to minimum retail [**2] price schedules for branded distilled spirits. The section is part of the Alcoholic Beverage Control Act (§§ 23000-25762) which herein will be called the Act.

The individual respondents and real parties in interest were holders of off-sale general liquor licenses issued by the Department of Alcoholic Beverage Control (hereinafter called Department). Against each respondent licensee the Department filed an accusation alleging the sale of branded distilled spirits at prices less than the stipulated minimum retail schedules duly filed with the Department. After hearings the Department found the charges to be true. As to some of respondent licensees, license suspension was ordered; as to the others the sanction was license revocation.

Appeals in each case were taken to the Alcoholic Beverage Control Appeals Board (hereinafter called Appeals Board). The Appeals Board reversed the several decisions of the Department. It [**3] held in each case that the record did not establish publication as required by [section 24755](#); therefore the evidence did not support the Department's findings that the licensees sold at prices "below the minimum retail price schedule duly filed."

The Department thereupon filed in the superior court applications for mandate ([Code Civ. Proc., § 1094.5](#)) seeking reversal of the decisions of the Appeals Board. The superior court, after hearings, entered judgment in each case denying the prayed for relief. Each of the judgments recited: "The [*164] foregoing judgment is rendered by this Court upon the grounds that, as determined by the Appeals Board in its decision, the record does not contain substantial evidence that the petitioner sustained its burden of proving publication of the price schedule in the manner required by [section 24755 of the Business and Professions Code](#)."

It is from these judgments that the instant appeals were taken.

As pertinent here [HN1](#) [↑] [section 24755](#) provided:

"(a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a [**4] minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

"(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. . . . *Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof.*

"(c) Such schedule shall be filed by (1) the owner of the brand [or any of certain other designated persons]. . . .

" [**29] (e) No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package. . . ." ² (Italics added.)

* Assigned by the Chairman of the Judicial Council.

¹ All statutory references unless otherwise noted are to Business and Professions Code.

[***5] [HN2](#)² Under the authority of [section 24757](#)³ the Department adopted its rule 99 (k) (tit. IV, Cal. Adm. Code) which as pertinent here states: "(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or new price on every replacement price schedule *to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. . . .*" (Italics added.)

[*165] It seems proper at this point before discussing the respective contentions of the parties to consider certain fundamental principles relating to the enforcement of the Act.

Our Supreme Court in [Allied Properties v. Department of Alcoholic Beverage Control](#), 53 Cal.2d 141, 147 [346 P.2d 737], has said, [HN3](#)⁴ "A state has [***6] particularly wide powers with respect to the . . . traffic in alcoholic beverages and may provide for their prohibition or impose such conditions and regulations as it may deem proper."

This court in [State Board of Equalization v. Superior Court](#), 5 Cal.App.2d 374, 377 [42 P.2d 1076], stated: [HN4](#)⁵ "Unlike the rule with respect to the right to deal in ordinary commodities . . . there is no inherent right in a citizen to sell intoxicants [citations]; and a license to do so is not a proprietary right within the meaning of the due process clause of the Constitution ([Cal.] [Const., art. I, § 13](#)), nor is it a contract [citation]; it is but a permit to do what would otherwise be unlawful. . . ." (See also [Kirchhubel v. Munro](#), 149 Cal.App.2d 243, 247-248 [308 P.2d 432]; [Schaub's Inc. v. Department of Alcoholic Beverage Control](#), 153 Cal.App.2d 858, 869-870 [315 P.2d 459].)

[CA\(1\)](#)⁶ (1) [HN5](#)⁷ [Section 24755](#) does not require as an element of its violation that a sale below the effective minimum retail price schedule be made *knowingly*. A strict liability is imposed on those exercising the privilege of selling alcoholic beverages. (See [DeMartini v. Department of Alcoholic Beverage Control](#), 215 Cal.App.2d 787, 815 [30 Cal.Rptr. 668]; [Morell v. Department of Alcoholic Beverage Control](#), 204 Cal.App.2d 504, 513 [22 Cal.Rptr. 405]; [Munro v. Alcoholic Beverage Control Appeals Board](#), 154 Cal.App.2d 326, 329 [316 P.2d 401]; [Mercurio v. Department of Alcoholic Beverage Control](#), 144 Cal.App.2d 626, 630-631 [301 P.2d 474].)

[CA\(2\)](#)⁸ (2) The duty to enforce and administer the Act is vested in the Department, and "it has been given a broad range of power and discretion in carrying out this duty, . . ." ([Harris v. Alcoholic Beverage Control Appeals Board](#), 238 Cal.App.2d 24, 30 [47 Cal.Rptr. 424].)

We shall state the several contentions on these appeals as they are outlined by respondents.

The first and principal contention of respondents⁴ may be stated as: *The record discloses that the Department did not [*166] sustain its burden of proving publication of the minimum retail price schedules as required by [section 24755](#).*

[***8] The specific contention of respondents takes the following form. In order that [section 24755](#) be violated there must be a [**30](#) sale below the "effective" filed minimum retail price schedule ([§ 24755, subd. \(e\)](#)). For such a schedule to be "effective" there must have been a compliance with subdivision (b) of the section which provides that the "person filing such schedule shall cause [it] to be published in a manner which will result in each retailer affected by such schedule being advised of [its] contents." The schedule was not so published; it follows that there was no "effective" price schedule and accordingly no violation.

² [Section 24755](#) also delineates "trading area" for which the minimum retail price schedules may be filed separately and differently. Here we are concerned with the northern California trading area.

Effective November 8, 1967, [section 24755](#) was again amended. Among the changes the requirement of publication was deleted.

³ "The [Department] may adopt such rules as it determines to be necessary for the Administration of sections 24754 to 24756 inclusive. . . ." ([Bus. & Prof. Code, § 24757](#).)

⁴ This is the only contention urged by respondent Appeals Board.

Further it is contended: The specification that the schedules be published in a manner which will result in each retailer being advised of their contents is a requirement of some form of actual notice by personal service or by mail.

The records of the administrative hearings show the following: Publication of the minimum retail price schedules was made in the Beverage Industry News, a privately owned monthly publication in business since 1946. It was a trade journal of the liquor industry in general circulation in the area here concerned. Its [***9] subscription price was \$ 7.50 per year. Since 1946, copies of the publication had been mailed monthly to a majority of the offsale retail licensees authorized to sell alcoholic beverages in the northern California trading area.

It is clear that publication here was not made in a manner designed to effect actual notice by personal service on, or mailing to, each retailer affected.

CA(3)[[↑]] (3) In cases dealing with a statutory requirement of publication in a newspaper, California's appellate courts have defined **HN6[[↑]]** publish as to "disclose, reveal, proclaim, circulate or make public" ([Application of Monrovia Evening Post, 199 Cal. 263, 266 \[248 P. 1017\]; Western States Newspapers, Inc. v. Gehringer, 203 Cal.App.2d 793, 795 \[22 Cal.Rptr. 144\]](#)) and "to proclaim, to advertise." ([Arthur v. City of Petaluma, 27 Cal.App. 782, 788 \[151 P. 183\].](#))⁵

[***10] Black's Law Dictionary (4th ed. 1954) defines "publish" as "To make public; to circulate; to make known to people in general. . . . An advising of the public or making known of something to the public for a purpose." It defines "publication" [*167] as "To make public; to make known to people in general; . . . The act of publishing anything; offering it to public notice, or rendering it accessible to public scrutiny." Webster's New International Dictionary, Unabridged (2d ed. 1953), defines "publish" as "To make public announcement of; to make known to people in general; . . . To promulgate or proclaim, as a law or an edict. . . . To make public in a newspaper, book, circular or the like." (See also 73 C.J.S. 1250-1251.)

HN7[[↑]] "Publish" has been held not to be synonymous with "communicate" or "to divulge" or "to make known." ([United States v. Baltimore Post Co., 2 F.2d 761, 764](#); 15A C.J.S. 84; 51 C.J.S. 463.) Inseparable from the term is the idea of publicity and circulation. ([United States v. Williams, 3 F. 484, 486; People v. Burns, 178 App. Div. 845 \[166 N.Y.S. 323, 325\]; Cox v. First Mortg. Loan Co., 173 Okla. 392, 394 \[48 P.2d 1060, 1063\].](#)) [***11] "The thought running through all the uses of the words . . . is an advising of the public or the making known of something to the public for a purpose. . . ." ([Estill County v. Noland, 295 Ky. 753 \[175 S.W. 2d 341, 346\]; Marx v. United States, 96 F.2d 204, 206; Associated Press v. International News Service, 245 F. 244, 251](#) [157 C.C.A. 436, 2 A.L.R. 317].)

We have before us conflicting statutory provisions. If we accept respondents' interpretation we must ignore the phrase, "shall cause such schedule to be published." Conversely, if we give "published" its ordinary and accepted meaning we must hold that actual notice to each licensee is not required.

CA(4)[[↑]] (4) **HN8[[↑]]** If reasonably possible, conflicting provisions of a statute should be reconciled [**31] and brought into harmony with each other ([Hough v. McCarthy, 54 Cal.2d 273, 279 \[5 Cal.Rptr. 668, 353 P.2d 276\]; County of Placer v. Aetna Cas. etc. Co., 50 Cal.2d 182, 188-189 \[323 P.2d 753\].](#)) In doing so, effect and meaning should be given to each word and phrase under consideration. ([Select Base Materials v. Board of Equalization, 51 Cal.2d 640, 645 \[335 P.2d 672\]; Brown v. \[***121\] Cranston, 214 Cal.App.2d 660, 672 \[29 Cal.Rptr. 725\].](#)) **CA(5)[[↑]]** (5) A construction should be avoided which implies that the Legislature was ignorant of the meaning of language employed, or that it used words in vain, the legal intendment being that each and every clause was inserted for some useful and reasonable purpose. ([Prager v. Isreal, 15 Cal.2d 89, 93 \[98 P.2d 729\]; Siler v. Industrial Acc. Com., 150 Cal.App.2d 157, 161 \[309 P.2d 910\].](#)) The use of a word with settled legal meaning is

⁵ We consider "publish" and "publication" in the sense of transmitting information or knowledge. They have, of course, other connotations such as in the law of defamation, negotiable instruments, wills, etc.

some [*168] indication that such meaning was intended. ([Perry v. Jordan, 34 Cal.2d 87, 93 \[207 P.2d 47\]](#); [City of Long Beach v. Payne, 3 Cal.2d 184, 191 \[44 P.2d 305\]](#)).)

CA(6a)[] (6a) In its interpretation of [section 24755](#) the Department has given to the word "published" its accepted meaning. It has concluded that the intent of the Legislature was that the price schedules be published in a manner *most likely* to give notice to the affected licensees. Rule 99(k) requiring publication "in a trade journal of general circulation" gives rational effect to this interpretation. Such a publication may reasonably be considered as most likely to give the desired notice.

CA(7)[] (7) **HN9[]** We [***13] are required to accord great respect to this interpretation by the Department. It must be followed unless it appears to be clearly erroneous. ([Cohon v. Department of Alcoholic Beverage Control, 218 Cal.App.2d 332, 339 \[32 Cal.Rptr. 723\]](#); see also [Adoption of Parker, 31 Cal.2d 608, 615 \[191 P.2d 420\]](#); [Bodinson Mfg. Co. v. California Employment Com., 17 Cal.2d 321, 325-326 \[109 P.2d 935\]](#); [Neely v. California State Personnel Board, 237 Cal.App.2d 487, 491 \[47 Cal.Rptr. 64\]](#); [Rich v. State Board of Optometry, 235 Cal.App.2d 591, 604 \[45 Cal.Rptr. 512\]](#).) Accordingly, we now direct our inquiry into the reasonableness of the Department's interpretation.

The search for the Legislature's intent is aided by a consideration of **HN10[]** [section 24875](#) of the Act relating to minimum price schedules for wine. That section provides for publishing (by the person filing the schedules) in a *trade journal of general circulation* among affected licensees. It then recites: "*Instead of publishing, [such person] may mail his price schedule or any changes therein to licensees affected.*" (Italics added.) An intent to give the word "publishing" a meaning [*14] other than the giving of actual notice as insisted by respondents, is demonstrated. Elsewhere in the Act where actual notice is intended, appropriate words are used, i.e., sections 23328, 23329, 23987, prescribing "written notice," and section 25760 calling for notice "personally or by mail." **HN11[]** "[It] is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law." ([Stillwell v. State Bar, 29 Cal.2d 119, 123 \[173 P.2d 313\]](#).)

Throughout the statutes and codes of this state the Legislature has many times provided for publication of notices. So [*169] far as we can determine the term has never been construed to require actual notice. **CA(8)[]** (8) In construing a provision of any code, reference may properly be made to other codes or statutes for clarification. ([In re Porterfield, 28 Cal.2d 91, 100 \[168 P.2d 706, 167 A.L.R. 675\]](#); [People v. Vassar, 207 Cal.App.2d 318, 323 \[24 Cal.Rptr. 481\]](#).) **HN12[]** "When the scope and meaning of words or phrases in a statute have been repeatedly interpreted by the courts, there [***15] is some indication that the use of them in a subsequent statute in a similar setting carries with it a like construction." ([Perry v. Jordan, supra, 34 Cal.2d 87, 93](#).)

CA(6b)[] (6b) It seems reasonable to conclude that the Legislature intended in its amended [section 24755](#) the common and accepted meaning of the word "published."

However, the Department was required, as are we on these appeals, to give meaning, if possible, to the words "in a manner which will result in each retailer . . . being advised of [its] contents." **CA(9)[]** (9) If necessary, in order to reach such a result, we can depart from a literal construction of the words employed. ([County of Los Angeles v. Frisbie, 19 Cal.2d 634, 639 \[122 P.2d 526\]](#); [In re Kerman, 242 Cal.App.2d 488, 491 \[51 Cal.Rptr. 515\]](#); [Brown v. Cranston, supra, 214 Cal.App.2d 660, 672-673](#). **HN13[]** "[The] intention of the Legislature must be ascertained, if possible, and, when once ascertained will be given effect, even though it may not be consistent with the strict letter of the statute." ([Struckman v. Board of Trustees, 38 Cal.App.2d 373, 376 \[101 P.2d 151\]](#).)

CA(10)[] (10) We conclude that the Department's determination that the words [*16] in question, in the context of the Act and its [section 24755](#), indicated a legislative intent that the price schedules be published in a manner *most likely* to give notice to the affected licensees is reasonable and correct. This interpretation gives effect to each of the words and phrases under consideration. It brings them to a degree of harmony with each other not otherwise possible. And it is consistent with the usual meaning given the word "published" by the Legislature and by the courts.

The Department's interpretation is in accord with the general legislative practice of prescribing publication in such a manner as is best designed to give notice to persons concerned.⁶ [*170] And it imposes no hardship upon the individual licensee who is under an affirmative duty to conduct his business in accordance with law. (See [Morell v. Department of Alcoholic Beverage Control, supra, 204 Cal.App.2d 504, 514](#); [Munro v. Alcoholic Beverage Control Appeals, Board, 181 Cal.App.2d 162, 164 \[5 Cal.Rptr. 527\]](#); [Cooper v. State Board of Equalization, 137 Cal.App.2d 672, 678 \[290 P.2d 914\]](#).) If he cannot conveniently check the price schedules filed with the [***17] Department he may have the information delivered to him by subscribing to the Beverage Industry News.

Respondents urge that such a construction of [section 24755](#) makes it "incumbent on a retailer [***18] to assume the burden of subscribing to a private trade journal which has no official blessing, sponsorship or information at its disposal."

The Act simply provides that the retailer shall not sell at prices below the effective minimum price schedules under peril of administrative sanction. The publication provisions of [section 24755](#) and rule 99 (k) make these price schedules readily available to him. He may, however, obtain the retail price information from the Department where it is on file or in any manner he chooses. As to the claimed compulsion to subscribe to a private trade journal without official blessing or sponsorship, we see no illegality. [HN14](#)[↑] All statute-directed publications of notice are made (so far as we can determine) in privately owned newspapers or journals. Indeed, as we have previously pointed out, [section 24875](#) of the Act expressly calls for publication in a trade journal or industry price book of general circulation among wine licensees.

Respondents point out that prior to the 1961 amendment of [section 24755](#), publication [**33] as now directed by rule 99 (k) was then also directed by Department rule. Publication was not then expressly directed by the [***19] Act as it is now. They contend that by amending [section 24755](#) the Legislature is presumed to have intended a change in the method of giving notice to retailer licensees.

[CA\(11\)](#)[↑] (11) By rules of the Department, and of its predecessor agency, the State Board of Equalization, minimum retail price schedules for branded distilled spirits have been published [*171] (except for a few years during and after World War II) since 1939⁷ in a trade journal of general circulation. If the Legislature intended by its 1961 amendment of [section 24755](#) that such publication be discontinued in favor of actual notice it seems likely that it would not have used the word "published." Instead it would have called for "written notice" or notice "personally or by mail" as it has elsewhere in the Act. (See for instance, §§ 23328, 23329, 23987, 25760.) The circumstances seem more likely to indicate an intent to confirm the practice of publication by placing express direction therefor in the Act.

[***20] [CA\(12\)](#)[↑] (12) [HN15](#)[↑] While an intention to change the law is usually inferred from a material change in the language of the statute ([Loew's Inc. v. Byram, 11 Cal.2d 746, 750 \[82 P.2d 1\]](#); [People v. Weitzel, 201 Cal. 116, 118 \[255 P. 792, 52 A.L.R. 811\]](#)) "the circumstances may indicate merely a legislative intent to clarify the law." ([W. R. Grace & Co. v. California Employment Com., 24 Cal.2d 720, 729 \[151 P.2d 215\]](#); see also [San Joaquin Ginning Co. v. McColgan, 20 Cal.2d 254, 264 \[125 P.2d 36\]](#); [Martin v. California Mut. Bldg. & Loan Assn., 18 Cal.2d 478, 484 \[116 P.2d 71\]](#); [Union League Club v. Johnson, 18 Cal.2d 275, 279 \[115 P.2d 425\]](#); [County of Alameda v. Clifford, 187 Cal.App.2d 714, 723 \[10 Cal.Rptr. 144\]](#).)

⁶I.e., [Code of Civil Procedure section 1277](#), in a "newspaper of general circulation . . . printed in the county"; [Health and Safety Code section 4785](#), in a "newspaper having a general circulation in the [sewer] district"; [Labor Code section 1181](#), "by advertisement in at least one newspaper published in each of the cities of Los Angeles, Oakland, Sacramento, San Jose, Fresno, Eureka, San Diego, Long Beach, Alameda, Berkeley, Stockton, San Bernardino, and San Francisco"; [Business and Professions Code section 23986](#), "in a newspaper of general circulation in the city in which the premises are situated"; [Revenue and Taxation Code section 3391](#), publication "within the county as they [the board of supervisors] shall determine most likely to afford adequate notice to owners whose property is upon the delinquent lists."

⁷ Rule 42 (1939, 1940) and rule 22 (1941-1944), State Board of Equalization, rule 99, title 4, California Administrative Code (1947).

CA(13)[] (13) We conclude that the Department's interpretation of the publication provisions of [section 24755](#) is reasonable and certainly not "clearly erroneous." It should be followed by us. (See [Cohon v. Department of Alcoholic Beverage Control, supra, 218 Cal.App.2d 332, 339](#).) Accordingly, the record before us discloses that the Department did sustain its burden of proving publication of minimum retail price schedules as required [***21] by [section 24755](#).

Respondent licensees' second contention is stated as "[Section 24755 of the Business and Professions Code and Rule 99 are unconstitutional.](#)"

The argument here is that [section 24755](#) as amended, "is now nothing more than a naked 'price fixing' statute by which the Legislature has unlawfully delegated its power to producers and brand owners (who no longer are required to be in fair and open competition) and which permits them unilaterally to fix the price at which liquor must be retailed without any protective 'standards,' 'price guidelines,' 'ordinary play of competition' or 'bargaining processes' whatsoever." [*172] Such a grant of power, it is argued, is an unlawful delegation of legislative authority and is so arbitrary as to amount to a denial of due process of law as guaranteed by the federal and state Constitutions.

The appellate courts of this state apparently have never considered the constitutionality of [section 24755](#) as amended in 1961. However, the general argument now made by respondent licensees has frequently been directed at distilled spirits minimum price statutes and regulations both in this state and elsewhere. While other states [***22] are not in agreement, the question in California appears to be resolved by the cases of [Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal.2d 349 /55 Cal.Rptr. 23, 420 P.2d 735](#), and [Allied Properties v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 141](#). These cases concerned the mandatory fair trade minimum [**34] price fixing provisions of the Act as they existed prior to the 1961 amendment of [section 24755](#).

The earlier law permitted (and still permits) fair trade contracts relating to the sale of any branded distilled spirits, "which is in [any] fair and open competition with alcoholic beverages of the same general class produced by others. . . ." (Section 24750.) [Section 24755](#) (before its 1961 amendment) provided that all "distilled spirits sold at retail shall be . . . sold pursuant to [such a fair trade] contract." As amended in 1961, [section 24755](#) provides that no branded distilled spirits shall be sold at retail at a price below the filed effective minimum price schedule, without regard to whether there is a related fair trade contract.

It will be seen that since 1961 under [section 24755](#) there is no longer [***23] a requirement that at least one fair trade contract be negotiated with a retailer, nor is there an express requirement that brands be in fair and open competition with other brands. These omissions, respondents urge, present new questions of constitutionality not decided by [Wilke & Holzheiser, Inc., supra](#), and [Allied Properties, supra](#), which should now be considered by this court.

[Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, supra, 65 Cal.2d 349, 365-369](#), considering the pre-1961 mandatory minimum price fixing provisions of the Act, rejected the contention that they *unlawfully delegated* legislative power by enabling a producer or wholesaler to fix retail prices. **CA(14)[]** (14) It held that (pp. 365-366): "To argue that the Alcoholic Beverage Control Act unlawfully delegates legislative power because it is a 'price-fixing act' is to overlook the [*173] crucial distinction between the fixing of a price for *all* products in a given market and the setting by the producer of the retail price at which *his own* product is to be sold." The court found no tendency in the Act to allow one to regulate the business of his competitors or to exclude potential [***24] competitors from the liquor industry. It concluded (p. 367): "To the extent that the retail price maintenance provisions enable a producer to control the bargaining process between those who sell and those who buy his own product, the Legislature could reasonably assume that competition among producers, coupled with the bargaining power of those low overhead retailers who desire lower retail prices, would provide a safeguard against excessive prices." The holding of [Allied Properties v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 141](#), generally was to the same effect.

CA(15)[] (15) Respondents contend that the earlier statutory requisite of a negotiated fair trade contract was a necessary guideline and safeguard now wholly missing from the Act. We cannot agree that the former requirement that a producer establish a minimum price for his product by securing a fair trade contract with at least one retailer before it became binding on all retailers was in substance or practical effect any different from the present [section 24755](#) requirement that he unilaterally fix such a price. In each case the producer effectively sets the price for which his own product is to be sold. [***25] The competition between producers and their respective brands is not affected. This, coupled with the bargaining power of low overhead retailers who desire lower retail prices, could, as said by the *Wilke & Holzheiser* court, reasonably be assessed by the Legislature to be a safeguard against excessive prices.

CA(16)[] (16) Nor do we deem the absence from [section 24755](#) of the specific requisite that the brands be in "fair and open competition with alcoholic beverages of the same general class produced by others" to create a constitutional infirmity. Such [HN16\[!\[\]\(66775f9bd8cb2320f891c128ff08e69b_img.jpg\)\]](#) fair and open competition is a positive requirement of the Cartwright **Antitrust Law** ([Bus. & Prof. Code, §§ 16700- 16758](#)). Minimum retail price schedules resulting from any [**35] combination for the purpose of stifling fair and open competition would be an offense against that law. (*DeMartini v. Department of Alcoholic Beverage Control, surpa, 215 Cal.App.2d 787, 808-809*.)

Respondents complain that the Department is no longer required under [section 24755](#) to produce affirmative evidentiary [*174] proof, or make express findings, that the brands involved are in such fair and open competition. This contention assumes that [***26] there was such a requirement prior to 1961. [DeMartini v. Department of Alcoholic Beverage Control, surpa, 215 Cal.App.2d 787, 808-809](#), considering the pre-1961 Act, held that certain statutory presumptions ⁸ constituted evidence, in similar proceedings before the Department, that the filed price schedules were in fair and open competition. (See also [Dave's Market, Inc. v. Department of Alcoholic Beverage Control, 222 Cal.App.2d 671, 677-678 \[35 Cal.Rptr. 348\]](#); [United Liquors, Inc. v. Department of Alcoholic Beverage Control, 218 Cal.App.2d 450, 453-454 \[32 Cal.Rptr. 603\]](#).) [DeMartini v. Department of Alcoholic Beverage Control, surpa](#) (pp. 813-814), also held that express findings that the products were in fair and open competition were not required.

[***27] **CA(17)[]** (17) Applying the principles announced in [Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, surpa, 65 Cal.2d 349](#), and [Allied Properties v. Department of Alcoholic Beverage Control, surpa, 53 Cal.2d 141](#), we hold [section 24755](#) and rule 99 not to be violative of the due process clauses of the federal and state Constitutions.

Respondents Carella and Carella (1 Civ. 22994) and Carella and Maniscalco (1 Civ. 22995) further contend: "*The Department erred by considering four unproven prior accusations in determining the penalty imposed herein.*

HN17[] Section 23095 provides, in part, as follows:

"Whenever a decision of the department suspending a license for 30 days or less becomes final, whether by failure of the licensee to appeal the decision or by exhaustion of all appeals and judicial review, the licensee may, before the operative date of such suspension, petition the department for permission to make an offer in compromise, . . ."

CA(18)[] (18) Four previous accusations concerning the named licensee respondents were found to be true by the Department. In each case it was decided that the license be suspended for 30 days or less. As to each decision, administrative [***28] or judicial review was pending when the parties stipulated to a penalty compromise (§ 23905) under which respondents would make a payment of \$ 2,000. The compromise stipulation further provided that one case would be "permitted to become final" [*175] while the suspensions in the other "proceedings mentioned were merged." The \$ 2,000 payment was made and the respective reviews or appeals were dismissed.

⁸ [Code of Civil Procedure section 1963, subdivision 15](#), "that official duty has been regularly performed"; *idem*, subdivision 19, that "private transactions have been fair and regular"; *idem*, subdivision 33, that "the law has been obeyed." (See [Evid. Code, § 12](#).) They were repealed effective January 1, 1967, and reenacted in substance elsewhere.

In the instant cases the Department found each of the four prior decisions was a final determination and considered all of them in fixing the penalties. Respondents contend that such findings were not supported by the evidence and that such consideration was error.

CA(19)[] (19) HN18[] In administrative matters such as those before us, consideration of prior disciplinary proceedings is entirely proper, and the prior record of a licensee is relevant and material evidence of his knowledge of and compliance with the pertinent laws. (*Dave's Market, Inc. v. Department of Alcoholic Beverage Control, supra, 222 Cal.App.2d 671, 679-680.*)

[**36] We conclude that the evidence before the Department gave sufficient support to the questioned findings, and that the Department did not err in considering [***29] the four prior proceedings.

CA(20)[] (20) Certain respondent licensees have in their briefs urged several additional points which were not raised before the Department, the Appeals Board or the superior court. With the hereinafter discussed exception these points relate to questions of fact or mixed questions of fact and law which could have been presented to and considered by the Department. Under well-established rules such matters may not be urged for the first time on appeal. (See *Ward v. Taggart, 51 Cal.2d 736, 742 [336 P.2d 534]; Damiani v. Albert, 48 Cal.2d 15, 18 [306 P.2d 780]; Algeri v. Tonini, 159 Cal.App.2d 828, 832 [324 P.2d 724].*)

We think it proper, however, to consider one matter which is now urged for the first time by the following contention: *The penalties of revocation and suspension ordered by the Department should be vacated and a monetary penalty as provided by section 24755.1 should be applied retroactively.*

In 1965, and following the Department's hearings and decisions in the matters before us, the Legislature enacted section 24755.1. This section provides among other things that the license of a Department licensee shall not be suspended [***30] or revoked for a violation of section 24755. It establishes monetary penalties as the sanction for such violations.

CA(21)[] (21) Respondent licensees ask us to give retroactive application of section 24755.1 to their cases. We are precluded from doing so by *Wilke & Holzheiser, Inc. v. Department of Alcoholic [*176] Beverage Control, supra, 65 Cal.2d 349*, where a similar request was made. The court in *Wilke & Holzheiser, Inc.* (p. 373) held "Section 24755.1 clearly does not apply to a license suspension or revocation proceeding its effective date." However, in view of the current legislative intent concerning license revocation and suspension demonstrated by section 24755.1 the Department may elect to review respondent licensee's penalty assessments before they are placed in effect, as permitted by section 24211, added in 1963.

Each of the judgments appealed from is reversed. The superior court in each case will grant a writ of mandate commanding respondent Appeals Board to set aside its decision reversing the decision of the Department and to affirm such decision of the Department.

Carl N. Swenson Co. v. E. C. Braun Co.

Court of Appeal of California, Fifth Appellate District, Division Two

April 29, 1969

Civ. No. 25059

Reporter

272 Cal. App. 2d 366 *; 77 Cal. Rptr. 378 **; 1969 Cal. App. LEXIS 2285 ***; 1969 Trade Cas. (CCH) P72,813

CARL N. SWENSON CO., INC., Plaintiff and Appellant, v. E. C. BRAUN CO., Defendant and Respondent

Subsequent History: [***1] Appellant's Petition for a Hearing by the Supreme Court was Denied June 25, 1969. Tobriner, J., was of the Opinion that the Petition Should be Granted.

Prior History: APPEAL from a judgment of the Superior Court of Santa Clara County. George H. Barnett, Judge.

Action to confirm an arbitration award.

Disposition: Affirmed. Judgment for defendant denying petition for confirmation and granting defendant's motion to dismiss affirmed.

Core Terms

bid, depository, withdraw, plumbing, subcontractor, arbitration award, general contractor, Contractors, user, awarding authority, closing time, construction project, mechanical work, sheet metal, Cartwright Act, confirmation, withdrawn

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1 Antitrust & Trade Law, Sherman Act

The California antitrust law, commonly known as the Cartwright Act, Cal. Bus. & Prof. Code, §§ 16700- 16758, is patterned upon the federal Sherman Antitrust Act, and federal cases construing the Sherman Act, as well as the common law policy against restraint of trade, are applicable with respect to the Cartwright Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2 Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The adoption and enforcement of certain bid depository rules, including one requiring general contractors utilizing the depository to use only bids received through the depository, constitutes an invalid restraint on interstate commerce in violation of the Sherman Act.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Real Property Law > Construction Law > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3 [] **Practices Governed by Per Se Rule, Boycotts**

Group boycotts are illegal per se, constituting restraints on trade in violation of the Cartwright Act, [Cal. Bus. & Prof. Code, §§ 16700- 16758](#). A bid depository cannot be allowed to operate under rules which (1) prevent, preclude or in any manner limit any subcontractor from submitting a bid to a general contractor or awarding authority on any construction project at any time prior to the time set by the awarding authority for the receipt of bids upon any such construction project; (2) limit or restrict, in any way, the amount of a bid submitted by a subcontractor to a general contractor or awarding authority at any time prior to the time set by the awarding authority for the receipt of bids upon a construction project; or (3) limit or in any way prevent a general contractor or awarding authority from receiving or considering any bid which is or may be submitted to him by a subcontractor at any time prior to the time set by the awarding authority for the receipt of bids upon a construction project.

Headnotes/Summary

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1) [] (1)

Monopolies—Under Cartwright Act.

--The California anti-trust law, commonly known as the Cartwright Act ([Bus. & Prof. Code, §§ 16700-16758](#)) is patterned upon the federal Sherman Anti-trust Act, and federal cases construing the Sherman Act, as well as the common law policy against restraint of trade, are applicable with respect to the Cartwright Act.

CA(2) [] (2)

Id.—Under Cartwright Act—Agreements and Combinations Prohibited.

--Rules of a locked box bid service operated by a contractors' association relating to time of withdrawal of bid and providing that if separate bids were also submitted in combination, the separate bids could not be withdrawn without withdrawing the combination bid were clearly restrictive of free competition among subcontractors and an arbitration award based upon a violation thereof could therefore not be enforced by the courts; an analysis of the challenged provisions, viewed in the context of other bid depository rules which prohibited depository users from submitting or refusing bids outside the depository, effectively demonstrated that such rules tended to stifle competition between subcontractors and to further an illegal restraint of trade.

Counsel: Littler, Mendelson & Fastiff, Arthur Mendelson, James A. Carter and Robert M. Lieber for Plaintiff and Appellant.

Robert C. Taylor and Ronald H. Klein as Amici Curiae on behalf of Plaintiff and Appellant.

Edmond G. Thiede, Bancroft, Avery & McAlister, William H. Orrick, Jr., and Orrick, Herrington, Rowley & Sutcliffe and Robert J. Gloistein for Defendant and Respondent.

Judges: Shoemaker, P. J. Agee, J., and Taylor, J., concurred.

Opinion by: SHOEMAKER

Opinion

[*367] [**378] Plaintiff appeals from a judgment denying its petition for confirmation of an arbitration award and granting defendant's motion to dismiss and entry of judgment in defendant's favor.

The facts are without dispute. Plaintiff is a licensed general building contractor and defendant is a [***2] licensed subcontractor engaged in the plumbing and heating business. Defendant is a member of the Greater Bay Area Bid Service, a locked box bid service operated by the Plumbing-Heating-Cooling [**379] Contractors Association of the Greater Bay Area, Inc. (hereinafter referred to as "Contractors Association"). The bid service operated pursuant to bid depository rules which bound all members. On December 7, 1965, defendant submitted bids on a construction project at Moffett Field through the bid service and plaintiff as a general contractor received such bids. The bids submitted by defendant were (1) for plumbing alone and (2) a combination bid for plumbing, sheet metal and other mechanical work. On December 7, 1965, plaintiff executed a written acceptance of defendant's plumbing bid of \$ 78,735, the low bid received for that work. On the same day, plaintiff was awarded the general contract on the Moffett Field project. However, defendant, prior to the opening of the bids by the government, purported to withdraw its plumbing bid. Plaintiff refused to recognize the right of defendant to withdraw its bid, contending that under the bid service rules it could not do so and the [***3] defendant, refusing to honor its bid, was taken by plaintiff before the Contractors Association. The dispute was thereafter submitted to the Fair Trade Committee [*368] of the Contractors Association in accordance with the dispute settlement procedure provided for in the bid depository rules. A hearing was held and the committee ruled that defendant had not withdrawn its plumbing bid in accordance with the bid depository rules and directed that it enter into a subcontract with plaintiff for the performance of such work or be subject to the penalties provided for by said rules. Defendant refused to perform and thereupon the Fair Trade Committee ruled that defendant, under the rules, must pay plaintiff liquidated damages in the amount of \$ 3,149.40. Defendant was notified of said decision and did not proceed with an appeal under the bid depository rules.

In due time plaintiff filed its petition for an order confirming the award and the entry of judgment against defendant in the amount of the award.

Defendant, opposing the confirmation, moved for vacation of the arbitration award, for dismissal of plaintiff's petition to confirm said award and for the entry of judgment for [***4] defendant. One of the grounds urged in support of defendant's motion was that the bid depository rules were illegal as a restraint of trade contrary to both state and federal antitrust legislation.

Prior to the hearing, plaintiff filed documents to the effect that defendant's attempt to withdraw its plumbing bid was not made by telegram, as required under the bid depository rules, and that defendant had also violated another of said rules by insisting upon its right to withdraw *only* its plumbing bid while refusing to withdraw its combination bid covering plumbing, sheet metal and mechanical work.

After hearing, the court found that the bid depository rules in effect on December 7, 1965, constituted an illegal group boycott and that the arbitration award in plaintiff's favor was predicated upon said rules. It concluded as a

matter of law that the bid depository rules were in violation of the Cartwright Act and were illegal per se in their entirety; that the arbitration award in plaintiff's favor was likewise illegal and unenforceable; and that defendant was not estopped from raising this defense because neither the action nor inaction of any party to an illegal agreement could [***5] validate it nor could the conduct of a party estop it from asserting such invalidity.

Judgment was accordingly entered in favor of defendant.

CA(1)[] (1) **HN1[]** The California antitrust law, commonly known as the Cartwright Act (Bus. & Prof. Code, §§ 16700- 16758) is patterned upon the federal Sherman Antitrust Act, and federal [*369] cases construing the Sherman Act, as well as the common law policy against restraint of trade, are applicable with respect to the Cartwright Act. (Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 315 [70 Cal.Rptr. 849, 444 P.2d 481]; People v. Santa Clara Valley Bowling etc. Assn. (1965) 238 Cal.App.2d 225, 232 [47 Cal.Rptr. 570].)

[**380] In reaching its determination relative to the illegality of certain of the bid depository rules adopted by the Contractors Association, the trial court relied upon the California case of People v. Inland Bid Depository (1965) 233 Cal.App.2d 851 [44 Cal.Rptr. 206], and the federal case of Mechanical Contractors Bid Depository v. Christiansen (10th Cir. 1965) 352 F.2d 817.

In the *Christiansen* case, the court held that **HN2[]** the adoption and enforcement of certain [***6] bid depository rules, including one requiring general contractors utilizing the depository to use *only* bids received through the depository, constituted an invalid restraint on interstate commerce in violation of the Sherman Act.

In the *Inland Bid Depository* case, the court held that **HN3[]** group boycotts were illegal per se, constituting restraints on trade in violation of the Cartwright Act. The court further held that a bid depository could not be allowed to operate under rules which (1) prevent, preclude or in any manner limit any subcontractor from submitting a bid to a general contractor or awarding authority on any construction project at any time prior to the time set by the awarding authority for the receipt of bids upon any such construction project; (2) limit or restrict, in any way, the amount of a bid submitted by a subcontractor to a general contractor or awarding authority at any time prior to the time set by the awarding authority for the receipt of bids upon a construction project; or (3) limit or in any way prevent a general contractor or awarding authority from receiving or considering any bid which is or may be submitted to him by a subcontractor at any time [***7] prior to the time set by the awarding authority for the receipt of bids upon a construction project.

CA(2)[] (2) Plaintiff concedes that certain of the bid depository rules adopted by the Contractors Association were of the type condemned in the *Christiansen* and *Inland Bid Depository* cases, i.e., section 2 of article III of said rules provides for a bid depository closing time of at least four hours before any prime bid closing time of 1 p.m. or thereafter and by certain [*370] designated hours of the preceding afternoon if the prime bid closing time is prior to 1 p.m.; section 6, subdivision (a), of article III provides that no subcontractor who is a member of the bid depository may "accept work" on any project being bid through the bid service from any general contractor to whom he did not bid in accordance with the bid depository rules and hence through the depository; section 6, subdivisions (b) and (c) of article III provide that a general contractor must use the low bid received from the depository and may use the bid of an "outside" subcontractor only if said bid is placed in the depository by the general contractor and is the low bid received through the depository.

Plaintiff, [***8] however, takes the position that even though the above-mentioned rules are violative of the Cartwright Act, the defense of antitrust illegality may not properly be asserted against the arbitration award in plaintiff's favor because such award was based upon defendant's violation of other depository rules which are themselves valid and lawful and capable of being enforced independently of the invalid rules.

The rules giving rise to the arbitration award in plaintiff's favor consist of the following:

Section 3, subdivision (a) of article III provides that a bid must be revoked or withdrawn before the depository closing time or within two hours thereafter and that the revocation must be confirmed in writing or by telegram. The

rule prohibits any bid from being changed in any manner, as opposed to withdrawn, after the depository closing time. A changed bid submitted prior to the depository closing time supersedes an earlier bid.

Section 3, subdivision (c) of article III provides that in the event separate bids are also submitted in combination, the withdrawal of a separate bid requires the withdrawal of any combination bid containing the withdrawn bid.

[**381] Section 1 of article [***9] V provides that any user of the bid service who violates the rules may, by majority vote of the Fair Trade Committee, be subject to liquidated damages, suspension from the bid service or any other penalties prescribed by the committee.

Section 2 of article V provides that a noncomplying user shall be required to pay a complying user liquidated damages in the amount of four percent of the bid of the complying user (the terms "complying user" and "noncomplying user" are defined in the rules).

[*371] Sections 2 through 6 of article VI set forth the procedure governing the hearing and determination of disputes by the Fair Trade Committee and provide that the committee's decision shall be final and binding unless appealed in the manner prescribed in section 6.

Plaintiff argues that although the *Inland Bid Depository* case held that it was unlawful for a bid depository to impose rules limiting the time for the *submission* of bids, there is nothing in that opinion which suggests that a bid depository may not lawfully limit the time for the *withdrawal* of bids. Plaintiff reasons that since the arbitration award against defendant was predicated upon its failure to withdraw [**10] its bid in accordance with the depository rules and its subsequent refusal to be bound by such bid and to enter into a contract with plaintiff, the arbitration award can properly be enforced without giving effect to any of the rules of the type condemned in the *Christiansen* or *Inland Bid Depository* cases.

Defendant, in response, asserts that section 3, subdivision (a), imposes an illegal restraint on trade, within the meaning of the *Inland Bid Depository* case, because it deprives a subcontractor of the right to withdraw a particular bid and submit an altered bid at any time prior to the general bid opening time and requires him to perform such actions prior to an earlier time limit established by the bid depository rules, and further reasons that the imposition of this earlier time limit stifles competition in and of itself because it precludes a subcontractor from lowering a previously submitted bid during the precise period, immediately preceding the general bid opening time, which, as pointed out in the *Inland Bid Depository* case, "is precisely the time of the most intensive competition by the subcontractors" (p. 861).

Defendant also asserts that section 3, subdivisions [***11] (a) and (c), must be read together and that the latter provision imposes a further invalid restraint on trade because it requires that a subcontractor who withdraws a particular separate bid must also withdraw any combination bid containing the withdrawn bid. Defendant points out that plaintiff does not question that it was actually desirous of withdrawing only its plumbing bid without withdrawing its combination bid which included the plumbing, sheet metal and mechanical work, and that had it been permitted under the depository rules to withdraw its separate plumbing bid, its combination bid would have been the low combination bid for the plumbing, sheet metal and mechanical work and would also have been [*372] \$ 567 lower than the combined total of the separate low bids for the plumbing, sheet metal and mechanical work submitted by the other subcontractors bidding through the depository. Under such circumstances, defendant contends that section 3, subdivisions (a) and (c), are clearly restrictive of free competition among subcontractors and that to enforce an arbitration award based upon defendant's violation of those provisions would be to foster an illegal restraint of trade. [***12] We agree.

The cases relied upon by plaintiff in support of its contention that the provisions of the rules that resulted in the arbitration award to plaintiff do not constitute a restraint of trade and hence cannot be used to deprive plaintiff of the judicial enforcement of the award have no application to the problem before us. In our opinion, analysis of section 3, subdivisions (a) and (c), effectively demonstrates that said provisions, when viewed in the context [**382] of the other bid depository rules which prohibit depository users from submitting or receiving bids outside the depository, do tend to stifle competition between subcontractors and do further an illegal restraint of trade within the meaning of

272 Cal. App. 2d 366, *372 77 Cal. Rptr. 378, **382 1969 Cal. App. LEXIS 2285, ***12

the *Inland Bid Depository* case. Since section 3, subdivisions (a) and (c) contribute to this unlawful object, the arbitration award based upon defendant's violation thereof cannot be enforced by the courts.

Judgment affirmed.

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Oakland-Alameda County Builders' Exch. v. F. P. Lathrop Constr. Co.

Court of Appeal of California, First Appellate District, Division One

May 26, 1970, Decided

Civ. 25660

Reporter

1970 Cal. App. LEXIS 2242 *; 8 Cal. App. 3d 75; 87 Cal. Rptr. 129; 1970 Trade Cas. (CCH) P73,253

OAKLAND-ALAMEDA COUNTY BUILDERS' EXCHANGE, a Corp., E. A. Patterson Co., a Corp., and Floor Styles, Inc., a Corp., Plaintiffs and Appellants, v. F. P. LATHROP CONSTRUCTION COMPANY, a Corporation, Defendant and Respondent.

Subsequent History: [*1] August 19, 1970, Hearing Granted.

Withdrawn from the Bound Volume.

Disposition: Judgment on the pleadings reversed.

Core Terms

bid, depository, subcontractor, general contractor, contractor's, Contracts, boycott, withdrawal, price fixing, cause of action, cases, deposited, pleadings, general contract, prime contractor, Cartwright Act, provisions, awarding authority, submit a bid, regulations, revised, bidder, firms, bid shopping, trial court, painting, peddling, restrain, appears, subbids

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[HN1](#) [down arrow] **Regulated Practices, Price Fixing & Restraints of Trade**

See [Cal. Bus. & Prof. Code §§ 16720, 16722, 16726](#).

Antitrust & Trade Law > Sherman Act > General Overview

[HN2](#) [down arrow] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. §§ 1, 2](#).

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[**HN3**](#) [+] **Antitrust & Trade Law, Sherman Act**

The California law of antitrust, commonly known as the Cartwright Act, [Cal. Bus. & Prof. Code, §§ 16700-16800](#), is patterned upon the federal Sherman Act and both have their roots in the common law; hence federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN4**](#) [+] **Antitrust & Trade Law, Sherman Act**

Under the Sherman Act, any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal per se.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > Sherman Act > General Overview

[**HN5**](#) [+] **Per Se Rule & Rule of Reason, Per Se Violations**

Resale price fixing is a per se violation of the Sherman Act whether done by agreement or combination.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

[**HN6**](#) [+] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

If the trade practice under attack is unlawful per se it will not be saved by reference to the need for preserving the collaborators' profit margins or by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > Public Enforcement > State Civil Actions

[**HN7**](#) [+] **Antitrust & Trade Law, Sherman Act**

Since the Cartwright Act articulates in greater detail a public policy that has long been recognized at common law, these provisions must be considered in the light of common-law precedents. It may be assumed that the broad prohibitions of the Cartwright Act are subject to an implied exception similar to the one that validates reasonable restraints of trade under the federal Sherman Antitrust Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

HN8 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

When the trade practice is not illegal per se it is necessary to determine the market impact of the practice and apply the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Public Contracts Law > Bids & Formation > Offer & Acceptance > Acceptances & Awards

Public Contracts Law > Bids & Formation > Subcontractors & Subcontracts > General Overview

Public Contracts Law > Types of Contracts > State Government Contracts

HN10 Offer & Acceptance, Acceptances & Awards

Substitution of subcontractors after the award of the general contract is made is prohibited in public contracts. [Cal. Gov't. Code, §§ 4100-4113.](#)

Counsel: Mac Donald, Brunsell & Walters, William Walters, Oakland, for appellants.

Robert J. Foley, Foley, Saler & Doutt, Albany, William H. Orrick, Jr., Orrick, Herrington, Rowley & Sutcliffe, San Francisco, for respondent.

Judges: SIMS, Associate Justice. MOLINARI, P. J., and ELKINGTON, J., concur.

Opinion by: SIMS

Opinion

SIMS, Associate Justice.

Plaintiffs, a builders' exchange which operates a bid depository¹ and two subcontractors, have appealed from an adverse judgment entered following the granting of defendant general contractor's motion for judgment on the pleadings. The motion was made and granted on the ground that the rules of the bid depository upon which the plaintiffs predicated their right to relief are illegal per se under the provisions of the Cartwright Act ([Bus. & Prof. Code, §§ 1670](#)-(16758).)

[*2] The crucial issue on this appeal is whether those rules demonstrate on their face an operation which is illegal per se as a restraint of trade in violation of the provisions of the Cartwright Act. ([Bus. & Prof. Code, §§ 16720-16758](#).) An examination of the applicable precedents, both general and with particular reference to bid depositories, leads to the conclusion that the rules in question in themselves do not establish illegality per se, and that the judgment on the pleadings must be reversed. In so concluding the validity of a provision terminating the price fixing process is upheld and the principles set forth in the cases of [Carl N. Swenson Co. v. E. C. Braun Co. \(1969\) 272 Cal. App. 2d 366](#), 272 A.C.A. 447, [77 Cal. Rptr. 378](#), and [People v. Inland Bid Depository \(1965\) 233 Cal. App. 2d 851, 44 Cal. Rptr. 206](#), which were respectively decided after trial and hearing, are distinguished in part and are rejected insofar as inconsistent with the views enunciated below.

The Pleadings

By the complaint the builders' exchange sought a declaration adjudicating the respective rights and obligations of the builders' exchange and the general contractor under the rules and regulations [*3] of the bid depository, which are set forth as an exhibit to the complaint, and the defendant's agreement to abide by those rules when he requested and accepted subcontractors' bids from the bid depository in connection with a public work for which he was the successful bidder. In a second cause of action a painting subcontractor seeks to recover \$ 2,817.20 for loss of profit because of the defendant's breach of contract in awarding the painting subcontract to another subcontractor in violation of its agreement with the bid depository; and in the third cause of action the same subcontractor seeks a declaration of the respective rights and duties of the subcontractor and general contractor under the facts referred to above. The fourth and fifth causes of action present similar requests for relief by a carpeting subcontractor which claims \$ 2,659.21 for loss of profits.

The defendant in answering the complaint admitted that the exhibits attached to the complaint correctly set forth the rules and regulations of the bid depository, a copy of the form designed for signature by each bidding subcontractor, and a copy of the form to be signed by a general contractor by which the general contractor [*4] agrees to be bound by those rules and regulations; that the general plan of operation of the bid depository requires a subcontractor or supplier desiring to submit a bid to any person or persons through the bid depository to submit to the bid depository a separate and sealed bid addressed to each general contractor to whom the subcontractor or supplier desires to bid, and to file with the bid custodian in a separate sealed envelope an identical copy of each bid filed by him; that the plan permits the general contractor to refuse to accept delivery of the sealed bid of any subcontractor or supplier with whom he does not want to deal; that pursuant to the foregoing procedure on March 1, 1966 various subcontractors submitted bids to the bid depository for use by general contractors on the work referred to below; that on that date defendant executed a general contractor's form in which it acknowledged that it had received from the bid depository, in connection with the bidding for the work of constructing an auditorium at Chabot College, 11 bids from firms engaged in installation of gypsum board and/or lathing and plastering, 4 bids from firms engaged in painting, including one of the [*5] plaintiffs in this action, 4 bids from firms engaged in masonry work, 7 bids from firms engaged in installing resilient flooring and/or carpeting, including the other subcontractor plaintiff, 6 bids from firms engaged in roofing, waterproofing, membran (sic) and dampproofing; 2 bids from firms furnishing steel decking; and 7 bids from firms engaged in structural steel and/or miscellaneous and

¹ For discussion of the nature and the legality of bid depositories see: Orrick, Trade Associations Are Boycott-Prone- Bid Depositories As a Case Study (1968) 19 Hastings L.J. 505, 519-524; Comment (1965) 114 U.Pa.L.Hev. 231; and Scheuller, Bid Depositories (1960) 58 Mich.L.Rev. 497, For studies of the background of the general contractor-subcontractor relationship see: Note, Construction Bidding (1967) 53 Va.L. Rev. 1720; Note, Construction Bidding (1964) 39 N.Y.U.L.Rev. 816; and Schultz, The Firm Offer Puzzle (1952) 19 U. of Ch.L.Rev. 237.

ornamental metal work; that the form signed recites in part, "The undersigned agrees to abide by the rules of the Oakland-Alameda County Builders' Exchange Bid Depository as to the above project and to pay any depository fees payable by the undersigned under Rule 10 of said Bid Depository" ²; that defendant was awarded the contract for the auditorium and confirmed and issued its contracts to the low bidders through the bid depository in the above classifications except for painting, carpeting and steel decking, and that defendant entered into contracts with parties other than those listed on the form it had executed for the painting and carpeting work.

[*6] The defendant denied that there was any enforceable contract between it and the bid depository. As separate defenses to each cause of action it alleged as follows: first, that any cause of action is barred by the provisions of the Cartwright Act, particularly sections 16720, subdivision (a), 16720, subdivision (a) [sic (e)] (4), and 16726 of the Business and Professions Code³ [*7]; second, that any cause of action is barred by the provisions of the Sherman Anti-Trust Act (15 U.S.C.A. §§ 1-7)⁴; and third, that the alleged agreement is void by reason of duress, menace

² The document, with the exception of the listing of the bidders and the last paragraph, which has been quoted above, reads: "The undersigned hereby acknowledges receipt from the Bid Depository of the Oakland-Alameda County Builders' Exchange of bids for the designated craft(s) and/or classification(s) of work on Building No. 1300 Auditorium, Chabot College (Hayward) Mt. Eden from the following Bidders: * * * In the event the undersigned is awarded the general contract for the above project by the awarding authority, the undersigned agrees to accept the lowest of the bids submitted through the Bid Depository in each of the designated craft(s) and classification(s) if it complies with the Rules and regulations of said Depository and has not been revoked under Rule 8. Lowest of said bids includes a bid submitted by the general contractor under Rule 6c., subject to the terms and conditions of said section. The undersigned reserves the right to reject the low bid so submitted to the undersigned if the person submitting the same: (1) shall at the time of submitting such bid indicate that he is unable to and/or unwilling to, or (2) shall fail at the time of submitting such bid to indicate that he is able and willing to, or (3) shall not, upon the request of and at the expense of the under-signed at the established charge therefor, furnish to the undersigned a bond issued by an authorized surety company wherein the undersigned shall be named as the obligee, guaranteeing prompt and faithful performance of said bid and the payment of all claims for labor and materials furnished or used in and about the work to be done and performed under the said bid."

³ The Cartwright Act provides in part:

HN1 [↑] § 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 combination of any 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."

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

⁴ **HN2** [↑] The Sherman Antitrust Act provides in part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *." (15 U.S.C.A. § 1)

and undue influence. Defendant further alleged that the first, second and third causes of action for declaratory relief cannot be properly entertained because the allegations reflect that the questions raised in those three causes of action may all be resolved in the causes of action to recover for the actual breach.⁵ [*8] It also asserted that the second and fourth causes of action, in which the respective subcontractors seek to recover money damages for the alleged breach of contract by the defendant, are not within the jurisdiction of the superior court.⁶

[*9] The complaint contains further allegations relating to the purpose, effect and function of the bid depository⁷. These allegations were denied by defendant. Defendant also denied that the subcontractor plaintiffs were

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *." ([15 U.S.C.A. § 2](#).)

[Alpha Beta Food Mkts. v. Amal. Meat Cutters \(1956\) 147 Cal. App. 2d 343, 351, 305 P.2d 163](#) indicates that this defense may be raised in the state court.

⁵ See [Code Civ. Proc. §§ 1060](#) and [1061](#); [Bachis v. State Farm Mutual Auto. Ins. Co. \(1968\) 265 Cal. App. 2d 722, 724-728, 71 Cal. Rptr. 486](#); [General of America Ins. Co. v. Lilly \(1968\) 258 Cal. App. 2d 465, 470-472, 65 Cal. Rptr. 750](#); [Girard v. Miller \(1963\) 214 Cal. App. 2d 266, 277, 29 Cal. Rptr. 359](#); [Houghton v. Coberly \(1962\) 201 Cal. App. 2d 820, 824, 20 Cal. Rptr. 489](#); and [Adams v. San Joaquin County \(1958\) 162 Cal. App. 2d 271, 274, 328 P.2d 250](#); but cf. [Holland v. Paddock \(1956\) 142 Cal. App. 2d 534, 538, 298 P.2d 587](#). Regardless of the merits of this contention with respect to the subcontractors, further matters must be considered in regard to the bid depository's cause of action. (See [Code Civ. Proc. § 382](#); [Professional Fire Fighters, Inc. v. City of Los Angeles \(1963\) 60 Cal. 2d 276, 283-284, 32 Cal. Rptr. 830, 384 P.2d 158](#); and [International Assn. of Fire Fighters, Local No. 1319, AFL-CIO v. City of Palo Alto \(1963\) 60 Cal. 2d 295, 298-299, 32 Cal. Rptr. 842, 384 P.2d 170](#); and note [Western Gulf Oil Co. v. Oilwell Service Co. \(1963\) 219 Cal. App. 2d 235, 239-240, 33 Cal. Rptr. 20](#); and [County of Colusa v. Strain \(1963\) 215 Cal. App. 2d 472, 476-478, 30 Cal. Rptr. 415](#).)

⁶ See [Const., article VI, section 10](#), 2d paragraph, and section 5, 3d paragraph; [Code Civ. Proc. § 89](#); [Emery v. Pacific Employers Ins. Co. \(1937\) 8 Cal. 2d 663, 666, 67 P.2d 1046](#) (distinguished and disapproved on another issue [Barrera v. State Farm Mut. Auto. Ins. Co. \(1969\) 71 A.C. 683, 703, 71 Cal. 2d 659, 79 Cal. Rptr. 106, 456 P.2d 674](#), fn and accompanying text); [Bachis v. State Farm Mut. Auto. Ins. Co., supra, 265 Cal. App. 2d 722, 724-728, 71 Cal. Rptr. 486](#); [Linnick v. Sedelmeier \(1968\) 262 Cal. App. 2d 12, 14-16, 68 Cal. Rptr. 334](#); and [Cochrane v. Superior Court \(1968\) 261 Cal. App. 2d 201, 203-205, 67 Cal. Rptr. 675](#). When the case was originally called for trial it was continued four days so that counsel could brief the legal issues involved. At the continued hearing the court recognized the jurisdictional question involved by the juxtaposition of the principles set forth in this and in the immediately preceding footnotes. Nevertheless, it elected to proceed to dispose of the case on the issue presented by defendant's first separate defense as applied to the facts admitted in the pleadings. In so doing the court was acting within the jurisdiction of the superior court. "The superior court is not under the same disability as the municipal court. The fifth paragraph of section 396 provides: 'Nothing herein shall be construed to require the superior court to transfer any action or proceeding because the judgment to be rendered, as determined at the trial or hearing, is one which might have been rendered by a municipal or justice court in the same county or city and county.' (Emphasis added.) The effect of this paragraph is to qualify the second paragraph of section 396 as to superior courts only. It gives such courts the discretion either to transfer back to the municipal courts or retain jurisdiction where what otherwise would be a lack of jurisdiction is 'determined at the trial or bearing.' (" [Wexler v. Goldstein \(1956\) 146 Cal. App. 2d 410, 414, 304 P.2d 41, 43](#). See also [Linnick v. Sedelmeier, supra, 262 Cal. App. 2d 12, 14-15, 68 Cal. Rptr. 334](#); and [Adams v. County of San Joaquin \(1958\) 162 Cal. App. 2d 271, 275-276, 328 P.2d 250](#).) The parties have tacitly recognized the jurisdiction of the court to so proceed by failing to mention the issues discussed in this footnote in their briefs.

⁷ The allegations read: "III. For many years prior to the establishment of the BID DEPOSITORY, more particularly hereinafter described and referred to, the construction trades in Alameda County and vicinity were plagued with the practices of 'bid peddling' which refers to the disclosure, for the purpose of obtaining a more favorable bid, by a general contractor of one subcontractor's bid to a competing subcontractor prior to award, and the practice of 'bid shopping' which refers to such disclosure for the same purpose after an award has been made to a general contractor.

"IV. In order to combat the practices aforesaid, and as a service to contractors in the construction trades, whether members of plaintiff or not, plaintiff heretofore has established the OAKLAND-ALAMEDA COUNTY BUILDERS' EXCHANGE BID DEPOSITORY, hereinafter called BID DEPOSITORY, which is a facility established, maintained and operated by plaintiff

respectively the low bidder in the painting and carpeting classifications, and that they had demanded that it accept and acknowledge its contract with them.

[*10] General Principles

In order to properly dispose of the issues raised by the admitted allegations of the complaint and the defendant's special defense it is necessary to consider the general principles governing the subject matter of contracts which are illegal because they restrain trade, and the precedents in which those principles have been applied to bid depositories. The bid depository rules set forth in the complaint can then be tested in the light of those principles and precedents.

HN3 [↑] "The California law of antitrust, commonly known as the Cartwright Act ([Bus. & Prof.Code, §§ 16700-16800](#)) is patterned upon the federal Sherman Act and both have their roots in the common law; hence federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act. [Citations.]" ([Chicago Title Ins. Co. v. Great Western Financial Corp. \(1968\) 69 Cal. 2d 305, 315, 70 Cal. Rptr. 849, 855, 444 P.2d 481, 487](#). See also [Carl N. Swenson Co. v. E. C. Braun Co., supra, 272 A.C.A. 447, 449, 77 Cal. Rptr. 378](#); and [People v. Santa Clara Valley Bowling Proprietors' Assn. \(1965\) 238 Cal. App. 2d 225, 232, 47 Cal. Rptr. 570](#), and cases therein collected.)

HN4 [↑] "Under the Sherman [*11] Act, any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal *per se*. [United States v. General Motors, 384 U.S. 127, 146-147, 86 S. Ct. 1321, 16 L. Ed. 2d 415 \(1966\)](#); [Klor's v. Broadway-Hale Stores, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 \(1959\)](#)." ([FMC v. Aktiebolaget Svenska Amerika Linien \(1968\) 390 U.S. 238, 250, 88 S. Ct. 1005, 1012, 19 L. Ed. 2d 1071](#). See, in addition to the cases cited, [Silver v. New York Stock Exchange \(1963\) 373 U.S. 341, 347, 83 S. Ct. 1246, 10 L. Ed. 2d 389](#); [White Motor Company v. United States \(1963\) 372 U.S. 253, 259-260, 83 S. Ct. 696, 9 L. Ed. 2d 738](#); [Northern Pac. R. Co. v. United States \(1958\) 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545](#); [Fashion Originators' Guild of America v. Fed. Trade Comm'n. \(1941\) 312 U.S. 457, 465, 61 S. Ct. 703, 85 L. Ed. 949](#); [Mechanical Contractors Bid Depository v. Christiansen \(10th Cir. 1965\) 352 F.2d 817, 820, fn. 10](#) and accompanying text; [Christiansen v. Mechanical Contractors Bid Depository \(Utah Cent.Div.1964\) 230 F. Supp. 186, 189, fn. 7](#); [People v. Santa Clara Valley Bowling Proprietors' Assn., supra, 238 Cal. App. 2d 225, 233-234](#) and [235-237, 47 Cal. Rptr. 570](#); [*12] [People v. Inland Bid Depository, supra, 233 Cal. App. 2d 851, 860, 44 Cal. Rptr. 206](#); 6A Corbin on Contracts (1962) § 1406, pp. 209-218; 5 Williston on Contracts (rev. ed. 1937) § 1658, pp. 4665-4669; and 2 Rest., Contracts, § 515, par. (c) and Illustrations 14 and 15, p. 993.)

It is also established "that **HN5** [↑] resale price fixing is a *per se* violation of the [Sherman] law whether done by agreement or combination. [United States v. Trenton Potteries Co., 273 U.S. 392, 47 S. Ct. 377, 71 L. Ed. 700 \(1927\)](#); [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 \(1940\)](#); [Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219 \(1951\)](#); [United States v. McKesson & Robbins, Inc., 351 U.S. 305, 76 S. Ct. 937, 100 L. Ed. 1209 \(1956\)](#)." ([Albrecht v. Herald Co. \(1968\) 390 U.S. 145, 151-152, 88 S. Ct. 869, 873, 19 L. Ed. 2d 998](#). See, in addition to the cases cited, [U.S. v. Arnold, Schwinn & Co. \(1967\) 388 U.S. 365, 373, 87 S. Ct. 1856, 18 L. Ed. 2d 1249](#); [United States v. Sealy, Inc. \(1967\) 388 U.S. 350, 355, 87 S. Ct. 1847, 18 L. Ed. 2d 1238](#); [United States v. General Motors \(1966\) 384 U.S. 127, 147, 86 S. Ct. 1321, 16 L. Ed. 2d 415](#); [*13] [White Motor Company v. United States, supra, 372 U.S. 253, 259, 83 S. Ct. 696](#),

through which bids of subcontractors and suppliers electing to use the BID DEPOSITORY are received, processed and made available to general contractors in accordance with the rules and regulations for the operation of said depository";

"V. * * * upon receiving the delivery of bids he [the general contractor] agrees to accept and use the bid of the lowest bidder using the depository. The bids filed with the Bid Custodian are retained as a check against any change of bids before or after award to eliminate the opportunity of 'bid peddling' and 'bid shopping'; and

"VII. The BID DEPOSITORY Rules and Regulations were established to implement a general plan whereby the practices of 'bid peddling' and 'bid shopping' could be minimized and eliminated. The form signed by the general contractor is required under Rule 9e which rule requires that the general contractor abide by the rules of the BID DEPOSITORY as to that particular job."

9 L. Ed. 2d 738; Northern Pac. R. Co. v. United States (1958) 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545; Schwegmann Bros. v. Calvert Distillers Corp. (1951) 341 U.S. 384, 386, 71 S. Ct. 745, 95 L. Ed. 1035; People v. Building Maintenance Contractors' Assn. (1953) 41 Cal. 2d 719, 727, 264 P.2d 31; People v. Santa Clara Valley Bowling Proprietors' Assn., supra, 238 Cal. App. 2d 225, 233-234, 47 Cal. Rptr. 570; Orrick, op. cit., fn. 1 above, 19 Hastings L.J., at pp. 515-519; Comment, op. cit., fn. 1 above, 114 U. of Pa., L.Rev. at p. 232; Schueller, op. cit., fn. 1 above, 58 Mich.L.Rev. at pp. 507-509; 6A Corbin on Contracts (1962) § 1407, pp. 219-226; 5 Williston on Contracts (rev. ed. 1937) §§ 1648 and 1658, pp. 4631-4636 and 4669-4670; and 2 Rest., *Contracts*, § 515, par. (c), and Illustration 8, p. 992.)

HN6 If the trade practice under attack is unlawful per se it will not be saved "by reference to the need for preserving the collaborators' profit margins" or "by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed." (United States v. General Motors, supra, [*141] 384 U.S. 127, 146-147, 86 S. Ct. 1321. See also Klor's v. Broadway-Hale Stores (1959) 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741; Associated Press v. United States (1945) 326 U.S. 1, 16, fn. 15, 65 S. Ct. 1416, 89 L. Ed. 2013; Fashion Originators' Guild of America v. Fed. Trade Comm'n. (1941) 312 U.S. 457, 467-468, 61 S. Ct. 703, 85 L. Ed. 949; Sugar Institute v. United States (1936) 297 U.S. 553, 599-600, 56 S. Ct. 629, 80 L. Ed. 859; Christiansen v. Mechanical Contractors Bid Depository, supra, 230 F. Supp. 186, 192-193; and Schueller, op. cit., fn. 1, *supra*, 58 Mich.L.Rev. at pp. 506-507; and 6A Corbin on Contracts (1962) §§ 1403 and 1414, pp. 189-199 and 285-289.)

In People v. Building Maintenance etc. Assn., supra, the court observed, "**HNT** Since the Cartwright Act articulates in greater detail a public policy that has long been recognized at common law, Speegle v. Board of Fire Underwriters, supra, 29 Cal.2d 34, 44, 172 P.2d 867, these provisions must be considered in the light of common-law precedents. Moreover, it may be assumed that the broad prohibitions of the Cartwright Act are subject to an implied exception similar to the one that validates reasonable restraints of **[*15]** trade under the federal Sherman Antitrust Act. See Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 60, 31 S. Ct. 502, 55 L. Ed. 619." (41 Cal. 2d at p. 727, 264 P.2d at pp. 36-37. See also Associated Plumbing Contractors of Marin etc. Counties, Inc. v. F. W. Spencer & Son, Inc. (1963) 213 Cal. App. 2d 1, 8, 28 Cal. Rptr. 425.) **HN8** When the trade practice is not illegal per se it is necessary to determine the market impact of the practice and apply the rule of reason. (See United States v. Arnold, Schwinn & Co., supra, 388 U.S. 365, 372-374, 87 S. Ct. 1856; Silver v. New York Stock Exchange (1963) 373 U.S. 341, 360, 83 S. Ct. 1246, 10 L. Ed. 2d 389; White Motor Company v. United States, supra, 372 U.S. 253, 261-262, 83 S. Ct. 696; Northern Pac. R. Co. v. United States, supra, 356 U.S. 1, 5, 78 S. Ct. 514; Sugar Institute v. United States, supra, 297 U.S. 553, 597-599, 56 S. Ct. 629; Appalachian Coals, Inc. v. United States (1933) 288 U.S. 344, 359-361, 53 S. Ct. 471, 77 L. Ed. 825; Chicago Board of Trade v. United States (1918) 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683; United States v. American Tobacco Co. (1911) 221 U.S. 106, 178-180, 31 S. Ct. 632, 55 L. Ed. 663; Standard [*161] Oil Co. of New Jersey v. United States (1911) 221 U.S. 1, 49-60, 31 S. Ct. 502, 55 L. Ed. 619; United States v. Bakersfield Associated Plumbing Contractors, Inc. (S.D.Cal., North.Div. 1958) 1958 CCH Trade Cases, P 69087, p. 74296 at p. 74305; People v. Santa Clara Valley Bowling Proprietors' Assn., supra, 238 Cal. App. 2d 225, 232-233, 47 Cal. Rptr. 570; Associated Plumbing Contractors of Marin etc. Counties, Inc. v. F. W. Spencer & Son, Inc., supra, 213 Cal. App. 2d 1, 8, 28 Cal. Rptr. 425; Milton v. Hudson Sales Corp. (1957) 152 Cal. App. 2d 418, 441-442, 313 P.2d 936; Loevinger, The Rule of Reason in Antitrust Law (1964) 50 Va.L.Rev. 23; 6A Corbin on Contracts (1962) §§ 1379 and 1402, pp. 29-33 and 179-189; 5 Williston on Contracts (rev. ed. 1937) § 1636 and § 1658, pp. 4580-4584 and 4665-4668; and see 2 Rest., *Contracts*, §§ 514 and 515; § 515 comment a, p. 989, and Illustration 16, p. 993. Cf. Christiansen v. Mechanical Contractors Bid Depository, supra, 230 F. Supp. 186, 193.) Over a half century ago Justice Brandeis articulated the test, in language which is still vital today. He said for a unanimous court, "Every agreement concerning trade, every regulation of trade, restrains. **[*17]** To bind, to restrain, is of their very essence, **HN9** The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

(*Chicago Board of Trade v. United States*, *supra*, 246 U.S. 231, 238, 38 S. Ct. 242, 244. See also *Albrecht v. Herald Co.*, *supra*, 390 U.S. 145, 155, fn., 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998, Douglas, J., concurring; *U.S. v. Arnold, Schwinn & Co.*, *supra*, 388 U.S. 365, 385, 87 S. Ct. 1856, Stewart, J., concurring in part; *White* [*181] *Motor Company v. United States*, *supra*, 372 U.S. 253, 261-262, 83 S. Ct. 696.)

Validity of the Rules

1. *Closing time for bids*

Rule 4 of the bid depository provides a closing time schedule for subcontractor's bids which is four hours prior to the time for bid opening on the general contract when that time is at 1 p. m. or later, and 4 p. m. of the previous normal working day when the general bid opening is earlier.⁸ [*19] Rule 9 provides, among other conditions discussed

⁸ "4. TIME OF DEPOSIT: All bids submitted through the Bid Depository shall be actually delivered to the Bid Custodian by mail, or in person, or otherwise, as follows:

Bid Depository Closing Time Schedule

General Opening

Depository Closing Time

9:00 AM

4:00 PM Previous Normal Working Day

10:00 AM

4:00 PM Previous Normal Working Day

11:00 AM

4:00 PM Previous Normal Working Day

12:00 Noon

4:00 PM Previous Normal Working Day

1:00 PM

9:00 AM Same Day

2:00 PM

10:00 AM Same Day

3:00 PM

11:00 AM Same Day

4:00 PM

12:00 Noon Same Day

5:00 PM

1:00 PM Same Day

below, that the bids addressed to the general contractors shall be made available for delivery to the addressees as soon as practicable after the expiration of the time within which bids may be deposited.⁹

[*20] *People v. Inland Bid Depository, supra, 233 Cal. App. 2d 851, 44 Cal. Rptr. 206* involved an appeal by the People from a judgment which approved revised rules of a bid depository after the court, following a trial, had found that the prior rules violated the provisions of the Cartwright Act (see fn. 3 above). The trial court's final judgment countenanced a cutoff time prior to the time for the award of the general contractor for both subcontractors using the depository and subcontractors not using the depository who wished to submit bids to a general contractor that was securing bids from the depository. As stated by the appellate court, "In other words, boycotts and other restraints, illegal per se, were enjoined by the court only with respect to submission of bids by such nonmembers when this occurred more than four hours in advance of the bid opening time. The evidence shows that during the period immediately preceding the awarding authority's time for receipt of bids from the general contractor is precisely the time of the most intensive competition by the subcontractors, even to the last few minutes, when bids are frequently lowered and the general contractor is able to put together [*21] a successively lower prime bid as the time for the general contractor's submission of his bid approaches." (*233 Cal. App. 2d at pp. 861-862, 44 Cal. Rptr. at p. 213.*) A divided court ruled that it was illegal to permit what it considered a boycott and price tampering

The Depository Closing Time shall be 1:00 P.M. of the same day on all projects where the Bid Opening for General Contractors is after 5:00 PM."

⁹ "9. DELIVERY OF BIDS:

"a. The sealed envelopes containing bids addressed to the general contractors shall be made available for delivery to the person or persons to whom addressed as soon as practicable after the expiration of the time for depositing bids upon the project involved as specified in Rule 4 hereof, provided, however, that the general contractor may refuse to accept any envelope containing the bid of a subcontractor with whom he does not desire to contract or any supplier from whom he does not wish to purchase or the general contractor may reject the bid of any subcontractor with whom he does not desire to contract or any supplier from whom he does not wish to purchase by immediately returning to the Bid Custodian, unopened, the envelope containing the bid of such subcontractor or supplier.

"A general contractor may refuse to accept all bids of a separate craft or classification. In the event of such rejection the general contractor nevertheless may accept bids through the Bid Depository from subcontractors of other crafts and suppliers of other classification.

"b. If only one subcontractor in any particular craft or one supplier in any particular classification submits bid(s) to the general contractors through the Bid Depository on a particular project, the Bid Custodian shall declare that particular craft or classification for that particular project closed and shall return such bids unopened to the subcontractor, supplier or general contractor thus submitting such bids, and no general contractor shall be given any bid in this particular craft or classification from the Bid Depository.

"c. If a general contractor elects to receive delivery through the Bid Depository of one or more bids for a craft or classification, he shall be obligated, and he hereby agrees, that if he is the successful prime bidder and receives an award of the general contract, he will award the contract for this particular craft or classification to the lowest bidder whose bid he receives through the Bid Depository. As used in these Rules, 'lowest bidder whose bid he received through the Bid Depository' shall include a bid submitted by the general contractor under Rule 6c., subject to the terms and conditions of said section.

"d. The election of the general contractor shall be endorsed by him on the general contractor's bid acceptance form, and thereupon he shall take and fully execute the form and deliver the same to the Bid Depository, whereupon the sealed envelopes which he has elected to receive shall be made available to him at the Bid Depository for his use.

"e. No sealed bid shall be delivered to a general contractor by the Bid Depository except in accordance with these Rules and until the general contractor shall have executed the general contractor's bid acceptance form provided by the Bid Depository. Such form shall require the general contractor to abide by the Rules of the Bid Depository as to the particular project."

for the limited period ([233 Cal. App. 2d at p. 864, 44 Cal. Rptr. 206](#)).¹⁰ [*22] The trial court upon finding that the rules in this case had a similar cutoff time properly accepted the law as declared by the [Court of Appeal. \(Auto Equity Sales, Inc. v. Superior Court \(1962\) 57 Cal. 2d 450, 455-56, 20 Cal. Rptr. 321, 369 P.2d 937.\)](#) This court, however, is under no such constraint. (3 Witkin, Cal. Procedure, Appeal, § 221, p. 2436.) The decision and the reasons advanced by the majority of the judges of the Fifth District are entitled to great weight. Also to be considered are the dissenting opinion, and the fact that the decision was not subjected to review by the state Supreme Court through petition for hearing.¹¹ For the reasons set forth below it is concluded that the closing time provision does not render the rules illegal per se.

[*23] In the first place the restraint is not directly on the price for which the work may be done. Any subcontractor can make a timely bid at any price he chooses through the depository or directly to a general contractor. (The requirement that general contractor put the bid in the depository is discussed below.) For the same reason there is no boycott in the rules themselves. Any subcontractor can bid either through the bid depository or directly to the general contractor prior to the time fixed. The rule is analogous to that approved in [Chicago Board of Trade v. United States, supra](#), which is referred to as follows: "The restriction was upon the period of price-making. It required members to desist from further price-making after the close of the call until 9:30 a. m. the next business day; but there was no restriction upon the sending out of bids after close of the call. Thus it required members who desired to buy grain 'to arrive' to make up their minds before the close of the call how much they were willing to pay during the interval before the next session of the Board." ([246 U.S. at p. 239, 38 S. Ct. at p. 244](#). See also [U.S. v. New York Coffee & Sugar Exchange \(1924\) 263 U.S. 611, \[*24\] 619-620, 44 S. Ct. 225, 68 L. Ed. 475](#); and [Board of Trade of City of Chicago v. Christie Grain & Stock Co. \(1905\) 198 U.S. 236, 246, 25 S. Ct. 637, 49 L. Ed. 1031.](#))

In the *Inland Bid Depository* case the appellate court relied on evidence to show that lower bids were obtained by the competitive process in the period immediately preceding the award of the general contract. ([233 Cal. App. 2d at pp. 857 and 861-862, 44 Cal. Rptr. 206](#). See also *Southern California Acoustics Co., Inc. v. C. V. Holder, Inc.* (1969) 71 A.C. 747, 754, fn. 7, [71 Cal. 2d 719, 79 Cal. Rptr. 319, 456 P.2d 975](#).) The trial court found, however, that the increase in building costs brought about by the operation of the bid depository was de minimis. The instant case

¹⁰ In [Carl N. Swenson Co. v. E. C. Braun Co. \(1969\) 272 Cal. App. 2d 366](#), 272 A.C.A. 447, [77 Cal. Rptr. 378](#) the case was analyzed as follows: "In the *Inland Bid Depository* case, the court held that group boycotts were illegal per se, constituting restraints on trade in violation of the Cartwright Act. The court further held that a bid depository could not be allowed to operate under rules which (1) prevent, preclude or in any manner limit any subcontractor from submitting a bid to a general contractor or awarding authority on any construction project at any time prior to the time set by the awarding authority for the receipt of bids upon any such construction project (2) limit or restrict, in any way, the amount of a bid submitted by a subcontractor to a general contractor or awarding authority at any time prior to the time set by the awarding authority for the receipt of bids upon a construction project; or (3) limit or in any way prevent a general contractor or awarding authority from receiving or considering any bid which is or may be submitted to him by a subcontractor at any time prior to the time set by the awarding authority for the receipt of bids upon a construction project." (272 A.C.A. at p. 450, [77 Cal. Rptr. at pp. 380](#).)

¹¹ In *Carl N. Swenson Co. v. E. C. Braun Co.*, *supra*, 272 A.C.A. 447, [77 Cal. Rptr. 378](#), the court upheld a judgment which denied the general contractor the right to recover from a subcontractor on an arbitration award made under bid depository rules following the allegedly improper withdrawal of the subcontractor's bid. (Cf. [Drennan v. Star Paving Co. \(1958\) 51 Cal. 2d 409, 415, 333 P.2d 757](#).) The court concluded that analysis of rules which limited the time and the manner in which a subcontractor's bid could be withdrawn "effectively demonstrates that said provisions, when viewed in the context of the other bid depository rules which prohibit depository users from submitting or receiving bids outside the depository, do tend to stifle competition between subcontractors and do further an illegal restraint of trade within the meaning of the *Inland Bid Depository* case." (272 A.C.A. at p. 453, [77 Cal. Rptr. at pp. 381-82](#).) In that case a bearing was denied by the Supreme Court on June 25, 1969, Tobriner, J. voting for hearing. (See Tobriner & Jaffe, Revision of the Anti-Trust Laws (1932) 20 Cal.L.Rev. 585.) This refusal to examine the questions presented in the *Inland Bid Depository* case insofar as they were carried forward in the later case, may be balanced against the denial of a bearing by the [Supreme Court in Associated Plumbing Contractors of Marin etc. Counties, Inc. v. F. W. Spencer & Son, Inc. \(1963\) 213 Cal. App. 2d 1, 28 Cal. Rptr. 425](#), when the court stated, " * * * the trial court properly concluded that such restraints of trade as existed under the rules of the two associations were reasonable restraints of trade in the public interest and justified by the circumstances." ([213 Cal. App. 2d at p. 8, 28 Cal. Rptr. at p. 429](#).)

has been determined without any evidence, or even allegation, that the facts upon which the court relied in the earlier case existed by reason of the operation of this plaintiff's bid depository.¹²

[*25] Trade and commerce by definition imply that at some time a bargain will be struck. The system of competitive bidding is well recognized as, and is mandatory in connection with most public contracts as, a method of securing the performance of work at the lowest competitive price. It is obvious that there must be some interval between the time the general contractor receives the ultimate bid from a subcontractor, and the time he computes and makes his bid to the awarding authority. An agreement to make this period uniform for general and subcontractors alike is certainly a restraint on trade, but it cannot be considered an unreasonable restraint on trade without indicting the whole competitive bidding process.

From all that appears from the pleadings in this case it may be shown that subcontractors are dissuaded from bidding until the last possible interval of time in the absence of the orderly system provided by a bid depository; that bids are purposely high to compensate for bid shopping or bid peddling; and that the number of subcontractors bidding on any particular job is reduced in the absence of conditions enhancing fair competition. (See Scheuller, *Bid Depositories* (1960) [*26] 58 Mich.L.Rev. 497, 499-500 and cf. pp. 504-505, and references fn. 12 above.) In any event, the pleadings do not permit an empirical finding on either score. As stated in *White Motor Company v. United States, supra*, "we know too little of the actual impact of that restriction to reach a conclusion on the bare bones of the documentary evidence before us." (*372 U.S. at p. 261, 83 S. Ct. at p. 701, 9 L. Ed. 2d 738*; and see Schuller, op. cit., at p. 506.)

Similar provisions concerning the time of depositing and opening bids have been upheld both by the court which recently approved the *Inland Bid Depository* case (cf. *Carl N. Swenson Co. v. E. C. Braun Co.*, *supra*, 272 A.C.A. 447, 452, *77 Cal. Rptr. 378*, with *Associated Plumbing Contractors of Marin etc. Counties, Inc. v. F. W. Spencer & Son, Inc.*, *supra*, *213 Cal. App. 2d 1, 4* and *8, 28 Cal. Rptr. 425*), and by the judges of a United States District Court sitting in this state. (*United States v. Bakersfield Associated Plumbing Contractors, Inc.* (S.D. Cal. No.Div. 1958) *1958 Trade Cases, P 69087*, pp. 69087, rule "7" and 69087, and *id.* (1958) *1959 Trade Cases, P 69266*, pp. 75037 and 75039, rule "7.") In *United [*27] States v. San Francisco Electric Cont. Assn. (N.D.Cal. So.Div. 1944) 57 F. Supp. 57* the principal question was whether the operation under the bid depository restrained interstate commerce. The court did observe: "So here, the most that the depository system achieved was to substitute limited and restricted for unlimited and unrestricted bidding. It did not prevent an electrical contractor from doing business as a 'free lance' outside the depository system. The record shows that many *did* so, without hindrance either from the contractors or the unions." (*57 F. Supp. at p. 66*.) Although the foregoing federal cases are noted and distinguished in part in the *Inland Bid Depository* case (see *233 Cal. App. 2d at pp. 858* and *863, 44 Cal. Rptr. 206*; note also

¹² In fact the admitted facts tend to support a contrary finding. The defendant, which apparently considered itself free to shop the bids received from him prior to the award of the general contract, was apparently only able to secure more favorable terms in three of the seven categories in which he requested and accepted bids. That he secured more favorable terms is an assumption that goes beyond the admitted facts. From all that appears the general contractor may have rejected the bids tendered for steel decking by the bid depository, and the subcontractors selected for painting and carpeting may in fact have been selected for an equal price or on terms which permitted an equal or greater price if the general contractor was successful in getting the award.

See, Note, op. cit., fn. 1, *supra*, 53 Va.L.Rev. at page 1724, "As bid shopping becomes widespread in a given area, subs puff their instant bids to leave room for later negotiations, thus fictionalizing the bidding process." (See also *id.*, pp. 1732-1733 and 1738-1739.)

See, Note, op. cit., fn. 1, *supra*, 39 N.Y.U.L.Rev. at p. 818, "The more trouble the general contractor and subcontractor have in binding each other, the more the awarding authority-the third party with an interest in the bidding-may be hurt, either by having to pay a higher price or by not getting the best product for his money." (See, also, *id. pp. 825-826*.)

See, Schultz, op. cit., fn. 1 above, 19 U. of Ch.L.Rev. at pp. 280-281, and at p. 285, where he states, "Possibly, the firm offer provision will be a boon to the owner, the one whom sub and general are supposed to serve, in terms of more efficient construction at lower costs."

Christiansen v. Mechanical Contractors Bid Depository, supra, 230 F. Supp. 186, 193, fn. 21) the distinctions do not fully rebut the approval of the competitive bidding process which supports the rules at issue in this case.

2. Boycott of Subcontractors

The *Inland Bid Depository* case relies upon *Christiansen v. Mechanical Contractors Bid Depository, supra, 230 F. Supp. 186* (subsequently affd. as *Mechanical Contractors [*28] Bid Depository v. Christiansen* (10th Cir. 1965) *352 F.2d 817*, cert. den. (1966) *384 U.S. 918*, *86 S. Ct. 1365*, *16 L. Ed. 2d 439*.) That case did not expressly deal with the provision fixing the time for closing bids, but concentrated on the requirement that the general contractor making a request for bids from the depository would use only such bids in preparing his bid ("Rule V"), a prohibition against splitting bids into classes of work ("Rule III"), and a restriction prohibiting nonbidding members from submitting further bids for a period of 90 days except where there was a drastic revision in the plans ("Rule VIII"). The District Court ruled, "I doubt that Rule V, as implemented by the required agreement on the part of general contractors bidding through the Depository, can be deemed anything but a *per se* violation. But standing alone, or in combination with the other provision of the integrated regulations, in my opinion this rule is restrictive of competition to an unreasonable degree and in an unreasonable manner." (*230 F. Supp. at pp. 189-190*.)¹³

[*29] The views in the *Christiansen* cases must be considered in the light of the fact that use of the bid depository was restricted to its members who comprised a majority of the mechanical contractors in the State of Utah. The requirement that the general contractor use the bid of a member if he elected to receive bids from the depository served to boycott subcontractors who were not members of the depository, and the court found after taking evidence that there was economic pressure on the general contractors to in fact boycott nondepositing subcontractors, and that the freedom of a general contractor to select his subcontractor was commensurately decreased. (See *230 F. Supp. at pp. 190-191* and *352 F.2d at p. 819*.) The rules attached to the complaint in this case indicate that "any subcontractor or supplier desiring to submit a bid to any person or persons through the Bid Depository" may use the facilities.¹⁴

¹³ The Court of Appeals noted, "It was suggested that Rule V alone constituted a *per se* violation of *Section 1*; however, since the decision was based on the combined effect of Rules V, III and VIII, and their implementation, we need not determine whether a *per se* violation occurred." (*352 F.2d at p. 819, fn. 5*.)

¹⁴ "6. SUBMISSION OF BIDS:

"a Any subcontractor or supplier desiring to submit a bid to any person or persons through the Bid Depository shall submit to the Bid Depository a separate and sealed bid addressed to each general contractor to whom the subcontractor or supplier desires to bid and shall file with the Bid Custodian in a separate and sealed envelope addressed to the Bid Depository an identical copy of each such bid filed by him.

"B. Any general contractor who has received or solicited a bid direct from a subcontractor in a particular craft or supplier in a particular classification upon any project and who desires to use the facilities of the Bid Depository upon that project for receiving competitive bids in that craft or classification, shall submit to the Bid Depository such bid in a separate and sealed envelope addressed to the general contractor and shall file with the Bid Custodian in a separate and sealed envelope addressed to the Bid Depository an identical copy of each such bid filed by him, indicating on both the envelopes and the bid forms the subcontractor or supplier whose bid is being submitted and the craft or classification covered by the bid.

"c. A general contractor may submit through the Bid Depository in his own behalf a bid for any craft or classification as he may elect. Such bid submitted shall be considered on the same basis as other bids the general contractor shall receive through the Bid Depository from subcontractors or suppliers covering the same portion of work. In the event such general contractor's bid is lower by 10%, or less, of the next low bid submitted through the Bid Depository by the subcontractors or suppliers, the general contractor shall award the contract to the subcontractor or supplier submitting the low bid through the Bid Depository in accordance with the agreement entered into by the general contractor and the subcontractor or supplier at the time of delivery of bids. If the bid of the general contractor is low by more than 10% of the next low bid submitted through the Bid Depository, he may either award the contract to the subcontractor or supplier submitting the low bid through the Bid Depository in accordance with the agreement entered into by the general contractor and the subcontractor or supplier at the time of delivery of bids or he may perform the work with his own work forces.

[*30] The rules on their face do not disclose a general plan to exclude or boycott any segment of the subcontractors or suppliers in any particular craft or classification. Defendant asserts that the requirement that a general contractor desiring to use the facilities of the bid depository, who has received or solicited a direct bid, must deposit it in the depository (rule 6, par. b, fn. 14 above), and the restrictions on such a general contractor who wishes to reserve the right to do the work himself (rule 6, par. c, fn. 14 above) render the rules invalid. Here again the issue is not a boycott or price fixing, but a restraint on the time of trading which may or may not be reasonable in the light of all the circumstances. It is noted that the general contractor's bid on his own behalf is an antithetical aspect of the same evil which is found in, and prohibited as, puffing at an auction. (See 5 Williston, Contracts (rev. ed. 1937) § 1664, p. 4695.) It is unnecessary to determine whether the 10 percent qualification on the general contractor's bid is warranted under the circumstances. The rules are severable, and it is not shown in what manner that rule is applicable, or that it restricts [*31] the bidding or affects the price generally.

In the *Inland Bid Depository* case the original rules which were found illegal by the trial court precluded the general contractor from using any bid not processed by the depository ([233 Cal. App. 2d at p. 853, 44 Cal. Rptr. 206](#)). The trial court thereafter approved rules which permitted a general contractor to solicit and receive bids outside of the depository so long as he deposited the bids with the depository ([233 Cal. App. 2d pp. 853-854, 44 Cal. Rptr. 206](#)). Similar rules were noted in the *Swenson* case (272 A.C.A. at p. 451, [77 Cal. Rptr. 378](#)). The restraint found illegal in each case does not appear to be the requirement of clearing the bid through the depository, but the provision discussed and approved above, that the price fixing process be terminated at some reasonable time prior to the time of the award of the general contract.

3. Boycott of General Contractors

In the *Inland Bid Depository* case it was noted that "subcontractors who signed the rules or submitted a bid in accordance with the rules could not submit a bid to a contractor who did not use the depository." ([233 Cal. App. 2d at p. 853, 44 Cal. Rptr. 1*321 at p. 207](#).) That restriction contained in the original rules was struck down by the trial court. There was a similar boycott of nonusing general contractors in the *Christiansen* case (see [230 F. Supp. at pp. 190](#) and 191, and [352 F.2d at p. 819](#)). The District Court stated, "[The rules] further encourage mechanical subcontractors bidding through the Bid Depository to boycott general contractors who do not sign the Depository agreement." ([230 F. Supp. at p. 190](#).)

The defendant concedes that there is no provision in the bid depository rules attached to the complaint, other than the time of bid closing, which precludes subcontractors using the depository from submitting bids to nonusing general contractors. From all that appears a nonusing general contractor may shop for bids, and receive bids from bid peddlers up to the time of the award of the general contract. Defendants claim that "the practical effect as shown by its [the bid depository's] operation, is that subcontractors are not free to bid to general contractors both within and without the depository" is a matter of fact which cannot be determined from the pleadings on file.

In the *Christiansen* case ([230 F. Supp. at 1*331 p. 189](#) ("Rule VIII")), the *Swenson* case (272 A.C.A. at pp. 450-451, [77 Cal. Rptr. 378](#)), the *Associated Plumbing Contractors* case ([213 Cal. App. 2d at p. 6, 28 Cal. Rptr. 425](#)), and the *Bakersfield* case (1958 Trade Cases at p. 74301, "10" and 1959 Trade Cases at p. 75039, "10") the rules contained restrictions which would preclude substitution of subcontractors (i. e., shopping and peddling) after the award of the general contract is made. The rules in this case have a provision of similar import.¹⁵ [HN10](#) Such a substitution is prohibited in public contracts. ([Gov. Code, §§ 4100- 4113](#); and see *Southern California Acoustics Co., Inc. v. C. V. Holder, supra*, 71 A.C. 747, 752-755, [71 Cal. 2d 719, 79 Cal. Rptr. 319, 456 P.2d 975](#); and [People v. Inland Bid](#)

"d. Each of the sealed envelopes shall on its outside cover specify the project upon which the bid is made and the portion of the work on the project covered by the bid."

¹⁵ "13. GENERAL CONTRACT ADJUSTMENT: In the event that the awarding authority, after general bid opening, but prior to award, negotiates with the general contractor for changes in plans and specifications resulting in a revision downward of the general contract price, the general contractor shall negotiate such changes with the low bidder submitting bids through the Depository in each particular craft or classification involved. In case no agreement is reached as the result of such negotiations, bids for the particular craft(s) or classification (a) involved shall be resubmitted through the Bid Depository."

Depository, supra, 233 Cal. App. 2d 851, 863-864, 44 Cal. Rptr. 206.) There is no public interest in protecting the contractor who is attempting to increase his profit at the expense of the subcontractor. (See 71 A.C. at p. 754, fn. 7, 71 Cal. 2d 719, 79 Cal. Rptr. 319, 456 P.2d 975.) No illegality should be predicated upon the post-award restrictions whether the general contract awarded is public or private.

[*34] From all that appears in the pleadings *any* general contractor can deal with *any* subcontractor in any manner it wishes until the time of the award, but if he wants the advantages (lower price?) which may be produced from orderly bidding through the bid depository, he will have to forego his negotiations after the time of closing the subbids, a restriction which it has been concluded does not appear unreasonable on its face.

4. Withdrawal of Bids

In the *Bakersfield* case the original rules provided for withdrawal of a bid, during an interval between the time the bids were opened, and the time that they were delivered to the general contractor, upon the payment of a penalty (1958 Trade Cases, p. 74301, rule "12", par. "B"). The court found from the evidence that this rule afforded an opportunity, and was in fact used, to allow an unsuccessful bidder to buy off the successful bidder by paying the latter's penalty (id., p. 74304). The rule was invalidated in the original judgment (Jertberg, Dist. Judge, subsequently Judge 9th Cir.) which prohibited any rule which "(iv) permits any subcontractor to withdraw any bid during the interval between the time such [*35] subcontractor's bid is opened at such bid depository, and the time when any such bid is available for delivery to any general contractor by such bid depository." (1958 Trade Cases, p. 74306.) In the judgment entered after the submission of revised rules, the court (Yankwich, Chief Dist. Judge¹⁶ [*36]) eliminated the foregoing provision. (1959 Trade Cases, p. 75037.) The revised rules for withdrawal were approved in their original form (id., pp. 75039-75040). The court aimed its proscription at the injurious practices that attended the use of the withdrawal privilege.¹⁷

In the *Inland Bid Depository* case the court referred to a similar rule (233 Cal. App. 2d at p. 853, 44 Cal. Rptr. 206). It apparently was only of significance insofar as it precluded a subcontractor from withdrawing a bid without penalty during the period between the subbid closing and the general award. A similar rule was given such significance in the *Swenson* case and found to be illegal upon the precedent established in the earlier case in the Fifth District (272 A.C.A. at p. 452, 77 Cal. [*37] Rptr. 378).

Swenson further held illegal a provision which requires that a subcontractor who withdraws a particular separate bid for a craft or classification must also withdraw any combination bid containing the withdrawn bids (id., pp. 452-453, 77 Cal. Rptr. 378).

¹⁶ Judge Yankwich also authored United States v. San Francisco Electrical Const. Assn. (N.D.Cal.So.Div.1944) 57 F. Supp. 57 and United States v. Heating, Piping & Air Conditioning Contractors Assn. (S.D.Cal.Cent.Div.1940) 33 F. Supp. 978. In the latter case he recognized that collusion between bidders, or bidders and others, price rigging, and division of the work are abuses which should be struck down whether they utilize a bid depository or not. (See also Local 175 etc. v. United States (6th Cir. 1955) 219 F.2d 431; Las Vegas Merchant Plumbers Assn. v. United States (9th Cir. 1954) 210 F.2d 732; United States v. Northeast Texas Chapter (5th Cir. 1950) 181 F.2d 30; Annotation, Combination Among Contractors (1939) 121 A.L.R. 345; and Annotation: Labor-Antitrust Laws (1963) 9 L. Ed. 2d 998, 1045-1050 and 1057-1058.) He apparently did not think it was necessary to burn down the barn to kill the rats. By coincidence the *Christiansen* case is found reported in a volume containing a testimonial to this brilliant jurist on his retirement (230 F. Supp. preface).

¹⁷ The parties were restrained from "(c) coercing, inducing, or attempting to coerce or induce, any contractor who has submitted a bid through a bid depository operated by defendants, or any of them, to withdraw such bid after it has been opened, announced, or published at such bid depository; and (d) soliciting, receiving, or accepting money or any other things of value as an inducement to the withdrawal of any bid submitted through a bid depository operated by the defendants, or any of them, after it has been opened, announced, or published at such bid depository." (1959 Trade Cases, p. 75037.)

The rules involved in this case¹⁸ permit withdrawal up to the closing time of subbids without any penalty (rule 8, par. a, fn. 18 above). They do, however, as in *Swenson*, require the subcontractor to also withdraw "any combination containing the items withdrawn" (rule 8, par. a, fn. 18 above). In *Swenson* the arbitration award which was questioned depended on whether or not the subcontractor had properly withdrawn its plumbing bid. It was established that it had refused to withdraw its combination bid and that the combination bid was low. On that showing, the rule by requiring arbitrary withdrawal of the low combination bid, operated to restrain trade and fix a price above what should have obtained by true competitive bidding. Whether or not the rule uniformly requires such a result cannot be determined on the record before us. It would appear to be an illegal condition. In the *Bakersfield* case [***38**] the court outlawed a provision restricting combination bids. (See [1958 Trade Cases, p. 74300](#), rule "6" and comment p. 74304.) Similarly in the *Christiansen* case a converse restriction against bid splitting was found to be involved. (See [230 F. Supp. p. 189](#), rule "III" and comment pp. 191-192.)

[*39] Nevertheless, the rule in question does not directly affect the respective rights and obligations of the parties to this action. The rules purport to be severable.¹⁹ The fact that under particular circumstances an illegal restraint may be effected under one rule should not invalidate the entire procedure. The extent to which the tainted rule affects the construction industry, and particularly its customers, should be considered before arriving at such a drastic adjudication.

The provision for withdrawal of a delivered bid for a substantial mistake (rule 8, pars. b and c, fn. 18 above) appears to be reasonable. (Cf. [Drennan v. Star Paving Co. \(1958\) 51 Cal. 2d 409, 415-416, 333 P.2d 757](#).) They do not leave the door open [***40**] for the evils discovered and proscribed in the *Bakersfield* case. The question of the reasonableness of the fee is discussed below.

5. Fees

¹⁸ "8. REVOCATION OF BIDS:

"a. Any bid deposited with the Bid Depository may be revoked by the person submitting the same at any time prior to the expiration of the time for depositing bids upon the project involved as specified in Rule 4 hereof. Notice of revocation of any bid must be made in writing by the subcontractor or supplier or his authorized agent and any bids so revoked shall not be delivered to the person or persons to whom addressed.

"b. Any bid delivered to a general contractor as in these Rules provided, shall be deemed an irrevocable offer to such contractor and may not be revoked thereafter without such general contractor's consent for a period of thirty (30) days from the date of delivery to the general contractor or for such period as may be designated in the contract documents for acceptance of bids by the Awarding Authority, unless, prior to general bid opening:

"1. The subcontractor or supplier gives notice to all general contractors to whom he has bid of a substantial mistake, which notice shall constitute revocation of the bids, and he shall likewise immediately give such notice to the Bid Depository or Bid Custodian, or

"2. The bid appears on its face to a bidding general contractor that it is an obvious and substantial mistake, in which case that general contractor shall immediately notify the subcontractor or supplier giving the bid of the apparent mistake. The subcontractor or supplier shall as soon as possible either revoke the bid to all general contractors (as under paragraph 1 above) or confirm to the general contractor that the bid amount is correct.

"c. In the event any such bid be revoked and cancelled under paragraph b above, the subcontractor or supplier submitting such bid shall immediately pay to the Bid Depository a depository fee equal to 1% of the bid price provided, however, that such depository fees payable by any one person upon any one project shall not exceed \$ 500.00 or be less than \$ 5.00.

"d. In the event of bids submitted in combination, any segregated portion of the bid may be withdrawn as provided under Rule 8 without jeopardizing or invalidating other segregated portions of the bid. However, in addition to the segregated portion withdrawn, any combination containing the item withdrawn must likewise be withdrawn."

¹⁹ "20. SEVERABILITY: Any provision or condition of these Bid Depository Rules and Regulations which may be held to be void or unenforceable by a court of competent jurisdiction shall be severable from the remaining provisions and conditions which shall continue in full force and effect."

In the *Bakersfield* case the court found that the fees collected under a rule which required the successful subbidder to pay 1 percent of the bid price to a maximum of \$ 1,000 was producing substantially more revenue than was required for the ordinary operation and maintenance of the bid depository. ([1958 Trade Cases, p. 74300](#), rule "8" and p. 74303 finding "40.") The first judgment prohibited the collection of any fee from the subcontractor ([id. p. 74306](#)). The judgment with respect to the revised rules prohibited any rule which "(iii) requires that subcontractors who have been awarded contracts as a result of bids deposited at such bid depository shall pay any fees which, in the aggregate and in combination with any other fees collected pursuant to any such rule, are in excess of the amount reasonably required for the operation and maintenance of such bid depository; * * *" ([1959 Trade Cases, p. 75037](#).)

The latter conclusion is in accord with prevalent authority. In the Restatement of Contracts, the proposition, section 517, [*41] that "A bargain not to bid at an auction, or any public competition for a sale or contract, having as its primary object to stifle competition, is illegal" is accompanied by the following illustration: "6. A, B, C and D, building contractors, agree with one another to form the X association and that in future bids for the award of building contracts the successful bidder shall pay the X association 2 per cent. of the gross amount of the price fixed in the contract awarded. The agreement between A, B, C and D is illegal" ([id. pp. 1003-1004](#)). This rule has been applied indiscriminately in some cases. (See [Constructors Assn. of Western Pennsylvania v. Seeds \(1940\) 142 Pa. Super. 59, 63-64, 15 A.2d 467, 469](#); [Associated Wisconsin Contractors v. Lathers \(1940\) 235 Wis. 14, 291 N.W. 770](#); and Annotation, Trade Association Dues-Public Policy (1946) 161 A.L.R. 795, 798-800. Cf. [Morgan v. Gove \(1929\) 206 Cal. 627, 634, 275 P. 415](#).) The better view is that dues or fees commensurate with the costs of services rendered are not rendered illegal because they are measured by gross business transacted. ([Associated Plumbing Contractors of Marin etc. Counties, Inc. v. F. W. Spencer & Son, Inc., supra, \[*421\] 213 Cal. App. 2d 1, 8, 28 Cal. Rptr. 425](#); [Constructors' Assn. of Western Penn. v. Furman \(1949\) 165 Pa. Super. 248, 252, 67 A.2d 590, 592](#); [Electrical Contractors' Ass'n of City of Chicago v. A. S. Schulman El. Co. \(1945\) 391 Ill. 333, 339-346, 63 N.E.2d 392, 395-397; 161 A.L.R. 787, 794-795](#); [Griffiths & Sprague Steve. Co. v. Waterfront Emp. Assn. \(9th Cir. 1947\) 162 F.2d 1017, 1019](#); Annotation, op. cit., 161 A.L.R. 795, 797-798 and 800-801.)

In [Bay Area Painters etc. Committee v. Orack \(1951\) 102 Cal. App. 2d 81, 226 P.2d 644](#) the court approved and quoted the trial judge's opinion which followed the Illinois case cited above. In *Orack* the court upheld the right of a nonprofit corporation, created to stabilize an industrial activity, to collect a sum from nonmembers which was the equivalent of the sums derived from members of employers' associations through such associations. The charges were upheld against the contention that they imposed an unreasonable restraint on trade, because they were reasonable in the light of the services performed.

The rules in question here provide a fee of 1 percent of the price accepted with a maximum of \$ 500 and a minimum of \$ 5.²⁰ It cannot [*43] be ascertained from the pleadings whether the sums collected exceed the

²⁰"10. DEPOSITORY FEE: Any subcontractor or supplier obtaining a contract through a bid submitted through the Bid Depository shall pay to the Oakland-Alameda County Builders' Exchange as a depository fee a sum equal to 1% of the bid price provided, however, that the depository fee in no event shall exceed \$ 500.00 or be less than \$ 5.00. The said depository fee shall be due and payable thirty (80) days after the time of the award of the contract by the general contractor to such subcontractor or supplier. If paid within ten (10) days of the date of billing, there is a 5% discount allowable.

"In the event a general contractor deposits a bid with the Bid Depository which has been received by him direct or solicited by him, as provided in Rule 6 hereof, from a subcontractor or supplier not party to these Rules and Regulations, and such bid is the lowest bid submitted through the Bid Depository, the said general contractor shall pay to the Oakland-Alameda County Builders' Exchange the amount of the Bid Depository fee above, provided the general contractor is awarded the general contract by the awarding authority. Said fee shall be due and payable thirty (30) days after the time of the award of the contract by the general contractor to the said subcontractor or supplier. If paid within ten (10) days of date of billing, there is a 5% discount allowable.

"The Bid Depository Fees herein provided may be decreased but not increased by authorization of the Bid Depository Committee of the Oakland-Alameda County Builders' Exchange from time to time without amendment of these Rules and Regulations. There shall be an annual report of income and expenses of the Bid Depository to the Committee and to the Board of Directors of the Builders' Exchange.

amount reasonably required for the operation and maintenance of the bid depository. The provisions of the rules which provide for a decrease but not an increase in the fees, and for the reporting of income and expense suggest that there may be some effort made to keep the two in balance.

[*44] The provision for a payment of the fee by the general contractor in the event the successful subbid is one deposited by him, is not unreasonable in the light of the *Painter's* case referred to above.

6. Collateral Rulings

In the briefs reference has been made to the following: (1) an Attorney General's letter dated July 1, 1966 which invited attention to the *Inland Bid Depository* case and recommended that "each bid depository consult with its legal counsel with a view to conforming its rules with the law and the mandate of that and other decisions"; and (2) letters of the office of the Chancellor of the California State Colleges and of the Attorney General concerning the restriction of the use of bid depositories in connection with bids for certain public contracts. Although these letters may reflect the views of the authors they are not particularly pertinent to the solution of the questions discussed above.

7. Absence of Legislation

It has been noted that Congress has failed to pass legislation to prevent bid shopping and peddling. (Schueller, op. cit., 58 Mich. L.Rev. at pp. 503-506.)

The California Legislature has similarly turned down legislation [*45] relating to practices prior to the award. Statutes of 1963, chapter 2125, p. 4410 et seq. which enacted the "Subletting and Subcontracting Fair Practices Act" ([Gov.Code, §§ 4100-4113](#)) was originally introduced as Assembly Bill No. 2037. The bill as introduced ([§ 2](#)) contained the recitals now found in section 4101 reading, "The Legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies, loss of wages to employees, and other evils." (See Southern Cal. Acoustics Co. v. C. V. Holder, Inc., *supra*, 71 A.C. 747, 753, fn. 5, [71 Cal. 2d 719, 79 Cal. Rptr. 319, 456 P.2d 975](#).) It also ([§ 5](#)) amended and renumbered section 4102 and proposed ([§ 3](#)) a new section 4102 reading: "4102. (a) It is, therefore, hereby declared to be the policy of the State of California to eliminate, insofar as possible, the practices of bid shopping and bid peddling in connection with any public work or improvement.

[*46] "(b) It is further declared to be the policy of the State of California that, at the time of bidding to an awarding authority on any public work or improvement, the prime contractor offer to such awarding authority not only qualifications and experience on his part which are necessary for the efficient performance of the work which such prime contractor undertakes for himself but also such qualifications and experience on the part of each subcontractor under such prime contractor with respect to the work to be performed by such subcontractor.

"(c) It is further declared to be the policy of the State of California, that, in the interest of efficiency, economy, and fair practice in connection with the construction, alteration, and repair of public works, each awarding authority shall comply with the following procedure to insure (1) *that competition among subcontractors be completed prior to submission of their bids to the prime contractor;* (2) that the bids of such prime contractors will reflect such competition; and (3) that the awarding authority is apprised as to the identity of each subcontractor whom the prime contractor will actually utilize in the performance of any substantial [*47] portion of such public work or improvement." (Emphasis added.) These provisions were once amended (May 1, 1963) and then deleted (May 10, 1963) by amendments in the assembly. A bill by the same author, Assembly Bill No. 2068, proposed to add section 4107.7 to the Government Code. This proposal read in part: "4107.7. The public policy of this State in the construction, alteration and repair of building structures by all public agencies is to provide a uniform procedure for

the taking of subbids on a competitive basis prior to submission of any bid by a prime or general contractor to any public agency and the naming of the subcontractors to be used at the time of such submittal as provided in this chapter * * *." This bill was returned from the committee without action. In 1965 a similar bill, Assembly Bill. No. 1725 met with a similar fate. In 1967 a proposal, Assembly Bill No. 1792, provided that subcontractor's bids be submitted to the prime contractor not later than 24 hours before the time set for the award of the prime contract, and that copies be deposited with the awarding authority. No action was ever taken on this bill in committee. In 1969 through Senate Bill No. 85 revisions [*48] were enacted (Stats.1969, ch. 332, § 1, p. 705) to the law found in the Government Code. The revisions referred to substitution for cause after an award, and the legislation as proposed and as enacted never referred to the preaward relationship.

It cannot be determined whether the failure to legislate is an approval of preaward bid peddling and bid shopping, or an approval of the right to use self help, short of an unreasonable restraint of trade. It does not elucidate the questions presented by the rules which are reviewed in this case.

8. Price Fixing

The key to any bid depository arrangement is the general contractor's obligation to take the low bid from the depository. (See Carl N. Swenson Co. v. E. C. Braun Co., *supra*, 272 A.C.A. at p. 451, 77 Cal. Rptr. 378; People v. Inland Bid Depository, supra, 233 Cal. App. 2d at p. 853, 44 Cal. Rptr. 206, and see fn. p. 854, et seq. and cf. "Section 8 * * * B" as found in fn. 2 at p. 860, 44 Cal. Rptr. 206; Mechanical Contractors Bid Depository v. Christiansen, supra, 352 F.2d at p. 818 and Christiansen v. Mechanical Contractor's Bid Depository, supra, 230 F. Supp. at p. 188 "Rule V"; United States v. Bakersfield Associated [*49] Plumbing Contractors, *supra*, 1959, Trade Cases, at p. 74039, "Rule 7 * * * D," and *id. 1958 Trade Cases at p. 74300*, "Rule 7 * * * D.") In this case the rules attached to the complaint impose such an obligation on a general contractor who elects to receive bids from the depository. (See rule 9, fn. 9 above, particularly pars. c, d and e.)

It is suggested that the agreement between the subcontractors who deposit bids and the general contractors who elect to receive bids from the bid depository is illegal per se because it fixes the price at which the services and materials are to be furnished to the general contractor and perforce to the awarding authority.

Reflection indicates that a price arrived at by open competitive bidding is by its very nature not a price arrived at by restraints on competition. If the effect on the price of the use of the bid depository is to be condemned it must be for other causes. It has been shown above that these other causes are not inherent in the rules under review. The only restraint on the competitive process is that terminating the price fixing process at a reasonable time prior to the award of the general contract. For reasons set forth above [*50] the indictment of this rule as a per se illegality is rejected. Nothing is found in the statutory law or the precedents which have been examined, to require that a general contractor or the public whom he serves is entitled to the anarchy that traditionally is attributed to the price fixing process in an oriental bazaar. In our economy an individual is free to put a price on his goods or services and abide by it. He may resist being cajoled or coerced into lowering it. (Cf., however, People v. Inland Bid Depository, supra, 233 Cal. App. 2d at pp. 863-864, 44 Cal. Rptr. 206; and Christiansen v. Mechanical Contractors Bid Depository, supra, 230 F. Supp. at p. 190, fn. 10.) If he elects to exercise such restraint by using, what appears to be on the record in this case, an impartial instrumentality designed to produce a competitive price, he should not be faulted anymore than he would if refused to consider a bid shopping general contractor's overtures that he reduce his bid to meet a competitor.

Aside from the cutoff time, from all that appears in the rules under review, any general contractor is free to use or not use the depository as it may desire, without being subject to boycott [*51] by any subcontractor if he elects to proceed in the latter fashion. Similarly any subcontractor is free to deal in any manner it wishes with a general contractor, subject only to the condition that if the general wants to increase the competition by receiving bids from the depository, it may deposit the independent subcontractor's bid. The record fails to establish either boycott or price fixing or other grounds for finding illegality per se. (See analysis of the *Bakersfield* case in Christiansen v. Mechanical Contractors Bid Depository, supra, 230 F. Supp. at pp. 193-194, fn. 21.)

In *People v. Inland Bid Depository, supra*, the opinion recites: "To require the general contractor to employ the lowest bid under 8B, at a time when he had seen no other subbids, would be detrimental to the public, leading to collusion by the subcontractors, and ruinous to the constructing industry." ([233 Cal. App. 2d at pp. 859-60, 44 Cal. Rptr. at p. 212](#).) This statement simply does not bear analysis. Cutting of the price fixing process at a reasonable time prior to the award of the general contract does not of itself necessarily establish a higher price or illegally restrain trade. In the *Inland* [*52] *Bid Depository* case the trial court found "the increase in building costs brought about by the operations of defendant is de minimis" ([233 Cal. App. 2d pp. 854-855, 44 Cal. Rptr. p. 209](#). See also fn. 12 above). In the instant case the bids were satisfactory in four out of seven classifications. It is at least arguable in the absence of evidence to the contrary that the stability afforded by the depository encourages more bidders and consequently more competitive prices. If there is evidence of collusion, bid rigging, boycott, price fixing or any other restraint on the open competition which is fostered up to the bid cutoff time, it may be alleged and proved by the defendant. The rules themselves do not establish any such practice.²¹

[*53] The judgment on the pleadings is reversed.

MOLINARI, P. J., and ELKINGTON, J., concur.

End of Document

²¹ Similarly the conclusion of a learned and experienced author that "These provisions clearly and plainly violate the antitrust laws, * * *" (Orick, op. cit., 19 Hastings L.J. at p. 522) must be read as referring conjunctively rather than severally to the four types of rules which he lists. Since he refers to rules in which the subcontractors boycott nonusing general contractors, and in which generals utilizing the depository boycott nonusing subcontractors, his observations are not controlling in this case.



La Fortune v. Ebie

Court of Appeal of California, Second Appellate District, Division Two

June 15, 1972

Civ. No. 38834

Reporter

26 Cal. App. 3d 72 *; 102 Cal. Rptr. 588 **; 1972 Cal. App. LEXIS 919 ***; 1972 Trade Cas. (CCH) P74,090

KENNETH A. LaFORTUNE, Plaintiff and Respondent, v. LILLIAN EBIE, Defendant and Appellant

Subsequent History: [***1] A petition for a rehearing was denied July 11, 1972, and the judgment was modified to read as printed above.

Prior History: Superior Court of Los Angeles County, No. 914 080, Robert A. Wenke, Judge.

Disposition: The judgment is reversed, and the cause is remanded for a new trial. Each party shall bear his own costs.

Core Terms

franchise, territory, Chicken, franchisee, manufacturer, horizontal, contracts, territorial limits, delivery, vertical, restraint of trade, exclusive right, anti trust law, rule of reason, Sherman Act, Antitrust, food service, trial court, first time, new trial, Cartwright Act, competitors, resemblance, franchisor, automatic, marketing, legality, damages, void

LexisNexis® Headnotes

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Breach of Contract

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

HN1 [down arrow] Causes of Action, Breach of Contract

Under the Sherman Antitrust Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. Territorial limitations bear at least a superficial resemblance to horizontal divisions of markets among competitors, which have been held to be tantamount to agreements not to compete, and hence inevitably violative of the Sherman Act.

[Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade](#)

[Contracts Law > Breach > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation](#)

[Antitrust & Trade Law > Sherman Act > Defenses](#)

[Contracts Law > Breach > Breach of Contract Actions > General Overview](#)

[Contracts Law > ... > Sales of Goods > Breach, Excuse & Repudiation > General Overview](#)

[Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers](#)

[HN2](#)[] Interstate Commerce, Restraints of Trade

Cal. Bus. & Prof. Code § 16600 renders void every contract by which anyone is restrained from engaging in a lawful profession, trade, or business. [Cal. Bus. & Prof. Code §§ 16720](#) and [16726](#) render void any combination to create or carry out restrictions in trade or commerce and to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity. A breach of state or federal [antitrust law](#) may provide a valid defense in an action for breach of contract.

[Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review](#)

[Contracts Law > Defenses > Illegal Bargains](#)

[Contracts Law > Defenses > Public Policy Violations](#)

[HN3](#)[] Reviewability of Lower Court Decisions, Preservation for Review

The legality of a contract may always be examined, even for the first time on appeal.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade](#)

[Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation](#)

[Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview](#)

[HN4](#)[] Antitrust & Trade Law, Sherman Act

All territorial limitations do not automatically violate the Sherman Antitrust Act. Horizontal territorial limitations are automatic antitrust violations, and vertical territorial limitations' validity remains subject to a rule of reason.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A holder of a franchise for a ready-to-eat chicken delivery business recovered damages from defendant, a neighboring franchisee, for intentionally interfering with an advantageous business relationship by making deliveries in plaintiff's franchise territory. The judgment was based on the trial court's interpretation of the franchise contract as prohibiting one franchisee from delivering in another franchisee's territory. (Superior Court of Los Angeles County, No. 914080, Robert A. Wenke, Judge.)

The Court of Appeal reversed and remanded for a new trial, taking the view that franchise contracts, as construed by the trial court, violate antitrust laws, as constituting contracts in restraint of trade. The court did, however, recognize that the territorial restraints which were involved might be justified under the "rule of reason" applied to vertical limitations. After outlining factors which might justify exclusivity of territory in the instant case, the court noted that it was in no position to resolve the issues in this respect and, therefore, remanded. (Opinion by Fleming, J., with Herndon, Acting P. J., and Compton, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to McKinney's Digest

[CA\(1a\)](#) [down] (1a) [CA\(1b\)](#) [down] (1b)

Monopolies and Combinations § 4—Reversal and Remand—Antitrust Issues.

--In an action between neighboring franchisees of a ready-to-eat food delivery business arising out of defendant's delivery of food in plaintiff's franchise territory, reversal of a judgment for plaintiff and remand were required, where the franchise contracts, as construed by the trial court, appeared to violate the antitrust laws, as restraining trade, but where exclusivity of territory for delivery could, conceivably, be justified under the "rule of reason," as applied to a vertical limitation, and the issue of such possible justification could not be resolved on appeal.

[CA\(2\)](#) [down] (2)

Monopolies and Combinations § 2—Sherman Act.

--Under the Sherman Antitrust Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it.

[CA\(3\)](#) [down] (3)

Monopolies and Combinations § 5—Relation Between Sherman and Cartwright Acts.

--The California **antitrust law** (the Cartwright Act) is patterned on federal law (the Sherman Act), both have their roots in the common law, and cases construing the Cartwright Act follow the law as interpreted in the Sherman Act.

CA(4) [down arrow] (4)

Contracts § 76(5)—Enforcement—Contracts in Restraint of Trade—Breach of Antitrust Law as Defense to Contract Action.

--A breach of a state or federal antitrust law may provide a valid defense in an action for breach of contract.

CA(5) [down arrow] (5)

Contracts § 37—Legality as Element of Contract—When Issue May Be Raised.

--The legality of a contract may always be examined, even for the first time on appeal, and when the court discovers a fact which indicates that the contract is illegal and ought not to be enforced, it will, on its own motion, instigate an inquiry in relation thereto.

Counsel: John Guerin for Defendant and Appellant.

Sommers & Lakritz, Alfred J. Lakritz, Thompson & Miller and James Schiada for Plaintiff and Respondent.

Judges: Opinion by Fleming, J., with Herndon, Acting P. J., and Compton, J., concurring.

Opinion by: FLEMING

Opinion

[*73] [**588] Kenneth LaFortune and Lillian Ebie owned adjoining Chicken Delight food service franchises in Whittier and La Mirada. When [*74] Ebie delivered Chicken Delight chicken to homes in LaFortune's franchise territory, LaFortune brought this action against Ebie for intentional interference with an advantageous business relationship, [**589] and obtained judgment for \$ 25,000 (\$ 17,885 loss of profits, \$ 7,115 punitive damages). Ebie appeals.

The franchise contracts entered into by Chicken Delight, Inc. with LaFortune and Ebie provide that the franchisee shall have "exclusive right and franchise to use" [***2] the Chicken Delight system of operation within a particular territory, and that the business of a franchisee shall "be conducted and operated only at a location within" its franchise territory approved by the franchisor. Two alternative constructions of the basic contracts are possible: (1) the franchisee has the exclusive right to operate a place of business within the franchise territory; (2) the franchisee has the exclusive right to conduct all Chicken Delight business within the territory and may prevent neighboring franchise holders from making deliveries inside his territory. The trial court adopted this latter view and construed the franchise contract to mean that a Chicken Delight franchisee could not deliver chicken to customers located in another franchisee's territory; the judgment for damages was based wholly on this construction of the franchise contract.

CA(1a) [up arrow] (1a) In our view the franchise contracts, as construed by the trial court, violate the antitrust laws in that they are contracts in restraint of trade. Chicken Delight, Inc. sells to its franchisees the supplies of their business.

CA(2) [up arrow] (2) HN1 [up arrow] Under the Sherman Antitrust Act, "it is unreasonable without more for a manufacturer to [***3] seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." ([United States v. Arnold, Schwinn & Co. \(1967\) 388 U.S. 365, 379 \[18 L.Ed.2d 1249, 1260, 87 S.Ct. 1856\]](#).) "Territorial limitations bear at least a superficial resemblance to horizontal divisions of markets among competitors, which we have held to be tantamount to agreements not to compete, and hence inevitably violative of the Sherman Act, . . ." (Brennan, J., concurring in [White Motor Co. v. United States \(1963\) 372 U.S. 253, at p. 267 \[9 L.Ed.2d 738, at pp. 748-749, 83 S.Ct. 696\].\)](#)

HN2[] *Business and Professions Code section 16600* renders void "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business. . . ." [Sections 16720](#) and [16726](#) render void any combination "[to] create or carry out restrictions in trade or commerce" and "[to] prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity." [CA\(3\)](#)[] (3) The state [*75] **antitrust law** (the Cartwright Act) is patterned on federal law (the Sherman Act), both have their roots in the [***4] common law, and cases construing the Cartwright Act follow the law as interpreted in the Sherman Act. ([Chicago Title Ins. Co. v. Great Western Financial Corp., 69 Cal.2d 305, 315 \[70 Cal.Rptr. 849, 444 P.2d 481\].](#)) [CA\(4\)](#)[] (4) A breach of state or federal **antitrust law** may provide a valid defense in an action for breach of contract. ([Morey v. Paladini, 187 Cal. 727, 733 \[203 P. 760\].](#)) Since at bench liability was based solely on Ebie's interference with LaFortune's asserted contractual right to territorial exclusivity, the basis for liability does not exist, and the judgment must be reversed.

[CA\(5\)](#)[] (5) Although the issue of the legality of the franchise contract was not raised by Ebie at trial, [HN3](#)[] the legality of a contract may always be examined -- even for the first time on appeal. ([Lewis & Queen v. N. M. Ball Sons, 48 Cal.2d 141, 147-148 \[308 P.2d 713\].](#)) As was said in [Morey v. Paladini, supra, 187 Cal. 727, 734](#): "When the court discovers a fact which indicates that the contract is illegal and ought not to be enforced, it will, on its own motion, instigate an inquiry in relation thereto." [CA\(1b\)](#)[] (1b) Yet when this happens and an issue of illegality has surfaced for the first [***5] time on appeal, questions critical to a fair determination of the rights of the litigants may remain unexplored. The United States Supreme Court has not declared that [HN4](#)[] all territorial limitations automatically violate the [*590] Sherman Antitrust Act. In [United States v. Topco Associates, Inc. \(1972\) 405 U.S. 596 \[31 L.Ed.2d 515, 92 S.Ct. 1126\]](#), the court differentiated between horizontal territorial limitations, which it declared to be automatic antitrust violations, and vertical territorial limitations, whose validity remains subject to a rule of reason. It is, of course, somewhat artificial to characterize a series of agreements among manufacturers and retailers, or among franchisors and franchisees, as either vertical or horizontal, since in almost every case the agreements, considered collectively, contain aspects of both horizontal and vertical agreement, in much the same fashion that a house consists of both beams and uprights. In most instances some evaluation must be made in order to determine whether the structure's dominant element resembles a townhouse more than it does a country bungalow or vice versa. In the present case it is fairly clear that the [***6] franchise contracts reflect vertical rather than horizontal combination in that the impetus for the division of territory (if in fact such a division was made) came from above and did not originate in agreement negotiated by or dominated by competitors. Consequently, the restraint of trade is susceptible to justification under the rule of reason. It is possible that relevant factual distinctions between the food service industry and the bicycle industry in *Schwinn* may justify exclusivity of territory for delivery of product. For example, speed of delivery, quality of product, and condition of product at time of [*76] delivery may be factors which under the rule of reason could justify restraints of trade that would be unreasonable in the marketing of a standardized manufactured appliance. (Cf. [Tripoli Company v. Wella Corporation \(3d Cir. 1970\) 425 F.2d 932, 936-937.](#)) These issues cannot be resolved on appeal, and opportunity to present and develop them can only be provided in a new trial. (See [White Motor Co. v. United States, 372 U.S. 253, 261-263 \[9 L.Ed.2d 738, 745-747, 83 S.Ct. 696\]; Corwin v. Los Angeles Newspaper Service Bureau, Inc., \[***7\] 4 Cal.3d 842, 855 \[94 Cal.Rptr. 785, 484 P.2d 953\].](#))

The judgment is reversed, and the cause is remanded for a new trial. Each party shall bear his own costs.



Greenberg v. Equitable Life Assur. Society

Court of Appeal of California, Second Appellate District, Division One

October 30, 1973

Civ. No. 41600

Reporter

34 Cal. App. 3d 994 *; 110 Cal. Rptr. 470 **; 1973 Cal. App. LEXIS 865 ***

DAVID GREENBERG, Plaintiff and Appellant, v. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant and Respondent

Subsequent History: [***1] A petition for a rehearing was denied November 23, 1973.

Prior History: Superior Court of Los Angeles County, No. C 16265, Charles S. Vogel, Judge.

Disposition: Having concluded that the trial court erred in denying appellant leave to amend his complaint, we reverse the judgment of dismissal.

Core Terms

demurrer, first amended complaint, cause of action, leave to amend, reasonable possibility, trial court, allegations, economic power, life insurance

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

HN1 [down arrow] Standards of Review, Abuse of Discretion

An order sustaining a demurrer without leave to amend ordinarily constitutes an abuse of discretion, if there is a reasonable possibility that the defect can be cured by amendment. Liberality in permitting amendment is the rule, not only where a complaint is defective as to form but also where it is deficient in substance, if a fair prior opportunity to correct the substantive defect has not been given.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN2 Consumer Protection, Deceptive & Unfair Trade Practices

See [Cal. Ins. Code § 790.03\(c\)](#).

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN3 Consumer Protection, Deceptive & Unfair Trade Practices

[Cal. Ins. Code § 790.03\(c\)](#) must be construed in light of similar statutes prohibiting activities in restraint of trade in business other than insurance. "Coercion" prohibited by subdivision (c) is coercion in the antitrust sense, conduct which constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN4 Price Fixing & Restraints of Trade, Tying Arrangements

The Cartwright Act which encompasses the general [antitrust law](#) of California is expressly superseded and contravened by the specific provisions of the California Insurance Code.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Real Property Law > ... > Contracts of Sale > Enforceability > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN5 Price Fixing & Restraints of Trade, Tying Arrangements

A tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Tying arrangements are illegal per se whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and when a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN6 Private Actions, Purchasers

See [Cal. Ins. Code § 790.09.](#)

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

HN7 [down] **Private Actions, Purchasers**

[Cal. Ins. Code § 790.09](#) contemplates a private suit to impose civil liability irrespective of governmental action against the insurer for violation of a provision of the California Insurance Code. The fair construction is that the person to whom the civil liability runs may enforce it by an appropriate action.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court dismissed a class action against an insurance company after sustaining a demurrer to the first amended complaint without leave to amend further. The pleading alleged that the insurance company promoted and offered home loans secured by deeds of trust, but only on condition that the borrower purchase a life insurance policy from the defendant and assign it as further security for the indebtedness. (Superior Court of Los Angeles County, No. C 16265, Charles S. Vogel, Judge.)

On plaintiff's appeal, the Court of Appeal reversed the judgment dismissing the complaint, concluding that the trial court abused its discretion in not permitting further amendment. The court held that liberality in permitting amendments to pleadings is the rule and that leave to amend should be granted if there is a reasonable possibility the defect can be cured. In the instant case, the court found the complaint to contain allegations suggesting a cause of action for restraint of trade prohibited by [Ins. Code, § 790.03](#), and declared a strong possibility existed that amendment, if permitted, would ripen the suggestion of liability under this code provision into a legally adequate complaint. (Opinion by Thompson, J., with Wood, P. J., and Lillie, J., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to McKinney's Digest

CA(1a) [down] (1a) **CA(1b)** [down] (1b)

Pleading § 168—Amendment and Withdrawal—Amendments as of Course.

--In an action against an insurance company, the trial court abused its discretion in not granting a right to amend the complaint where plaintiff was not afforded an opportunity to correct the defect, and where the pleading, in containing allegations suggesting a cause of action for restraint of trade prohibited by [Ins. Code, § 790.03](#), indicated a strong possibility that amendment would ripen the suggestion into the reality of a legally adequate complaint.

CA(2) [down] (2)

Pleading § 168—Amendments as of Course.

--Liberality in permitting amendment to a complaint is the rule, not only when a complaint is defective as to form but also when it is deficient in substance if a fair prior opportunity to correct the substantive defect has not been given;

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an order sustaining a demurrer without leave to amend constitutes an abuse of discretion if there is a reasonable possibility the defect can be cured by amendment.

CA(3) [] (3)

Insurance § 2—Insurance Corporations and Other Insurers—Statutory Provisions.

--*Ins. Code, § 790.03, subd. (c)*, must be construed in light of similar statutes prohibiting activities in restraint of trade in business other than insurance; the "coercion" prohibited by subsection (c) is coercion in the antitrust sense, conduct constituting the improper use of economic power to compel another to submit to the wishes of one who wields it.

CA(4) [] (4)

Appeal § 967—Scope and Extent of Review—Pleadings—Judgment on Demurrer.

--On appeal of a judgment sustaining a demurrer to a complaint, appellant was not asserting new facts and theories in a fashion precluding their consideration on appeal where he was demonstrating the reasonable possibility that amendment could cure a pleading to which a demurrer was sustained without leave to amend.

CA(5) [] (5)

Insurance § 236—Actions—Civil Liability for Violation of Insurance Code.

--*Ins. Code, § 790.09*, contemplates a private action to impose civil liability, irrespective of governmental action against the insurer, for violation of a provision of the code.

CA(6) [] (6)

Insurance § 236—Actions—Exhaustion of Administrative Remedies.

--A party bringing a civil action against an insurance company was not required to exhaust his administrative remedies before the Insurance Commissioner before filing the lawsuit where the sole disciplinary authority of the commissioner would be to issue a cease and desist order or to obtain an injunction to restrain the illegal conduct while the plaintiff sought damages, and in view of the fact that *Ins. Code, § 790.09*, provides specifically that the commissioner's action could not relieve or absolve the insurer from civil liability; the rule of exhaustion of administrative remedies does not preclude prosecution of a civil claim without resort to administrative procedure irrelevant to the claim.

Counsel: Toxey Hall Smith and George D. Donnahoe for Plaintiff and Appellant.

Newlin, Tackabury & Johnston, George W. Tackabury and Arthur W. Francis for Defendant and Respondent.

Judges: Opinion by Thompson, J., with Wood, P. J., and Lillie, J., concurring.

Opinion by: THOMPSON

Opinion

[*996] [**472] In this appeal from a judgment of dismissal entered after a demurrer to appellant's first amended complaint was sustained without leave to amend, we conclude that the trial court abused its discretion in not permitting further amendment. We therefore reverse the judgment.

Appellant, suing personally and on behalf of a class of persons similarly situated, filed the complaint which began the case at bench on November 12, 1971. The pleading alleges in substance that respondent insurance company promoted and offered home loans to appellant and other members of the class to be secured by deeds of trust, but only on [***2] condition that the borrower purchase a whole life, cash value life insurance policy from respondent of a face amount identical to the loan to be assigned as further security for the indebtedness. The pleading also states that the individual and class plaintiffs could have secured other forms of life insurance or whole life policies from other insurers at less cost than the policy respondent sold as a condition to the loans. Respondent demurred to the complaint on the ground that it was legally inadequate to state a class action, was barred by the statute of limitations, and failed to state a cause of action on behalf of either the named plaintiff or the class represented by him. The demurrer was overruled.

[*997] By stipulation with respondent, appellant filed a first amended complaint. That pleading is essentially the same as the original complaint but adds allegations seeking attorneys' fees. Respondent filed a demurrer to the amended pleading. The demurrer asserts failure of the first amended complaint to state a cause of action, misjoinder of parties, and uncertainty. The propriety of the class action allegations was attacked by respondent by a simultaneous motion [***3] to strike. Legal issue on the sufficiency of the complaint was joined by contentions in points and authorities -- those of appellant, plaintiff, asserting that the first amended complaint alleges facts constituting a cause of action pursuant to [Insurance Code section 770](#), and those of respondent, defendant, arguing that [section 770](#) is inapplicable to the facts as alleged in the attacked pleading. The trial court¹ concluded that no cause of action based [**473] upon [Insurance Code section 770](#) was alleged. It reasoned that the section, which precludes a lender in the business of financing real or personal property from requiring insurance "covering such property" to be negotiated through "a particular agent or broker," is inapplicable to the type of transaction alleged in the first amended complaint. Respondent's demurrer was sustained without leave to amend and the motion to strike was placed off calendar.

[***4] On this appeal from an ensuing order of dismissal, appellant concedes the validity of the trial court's action in sustaining the demurrer to the first amended complaint. He contends, however, that the trial court abused its discretion in not permitting amendment to the pleading and submits a proposed second amended complaint illustrating the manner in which amendment could be accomplished to state a legally sufficient cause of action.

The proposed amended pleading is founded upon a concept of dealing by respondent in the nature of "tie-in sales." It amplifies the provisions of the first amended complaint by allegations that respondent offered otherwise secured loans to home owners only on condition that the borrower purchase high cost cash value adjustable whole life insurance from respondent and that he borrow the entire amount available on any existing policies of life insurance issued to him by other insurers to assist in paying for insurance issued by respondent. The proposed pleading states also that respondent required a security arrangement which denied purchasers of whole life insurance in the alleged transactions the benefits of accumulating cash values on their policies [***5] and that the purchasers, including the named and class plaintiffs, were damaged by reason of the excessively high cost of the insurance sold to them by respondent.

[*998] [CA\(1a\)](#) (1a) Appellant has demonstrated error of the trial court in not granting him a right to amend. [CA\(2\)](#) (2) [HN1](#) An order sustaining a demurrer without leave to amend "ordinarily constitutes an abuse of discretion, if there is a reasonable possibility that the defect can be cured by amendment." (3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 844.) Liberality in permitting amendment is the rule, not only where a complaint is defective as to form but also where it is deficient in substance, if a fair prior opportunity to correct the substantive defect has not been given. (3 Witkin, Cal. Procedure (2d ed. 1971) Pleading, § 845; see also [Halsted v. County of Sacramento](#), 243 Cal.App.2d 584, 586 [52 Cal.Rptr. 637], "[The] denial of . . . permission [to amend] is now usually

¹ The judge who overruled the demurrer to the original complaint did not hear the demurrer to the first amended complaint.

found to be an abuse of discretion, except where the impossibility of amendment to state a cause of action is clear.") Here, for all practical purposes, appellant was not afforded an opportunity to correct the substantive defects in the pleading [***6] attacked on demurrer. While that document is denominated a first amended complaint, the original complaint was held not vulnerable to demurrer so that the superseding pleading was filed by stipulation. The demurrer, which was here sustained without leave to amend, was the first successful attack upon appellant's pleading. Thus, if a reasonable possibility of amendment to state a cause of action may be divined from the first amended complaint, the trial court's action in sustaining the demurrer to it without leave to amend must be overturned.

Exercising the compulsory hindsight required of reviewing courts by California's ultraliberal amendment of pleadings rule, we find the reasonable possibility here. While, as conceded by appellant, the first amended complaint fails to state a cause of action created by the provisions of Insurance Code section 770 for the forced selection of an insurance agent or broker, it does contain allegations which suggest a cause of action for restraint of trade prohibited by Insurance Code section 790.03. The pleading indicates also the strong possibility that amendment will ripen the suggestion into the reality of a legally adequate complaint.

HN2 [\[!\[\]\(e0630f795ad273db739bca7c6e19b14b_img.jpg\)\]](#) Insurance [\[***7\]](#) Code section 790.03 states in pertinent part: "The following [**474] are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance . . . (c) Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance."

CA(3) [\[!\[\]\(a3777edd6872b0114c9d47f90bc7aaed_img.jpg\)\]](#) (3) **HN3** [\[!\[\]\(28d40ce2bc75240f536fea824f1d7851_img.jpg\)\]](#) Section 790.03, subdivision (c), must be construed in light of similar [*999] statutes prohibiting activities in restraint of trade in business other than insurance.² "Coercion" prohibited by subdivision (c) is thus coercion in the antitrust sense, conduct which constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it. (Atlantic Rfg. Co. v. FTC, 381 U.S. 357, 368-369 [14 L.Ed.2d 443, 452-453, 85 S.Ct. 1498]; Simpson v. Union Oil Co., 377 U.S. 13, 17 [12 L.Ed.2d 98, 102, 84 S.Ct. 1051]; United States v. National Retail Lumber Dealers Ass'n (D.C.Colo.) 40 F.Supp. 448, 455.)

[***8] **CA(1b)** [\[!\[\]\(cbcb1e149d6b51c123efb4e754d5b416_img.jpg\)\]](#) (1b) Respondent's practice in dealing with its customers for home loans, as alleged in the first amended complaint, constitutes one form of the coercive use of economic power to create an unreasonable restraint of trade. The practice results in an illegal "tie-in" agreement.³ **HN5** [\[!\[\]\(05db47725c8acc62574f3cec43aca75e_img.jpg\)\]](#) "[A] tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product. . . . Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed.' . . . Tying arrangements are illegal per se 'whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product' . . . and when 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie. . . .' ("Corwin v. Los Angeles Newspaper Service Bureau, Inc., 4 Cal.3d 842, 856-857 [94 Cal.Rptr. 785, 484 P.2d 953].) "Even absent a showing of market dominance, the crucial economic power may be inferred from the tying products [***9] desirability to consumers or

² In Chicago Title Ins. Co. v. Great Western Financial Corp., 69 Cal.2d 305 [70 Cal.Rptr. 849, 444 P.2d 481], our Supreme Court, in dealing with a demurrer to a complaint alleging restraint of trade by an insurance company, stated that **HN4** [\[!\[\]\(094363e25bc2e74253e1f13633cfc2ef_img.jpg\)\]](#) the Cartwright Act which encompasses the general antitrust law of California is "expressly superseded and contravened by the specific provisions of the Insurance Code." (69 Cal.2d at p. 322.) After making that statement, the court recognized legal prohibitions against trade restraint by insurers when it analyzed the complaint in painstaking detail to determine whether the pleading alleged a cause of action in restraint of trade. While the opinion in Chicago Title Ins. does not cite section 790.03, subdivision (c), that provision is the only one other than the Cartwright Act imposing such a prohibition upon insurance companies.

³ Tie-in agreements are inherently coercive. Underlying the illegality of such agreements is the assumption that ". . . such arrangements coerce the buyer into taking a product he doesn't want . . ." (60 Nw.U.L.Rev. 626), and that ". . . buyers are forced to forego their free choice between competing products." (Northern Pac. R. Co. v. United States, 356 U.S. 1, 6 [2 L.Ed.2d 545, 550, 78 S.Ct. 514]).

from uniqueness in its attributes." (*Corwin v. Los Angeles Newspaper Service Bureau, Inc., supra, 4 Cal.3d at p. 858.*)

[*1000] The first amended complaint to which a demurrer was sustained without leave to amend alleges the factual basis of a tying arrangement, the requirement that a person seeking a home loan from respondent purchase a policy of whole life insurance from it. While that pleading is deficient in failing to allege that respondent possesses sufficient economic power to compel a conclusion that the tying arrangement is an illegal restraint of trade, [***10] it cannot be concluded that no reasonable possibility of such an allegation was present when the demurrer was sustained. Appellant's proposed [*475] amendment demonstrates the existence of such a possibility by stating, granted somewhat imperfectly, that respondent possesses "vast nationwide lending capabilities."

Thus we conclude that there existed a reasonable possibility that appellant's complaint could be amended to state a legally sufficient cause of action when the demurrer to it was sustained.

Respondent argues in opposition to that conclusion that: (1) appellant may not for the first time on appeal assert facts and theories not before the trial court; (2) enforcement of *Insurance Code section 790.03* is vested exclusively in the Insurance Commissioner so that a private litigant may not bring an action based upon a violation of the section; and (3) appellant failed to exhaust his administrative remedies before the Insurance Commissioner.

CA(4)[[↑]] (4) Appellant is not here asserting new facts and theories on appeal in a fashion which precludes our consideration of them. Rather he has demonstrated, as he is permitted to do, the reasonable possibility of amendment of a pleading to [***11] which a demurrer was sustained without leave to amend.⁴ Unquestionably, the trial judge was not given the benefit of the argument which appellant subsequently developed before us. The very nature of California's liberal rule of amendment of pleadings, however, dictates that it is the interest of the client of the inept pleader and not the reversal record of the trial judge that must be given first consideration.

While the Insurance Code in sections 790.04 through 790.08 provides for administrative enforcement of statutes governing insurance companies, including *section 790.03*, **HN6[[↑]] Insurance Code section 790.09** states in pertinent part: "No order [***12] to cease and desist issued under this article directed to any person or subsequent administrative or judicial proceeding to enforce the [*1001] same shall in any way relieve or absolve such person from any . . . civil liability . . . under the laws of this State arising out of the methods, acts or practices found unfair or deceptive." **CA(5)[[↑]] (5) HN7[[↑]] Section 790.09** thus contemplates a private suit to impose civil liability irrespective of governmental action against the insurer for violation of a provision of the Insurance Code. The fair construction is that the person to whom the civil liability runs may enforce it by an appropriate action.⁵

[***13] **CA(6)[[↑]] (6)** Similar reasoning dictates the conclusion that appellant was not required to exhaust his administrative remedy before the Insurance Commissioner before filing the lawsuit which is the case at bench. Respondent concedes that the sole disciplinary authority of the commissioner would be to issue a cease and desist order or obtain an injunction to restrain the illegal conduct. Appellant's complaint seeks damages, and *Insurance Code section 790.09* provides specifically that the commissioner's action cannot relieve or absolve the insurer from such a claim. No rule of exhaustion of administrative remedies precludes prosecution of a civil claim without resort to an administrative procedure which is irrelevant to the claim.⁶

⁴ Cf. *Levinson v. Bank of America*, 126 Cal.App.2d 122 [271 P.2d 632]. Appellant's situation is different from the case where a plaintiff declines an opportunity to amend a complaint to which a demurrer is sustained with leave to amend. In that case, he is bound by the allegations of his complaint unaided by the possibility of correction by future amendment.

⁵ Any other construction would overturn by implication the rule of *Crisci v. Security Ins. Co.*, 66 Cal.2d 425 [58 Cal.Rptr. 13, 426 P.2d 173]. *Insurance Code section 790.03* was amended after the trial of the case at bench to add subdivision (h)(5) which defines as an unfair trade practice by an insurer the refusal to exercise good faith to effectuate settlements of claims.

⁶ At most, the potential administrative remedy before the Insurance Commissioner bears upon the propriety of the class action aspect of appellant's cause. That issue is not before us.

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Having concluded that the trial court erred in denying appellant leave to amend his complaint, we reverse [***14] the judgment of dismissal.

End of Document



Dayton Time Lock Service, Inc. v. Silent Watchman Corp.

Court of Appeal of California, Second Appellate District, Division Two

October 8, 1975

Civ. Nos. 45438, 45929

Reporter

52 Cal. App. 3d 1 *; 124 Cal. Rptr. 678 **; 1975 Cal. App. LEXIS 1428 ***; 1975-2 Trade Cas. (CCH) P60,625

DAYTON TIME LOCK SERVICE, INC., Plaintiff and Appellant, v. THE SILENT WATCHMAN CORPORATION, Defendant and Respondent

Subsequent History: [***1] A petition for a rehearing was denied October 29, 1975, and respondent's petition for a hearing by the Supreme Court was denied December 4, 1975. Mosk, J., was of the opinion that the petition should be granted.

Prior History: Superior Court of Los Angeles County, No. C49089, James D. Tante, Judge.

Disposition: The order for undertaking on appeal is affirmed. The judgment is affirmed on the third, fourth, and fifth causes of action. The judgment is reversed on the first and second causes of action. Findings of fact numbered 2, 8, 10 to 17, and 23, conclusions of law numbered 1, 7, 8, 10, and 11, and paragraphs 6 and 8 of the judgment are vacated. The cause is remanded to the trial court for entry of new findings and further proceedings in accordance with this opinion. Each party will bear its own costs on appeal.

Core Terms

locks, motors, customers, franchise, trial court, territory, lease, franchise agreement, electric clock, parties, damages, recording, contends, replace, anti-competitive, limitations

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN1[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Exclusive-dealing contracts are not necessarily invalid. They may provide an incentive for the marketing of new products and a guarantee of quality-control distribution. They are proscribed when it is probable that performance of the contract will foreclose competition in a substantial share of the affected line of commerce. A determination of illegality requires knowledge and analysis of the line of commerce, the market area, and the affected share of the relevant market.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN2 [Download] Types of Contracts, Covenants

In every contract the law implies a covenant of fair dealing by each party and a duty to do nothing to destroy the right of the other party to enjoy the fruits of the contract.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The franchisee of a recording time lock system service brought an action for declaratory and injunctive relief, and damages against the franchisor of the system. Under the franchise agreement, plaintiff was authorized to lease the system to local customers in certain western states, while defendant retained the right to lease to national customers in that territory. The agreement provided that any improvements made by defendant applicable to locks previously furnished to plaintiff would be furnished to it. Thereafter, defendant developed a new electronic clock and began to lease it in plaintiff's franchise territory. The trial court concluded that under the agreement plaintiff was not entitled to lease the new time lock device within the stated franchise territory; that defendant could compete for any customer that became a national account but could not lease the old device to local customers within the franchise territory; that an anti-competition clause prohibiting plaintiff from selling or leasing time lock device in competition with defendant was valid, and entered judgment accordingly. (Superior Court of Los Angeles County, No. C49089, James D. Tante, Judge.)

The Court of Appeal affirmed in part, reversed in part, and remanded. The court upheld the exclusive dealing provisions of the contract, holding that such contracts are not necessarily invalid, and that plaintiff failed to develop material evidence necessary for a determination of illegality, despite ample opportunity to do so at trial. The court also held that the fact defendant allowed plaintiff to service some customers outside its franchise territory did not negate defendant's right to enforce the written prohibition of the agreement against such extra-territorial service. The court further held, however, that the new time lock device developed by defendant was an improvement on the old device within the sense of the franchise agreement, and defendant was obligated to furnish it to plaintiff for a mutually acceptable price as provided by the agreement, also holding that if the parties could not agree between themselves, then the trial court could make the determination for them on remand. (Opinion by Fleming, J., with Roth, P. J., and Compton, J., concurring.)

Headnotes

CA(1) [Download] (1)

Monopolies and Restraints of Trade § 3—Agreements and Combinations—Exclusive Dealing.

--Exclusive-dealing contracts are not necessarily invalid, as they may provide an incentive for the marketing of new products and a guaranty of quality control distribution. They are proscribed when it is probable that performance of the contract will foreclose competition in a substantial share of the affected line of commerce, and a determination of illegality requires knowledge and analysis of the line of commerce, the market area, and the affected share of the relevant market. Accordingly, in an action relating to a franchise agreement, a franchisee of a time lock system did not establish that a provision of the franchise agreement prohibiting the franchisee from selling or leasing any time lock devices in competition with the business of the franchisor was invalid as a matter of law, where the franchisee did not develop material evidence on the issues of the line of commerce, the market area, or the affected share of the relevant market, despite ample opportunity to do so.

CA(2) [] (2)**Franchise, Distribution, and Dealership Contracts § 3—Construction and Effect—Territorial Limitation.**

--Under a franchise agreement for the lease and service of time lock systems, which authorized the franchisee to service local accounts only within the stated franchise territory, the fact that the franchisor allowed plaintiff to service some customers outside the franchise territory did not negate its right to enforce the written prohibition against extraterritorial service.

CA(3) [] (3)**Franchise, Distribution, and Dealership Contracts § 3—Construction and Effect.**

--Under a franchise agreement for the lease and service of time lock systems, which provided that if the franchisor developed or obtained any improvements applicable to locks previously furnished to the franchisee, it would furnish such improvements to the franchisee at a mutually acceptable price, a new electronic lock developed by the franchisor as a substitute for the old lock was a competitive device and was therefore an improvement within the sense of the franchise agreement. While the original franchise agreement did not foresee the development of an entirely new device, it did clearly visualize and provide for improvements in the existing device, and the fact that improvements were such as to wholly replace the device they were intended to make better did not make them any the less improvements within the meaning of the contract.

CA(4) [] (4)**Franchise, Distribution, and Dealership Contracts § 3—Construction and Effect.**

--In an action by a franchisee of time lock devices against its franchisor who was required under the agreement to provide the franchisee with workable locks, the franchisee failed to establish it was entitled to restitution for the cost of 2,000 clock motors purchased by it where the franchisee failed to prove that the additional motors were needed, and thus failed to prove that the franchisor was enriched by the purchase of the motors.

CA(5) [] (5)**Franchise, Distribution, and Dealership Contracts § 3—Construction and Effect.**

--Under a franchise agreement for the lease and service of time lock devices, in which the franchisee was given exclusive right to lease and service the devices within the franchise territory to local customers, the franchisor did not convert one of the franchisee's local customers within the territory, where a national company had purchased the local customer so that it became a chain organization with which the franchisor could do business as a national customer under the franchise agreement. Neither was the franchisee entitled to damages for the franchisor's installation of a lock on a local nonchain account, where principals in the franchisee's organization owned the account and solicited the franchisor's service as a test to see whether it would service a customer reserved for the franchisee under the agreement. Under these circumstances, the damage was self-induced and the franchisee was not entitled to recover for it.

CA(6) [] (6)**Appellate Review § 107—Briefs—Form and Requisites—Pointing out Errors—Evidence.**

--A party on appeal failed in its duty to support its claims of error in evidentiary rulings with argument and citation of legal authority, where it merely listed page and line citations for these rulings.

Counsel: Benjamin J. Goodman and Sanford M. Ehrmann for Plaintiff and Appellant.

Iverson, Yoakum, Papiano & Hatch, Neil Papiano and Donald M. Robbins for Defendant and Respondent.

Judges: Opinion by Fleming, J., with Roth, P. J., and Compton, J., concurring.

Opinion by: FLEMING

Opinion

[*4] [**680] This is an action for declaratory relief, injunctive relief, and damages arising out [***2] of a series of disputes between plaintiff Dayton Time Lock Service, Inc., and defendant The Silent Watchman Corporation,¹ franchisee and franchisor, respectively, for a recording time lock system service. The trial court's findings favored defendant. Plaintiff appeals the judgment and the order requiring plaintiff to post an undertaking to stay the judgment pending appeal.

A recording time lock system replaces an ordinary door lock. The system, either mechanical or electro-mechanical, records on tape the time when the lock is opened and closed. Sophisticated models indicate which key is used to operate the lock. A recording time lock system service, such as the one operated by plaintiff, leases the system to its customers, installs and maintains the equipment, and provides a periodic written report of the data [***3] recorded by the lock.

Defendant manufactures the Dayton Time Lock and directly operates 11 time lock system services located in various parts of the country. Plaintiff is its only franchise holder. In 1960 plaintiff and defendant entered a 10-year exclusive franchise agreement, with renewal options, [*5] effective retroactively to the start of their dealings in 1958, under which plaintiff was authorized to lease the Dayton Time Lock system to local customers in California, Oregon, and Washington, including branch offices of local customers in Arizona and Nevada. Plaintiff agreed not to compete with defendant during the franchise period and for 10 years thereafter. Defendant retained the right to lease to national customers in the territory. Defendant agreed to lease 1,794 Dayton Time Locks to plaintiff for a monthly charge. Plaintiff agreed to maintain the locks but could return them to defendant for major repairs or replacement. The agreement provided: "If [defendant] shall develop or obtain any improvements applicable to locks previously furnished to [plaintiff], it will, at the request of [plaintiff], furnish [**681] such improvements by furnishing suitable [***4] parts to [plaintiff] to be attached to such locks, provided that [defendant] and [plaintiff] can agree as to the amounts to be charged . . . for such parts"

In the early years of the agreement defendant manufacturer had difficulty keeping up a supply of 1,794 locks because the mechanical clocks in the locks were aging and replacements were no longer available. Defendant began a search for a new clock and for a new design for its lock system. In the mid-1960's defendant developed a prototype of a new electronic lock that subsequently became known as the Controlock, and it furnished models of this lock to plaintiff. In this same period plaintiff expanded its service to customers in states outside its franchise territory.

In 1968 plaintiff exercised its option to renew its franchise, and under the renewal the number of locks to be leased increased to 2,320. Thereafter plaintiff obtained from defendant 500 electric clock motors to replace failing mechanical clock motors in the Dayton Time Locks. Plaintiff, after discussions with defendant, also purchased 2,000 additional electric clock motors in Japan. About this time defendant began to lease the Controlock in

¹ The Silent Watchman Corporation is successor in interest to or has used the name of The Recording Devices Company, Lock-Tronic Corporation, Controlock Corporation and Dayton Time Lock Company.

plaintiff's [***5] franchise territory. By 1972 disputes on three basic issues brought the parties to court: (1) rights of the parties to service accounts within and without the franchise territory; (2) rights of the parties to lease the Controlock in the franchise territory; (3) responsibility for payment for the 2,000 electric clock motors.

After hearing the testimony of the principal parties and reviewing 15 years of correspondence between them, the trial court reached these conclusions: under the agreement and its extension plaintiff is entitled to lease and service the Dayton Time Lock but not the Controlock within [*6] the stated franchise territory; defendant may compete for any customer that becomes a national account but may not lease the Controlock to local customers within the franchise territory; the anti-competition clauses do not violate the antitrust laws; defendant has no duty to pay for the 2,000 electric clock motors purchased by plaintiff.

Issues raised by plaintiff on appeal fall under six headings: (1) competitive limitations; (2) right to lease the Controlock; (3) compensation for electric clock motors; (4) damages for breach of contract; (5) undertaking on appeal; and (6) [***6] evidentiary rulings.

1. *Competitive Limitations.* Plaintiff contends the anti-competitive provisions of the agreement violate state and federal antitrust laws. Plaintiff also argues the evidence failed to justify the territorial and customer contractual limitations placed on plaintiff's business.² [***7] Defendant concedes the post-franchise anti-competitive provision of the agreement violates antitrust laws (*Bus. & Prof. Code, § 16600*) and plaintiff may retain extraterritorial customers now being serviced, but it contends the anti-competitive clause remains in effect during the life of the franchise³ and [**682] the territorial limitations imposed on plaintiff's business are valid. On these points, we agree with defendant.

CA(1) [↑] (1) **HN1** [↑] Exclusive-dealing contracts are not necessarily invalid. They may provide an incentive for the marketing of new products and a guarantee of quality-control distribution. They are proscribed when it is probable that performance of the contract will foreclose competition in a substantial share of the affected line of commerce. ([Standard Oil Co. v. United States, 337 U.S. 293, 314 \[93 L.Ed. 1371, 1386, 69 S.Ct. 1051\]](#).) A [*7] determination of illegality requires knowledge and analysis of the line of commerce, the market area, and the affected share of the relevant market. [***8] ([Tampa Electric Co. v. Nashville Co., 365 U.S. 320, 327-328 \[5 L.Ed.2d 580, 586-587, 81 S.Ct. 623\]](#).) Plaintiff did not develop material evidence on these issues despite ample opportunity to do so at trial. Therefore it cannot be said that the challenged provision is invalid as a matter of law. Plaintiff is entitled only to a finding that the anti-competitive provision does not apply to 38 Dayton Time Locks already owned by plaintiff at the time of the original agreement and expressly excluded from its coverage.

CA(2) [↑] (2) The evidence amply supports the trial court's findings on territorial limitations. The findings follow the express language of the agreement, which authorizes plaintiff to service local accounts only within the stated franchise territory. Defendant allowed plaintiff to service some customers outside the franchise territory, but that fact

²The trial court found:

"4. The Original Agreement expressly withheld the exclusive right to lease and service Dayton Time Locks to chain organizations from plaintiff.

"5. A chain organization as defined by the Original Agreement is any organization having a place of business in any of the states of California, Oregon or Washington and in one or more states in addition thereto.

"6. Plaintiff may lease and service Dayton Time Locks in the states of Arizona and Nevada to chain organizations on a non-exclusive basis which have places of business in California, Oregon or Washington and branch business locations in the states of Arizona and/or Nevada.

"7. Plaintiff has been granted no right to lease and service Dayton Time Locks in states other than California, Oregon, Washington, Nevada and Arizona."

³Paragraph 15 of the agreement provides: "[Plaintiff] agrees that, during the life of this contract, and any renewal or extension thereof, except as herein provided, it will not sell or lease any locks, devices or service of any kind in competition with the business of [defendant], or use any time recording lock not supplied by [defendant] under this agreement. It is specifically understood that the above limitation excludes the present business of [plaintiff] in alarm exit locks and/or sequel locks."

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did not negate defendant's right to enforce the written prohibition against extraterritorial service. Plaintiff did not establish its claim of contractual alteration or its claim of detrimental reliance on defendant's failure to assert its contractual rights. (See [Panno v. Russo, 82 Cal.App.2d 408, 412 \[186 P.2d 452\]](#); [\[***9\] Bailey v. Breetwor, 206 Cal.App.2d 287, 291 \[23 Cal.Rptr. 740\].](#))

CA(3) [↑] (3) 2. The Controlock. The trial court found that plaintiff had no right to lease the Controlock from defendant pursuant to the franchise agreement.⁴ Yet the court also found that defendant "cannot compete with plaintiff by leasing the device known [\[**683\]](#) as the Controlock to non-chain organizations in the states of California, Oregon, and Washington."

[*10] [*8]** Plaintiff claims that under the franchise agreement it is entitled to the Controlock as a substitute for the Dayton Time Lock. We agree. The trial court's findings are irreconcilable. Either the Controlock is a competitive device with the Dayton Time Lock or is not; it can hardly be both. Since the evidence points unerringly to the fact that the Controlock is a competitive device, we conclude it is an improvement on the Dayton Time Lock within the sense of the franchise agreement. We agree that the original franchise agreement did not foresee the development of an entirely new device to replace the Dayton Time Lock, but nevertheless the agreement clearly visualized and made provision for improvements in the existing device. The fact that improvements later took on such a grand scale as to wholly replace the device they were intended to better did not make them any the less improvements within the meaning of the contract. Defendant has conceded the availability of the Controlock as a substitute for the Dayton Time Lock. Defendant could not evade its responsibilities and frustrate the commercial purpose of the franchise agreement by merely changing the design and name [\[***11\]](#) of its principal product. [HN2\[↑\]](#) In every contract the law implies a covenant of fair dealing by each party and a duty to do nothing to destroy the right of the other party to enjoy the fruits of the contract. ([McWilliams v. Holton, 248 Cal.App.2d 447, 451 \[56 Cal.Rptr. 574\]](#); [Brogdex Co. v. Walcott, 123 Cal.App.2d 575, 581 \[267 P.2d 28\].](#))

The agreement requires the parties to settle on a mutually acceptable price for an improvement. If the parties cannot agree between themselves, then on remand the trial court may make the determination for them. ([Cal. Lettuce Growers v. Union Sugar Co., 45 Cal.2d 474, 482 \[289 P.2d 785, 49 A.L.R.2d 496\].](#)) A reasonable price for

⁴ "2. The Original Agreement, and every provision contained therein, is clear and unambiguous.

"3. Under the terms of the Original Agreement defendant granted plaintiff the exclusive right to lease from defendant and thereafter to service a door lock, manufactured by defendant known as 'Dayton Time Lock' in the states of California, Oregon, and Washington.

"....

"10. The Amendatory Agreement, and every provision contained therein, is clear and unambiguous.

"11. The Amendatory Agreement did not grant plaintiff the right to lease the device known as the 'Controlock' from defendant.

"12. The Controlock is not within the meaning of the term 'improvement' as said term is used in paragraph 7 of the Original Agreement.

"13. Plaintiff and defendant never contemplated nor intended that the Controlock would be included within or be the subject of any of the provisions of either the Original or Amendatory Agreements.

"14. Defendant never agreed, orally or in writing, to supply plaintiff with the device known as the Controlock on any basis other than an experimental or test basis.

"15. Plaintiff and defendant never agreed to a price to be charged if the Controlock were ever supplied to plaintiff by defendant on any basis other than an experimental or test basis.

"16. Any Controlocks supplied to plaintiff by defendant were for testing purposes only and were not supplied under the Original Agreement or the Amendatory Agreement.

"17. Neither defendant nor plaintiff by either act or conduct, interpreted or construed the provisions of the Original Agreement or the Amendatory Agreement to include the Controlock."

the improvement may be objectively determined from defendant's costs of development and the price it charges its own customers for use of the Controlock.

3. *The Electric Clock Motors.* The trial court found that defendant did not agree to pay, and had no legal obligation to pay, the \$ 20,000 cost for the 2,000 electric clock motors purchased by plaintiff in Japan.⁵ Plaintiff [*9] contends these findings are erroneous. In our view substantial evidence supports the trial court's finding [***12] on this issue.

The parties corresponded at length on the subject of payment for the motors, but this correspondence amounted to no more than negotiation. At one point defendant offered to pay for the motors over an extended period of time in return for future rights in a new encoder-decoder device for time recording locks which plaintiff was developing, but this offer was rejected by plaintiff. The parties never reached any agreement in writing on payment for the motors.

Plaintiff produced evidence to show that Paul Oppenheimer, a representative of defendant, orally agreed to reimburse plaintiff [***13] for the purchase of the 2,000 motors. But Oppenheimer explicitly denied he ever made such an agreement, or had even talked to plaintiff's representative on the occasion the agreement was supposedly made. Resolution of this evidentiary conflict was a matter for the trial court. ([Texaco, Inc. v. Petroleum Specialists](#) [**684] [Corp., 35 Cal.App.3d 427, 436 \[110 Cal.Rptr. 641\].](#))

The evidence also defeats plaintiff's claim that an implied contract to pay for the motors arose or that plaintiff acted in reasonable reliance on defendant's promise to pay for them. The trial court could reasonably conclude, as it did, that defendant made no promise to pay, express or implied.

[CA\(4\)\[↑\]](#) (4) In the alternative, plaintiff contends it is entitled to restitution for the cost of the 2,000 motors because defendant was unjustly enriched by plaintiff's fulfillment of defendant's contractual duty to provide workable clocks for the Dayton Time Lock. This contention is not supported by evidence, because plaintiff failed to prove that 2,000 additional motors were needed. Defendant had already supplied 500 electric clock motors for the 2,320 locks it was required to make available under the franchise [***14] agreement. Although plaintiff offered some evidence that defendant failed to maintain 2,320 working locks at all times, plaintiff never established the number of locks within this figure that were not working. Under the franchise defendant could be held responsible only for unworkable locks within the 2,320 figure. The trial court could not order restitution for an unproved benefit. ([French v. Robbins, 172 Cal. 670, 679 \[158 P. 188\].](#))

[*10] 4. *Damages.* Plaintiff contends the trial court should have awarded damages for defendant's breach of the franchise agreement.

[CA\(5\)\[↑\]](#) (5) First, plaintiff asserts that defendant converted one of plaintiff's customers, Discount Stores. Plaintiff had serviced Stores until August 1973, when defendant convinced Stores to use Controlock. Substantial evidence, however, indicated that CBS, Inc., a national company, purchased Stores in 1968, at which time Stores became a chain organization with which defendant could do business under the franchise agreement. (See findings 4 and 5, fn. 2, *ante*.) Moreover, plaintiff delayed until the end of trial the amendment to its complaint which sought damages for conversion of its customers, and [***15] we cannot say the trial court abused its discretion in refusing this untimely amendment. ([Roberts v. Karr, 178 Cal.App.2d 535, 547 \[3 Cal.Rptr. 98\].](#))

Second, plaintiff claims damages for defendant's installation of a Controlock on a local nonchain account, Westpark Apartments in Westminster, California. But the evidence showed that principals in plaintiff's organization owned Westpark Apartments and solicited defendant's service as a test to see whether defendant would service a

⁵ The court concluded:

"12. Plaintiff and defendant did not agree, either orally or in writing, that defendants, or any of them, would repay in any manner for plaintiff's expenditure of any sum for the purchase of electric clock units manufactured in Japan."

"13. Plaintiff is not entitled to recover any damages from defendant to repay plaintiff for the purchase by plaintiff of 2000 clocks manufactured in Japan."

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customer reserved for plaintiff under the franchise agreement. Plaintiff is not entitled to recover self-induced damages it could have avoided. ([Valencia v. Shell Oil Co., 23 Cal.2d 840, 844 \[147 P.2d 558\].](#))

Third, plaintiff seeks damages for defendant's failure to maintain the required number of workable locks under the franchise agreement. But, as pointed out, plaintiff did not present proof of such damages at trial.

5. *Undertaking on Appeal.* Plaintiff contends the trial court erred in requiring it to post a \$ 10,000 undertaking to stay judgment pending appeal. Plaintiff argues it did not seek a stay. [Code of Civil Procedure section 917.9](#) gives the trial court discretion [***16] to require an undertaking as a condition for stay. If plaintiff did not want a stay, it did not have to post the undertaking.

[CA\(6\)\[↑\]](#) (6) 6. Evidentiary Rulings. Plaintiff's last contention is that the trial court erred in 20 evidentiary rulings, which precluded plaintiff from a fair presentation of its case. But in merely listing page and line citations for these rulings, plaintiff failed in its duty to support its claims of error with argument and citation of legal authority. ([Estate of Randall, 194 Cal. 725, 728 \[230 P. 445\].](#)) Nor has plaintiff suggested how the claimed errors, even if established, brought about a miscarriage of [**685] justice. ([Cal. Const., art. VI, § 13.](#)) We reject this contention summarily.

[*11] The order for undertaking on appeal is affirmed. The judgment is affirmed on the third, fourth, and fifth causes of action. The judgment is reversed on the first and second causes of action. Findings of fact numbered 2, 8, 10 to 17, and 23, conclusions of law numbered 1, 7, 8, 10, and 11, and paragraphs 6 and 8 of the judgment are vacated. The cause is remanded to the trial court for entry of new findings and further proceedings in accordance with [***17] this opinion. Each party will bear its own costs on appeal.

End of Document



Sixer v. Philip Morris, Inc.

Court of Appeal of California, Fourth Appellate District, Division Two

December 23, 1975

Civ. No. 15246

Reporter

54 Cal. App. 3d 7 *; 126 Cal. Rptr. 327 **; 1975 Cal. App. LEXIS 1640 ***

ALTON H. SAXER, Plaintiff and Appellant. PHILIP MORRIS, INCORPORATED, et al., Defendants and Respondents

Subsequent History: [***1] A Petition for a Rehearing was Denied January 13, 1976. Respondents' Petition for a Hearing by the Supreme Court was Denied March 3, 1976. Clark, J., was of the Opinion that the Petition should be Granted.

Prior History: Superior Court of Orange County, No. 202141, Mark A. Soden, Judge.

Disposition: The judgment of dismissal is reversed.

Core Terms

Escrow, floor covering, upgraded, allegations, restraint of trade, combinations, cause of action, carpeting, new home, buyers, close of escrow, purchasers, firms, installed, tying arrangement, conspiracy, homebuyers, antitrust, purposes, lender, discount, loans, escrow agent, practices, percent, pleaded, stock, amended complaint, Cartwright Act, competitors

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Demurrsers

Civil Procedure > ... > Defenses, Demurrsers & Objections > Motions to Dismiss > Failure to State Claim

HN1 [] **Defenses, Demurrsers & Objections, Demurrsers**

The sole issue involved in a hearing on a demurrer is whether the complaint, as it stands, unconnected with extraneous material, states a cause of action.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Demurrsers

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > General Overview

HN2 [] **Defenses, Demurrsers & Objections, Demurrsers**

In testing the legal sufficiency of a pleading against a general demurrer, all properly pleaded allegations, including those that arise by reasonable inference, are deemed admitted regardless of the possible difficulty of proof at trial. The allegations must be liberally construed with a view toward substantial justice between the parties.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview](#)

[Antitrust & Trade Law > Public Enforcement > State Civil Actions](#)

HN3 **Antitrust & Trade Law, Sherman Act**

The Cartwright Act, [Cal. Bus. & Prof. Code § 16700 et seq.](#), is patterned upon the federal Sherman Anti-Trust Act and both derive their basic provisions from the common law policy against restraint of trade; thus cases decided under the latter act are applicable as an aid to decision in interpreting the former. While the Cartwright Act is couched in terms of prohibited conduct with criminal sanctions and the attorney general is charged with its public enforcement private enforcement is also authorized and encouraged.

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview](#)

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements](#)

[Antitrust & Trade Law > Public Enforcement > State Civil Actions](#)

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview](#)

HN4 **Monopolies & Monopolization, Conspiracy to Monopolize**

A combination does not give rise to a cause of action unless a civil wrong has been committed which results in damage. Where a complaint charges conspiratorial conduct and the commission of a wrongful act, the significance of the conspiracy charge is to implicate each member participating in the common plan and thus place liability on the entity that acquiesced in the plan to commit the wrong as well as on the entity that actually perpetrated it. The conspiracy can be inferred from the nature of the acts done, the relationship of the alleged conspirators, the interests of the parties, and the individual circumstances surrounding each case.

[Antitrust & Trade Law > Public Enforcement > State Civil Actions](#)

[Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview](#)

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements](#)

[Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview](#)

HN5 **Public Enforcement, State Civil Actions**

In order to maintain a cause of action for a combination in restraint of trade, the complaint must allege: (1) the formation and operation of the conspiracy; (2) the illegal acts done pursuant thereto; and (3) the damage caused by such acts. General allegations of a conspiracy are sufficient if the unlawful acts are pleaded with particularity. However, multifarious facts illustrative of nefarious agreements need not be alleged if the pleadings, liberally

construed, are capable of an interpretation exhibiting the existence of facts constituting the combination, its object, and achievement in restraint of trade.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN6 **Monopolies & Monopolization, Conspiracy to Monopolize**

While allegations of the purposes of the conspiracy must normally be specific, inferences as to purpose may be drawn where the effect of the combination is apparent from the face of the complaint.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7 **Monopolies & Monopolization, Conspiracy to Monopolize**

Facts must be alleged indicating the creation or accomplishment of restrictions on trade.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8 **Private Actions, Remedies**

The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9 **Regulated Practices, Price Fixing & Restraints of Trade**

In deciding whether the restrictions are reasonable, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts. The court should consider the percentage of business controlled, the strength of the remaining competition and whether the action springs from business requirements or purpose to monopolize. .

Antitrust & Trade Law > Sherman Act > General Overview

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Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN10 [blue icon] Antitrust & Trade Law, Sherman Act

While both § 1 of the Sherman Act and [§§ 16720](#) and [16726](#) of the Cartwright Act purport to prohibit all restraints on trade, each has been interpreted to permit restraints found to be reasonable.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN11 [blue icon] Price Fixing & Restraints of Trade, Tying Arrangements

For the court's purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different or tied product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed tying agreements serve hardly any purpose beyond the suppression of competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN12 [blue icon] Price Fixing & Restraints of Trade, Tying Arrangements

Tying agreements fare harshly under the laws forbidding restraints of trade. Tying arrangements are illegal per se whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and when a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN13 [blue icon] Price Fixing & Restraints of Trade, Tying Arrangements

Although coercion is an element which must be pleaded and proved in all tying arrangements, it is slowly being eroded in favor of a somewhat less stringent test that examines the utilization of economic power in bringing about the alleged injury.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN14 [blue icon] Private Actions, Standing

In order to have standing to maintain an action for violation of the antitrust laws the plaintiff must be within the target area of the alleged violation the area which it could reasonably be foreseen would be affected by the antitrust violation.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN15 [] **Public Enforcement, State Civil Actions**

The Cartwright Act, [Cal. Bus. & Prof. Code § 16720 et seq.](#), is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A purchaser of a home in a large development brought a class action to recover damages under the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), against the corporation selling the homes, which also sold and installed carpeting, and against corporations owned by it that provided financing and escrow services. The corporation that owned and controlled the corporation selling the home was also named as a defendant. One cause of action alleged that the seller and the escrow corporation combined for the purpose of preventing competition and restricting trade in the sale of escrow services, and for the further purpose of establishing the price of such services in excess of those charged by other firms in the surrounding area. A second cause of action alleged that the seller and the lending corporation combined for the purpose of preventing competition and restricting trade in the making of F.H.A. and V.A. loans. It also alleged that another purpose of the combination was to increase the price of new homes inasmuch as the seller was charged an excessive amount of loan discounts by the lender. A third count contained similar averments as to restrictions of trade and excessive prices for upgraded floor coverings, which a purchaser was given credit for, provided he purchased it from the decorating center which was a separate operating division of the seller. Following the filing of a fourth amended complaint by plaintiff, demurrers were sustained without leave to amend, and the trial court entered a judgment of dismissal. (Superior Court of Orange County, No. 202141, Mark A. Soden, Judge.)

The Court of Appeal reversed. The court held that in order to maintain a cause of action for a combination in restraint of trade, a complaint must allege the formation and the operation of the conspiracy, the illegal acts done pursuant thereto, and the damage caused by such acts, and held that plaintiff's allegation exceeded those requirements. The court held that it could not say, as a matter of law, that the restraints alleged were not unreasonable, and that it was a question of fact to be determined at trial. The court also held that the fact that plaintiff and the class were purchasers of homes, and not competitors of defendants, presented no obstacle to recovery, since the Cartwright Act does not confine its protection to any particular class, but protect all who are made victims of the forbidden practices. The court further held that sufficient facts were alleged to establish the participation of the parent corporation in the allegedly unlawful combinations, since it owned all of the stock of the selling company, which in turn owned all the stock of the escrow corporation and the lending corporation, and that the parent corporation was aware of the seller's plans and operations, supported them, and that any change in such plans could be effected only by action of the parent's board. (Opinion by The Court.)

Headnotes

CA(1) [] (1)

Pleading § 29—Demurrer to Complaint—Hearing and Determination.

--The sole issue involved in a hearing on a demurrer is whether the complaint, as it stands, unconnected with extraneous material, states a cause of action. In testing the legal sufficiency of a pleading against a general demurrer, all properly pleaded allegations, including those that arise by reasonable inference, are deemed admitted

regardless of the possible difficulty of proof at trial. The allegations must be liberally construed with a view toward substantial justice between the parties.

CA(2) [2]

Parties § 6—Suing on Behalf of Class.

--A plaintiff in a class action may act both as class representative and as one of the attorneys for the class.

CA(3) [3]

Monopolies and Restraints of Trade § 1—Under Cartwright Act.

--The Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) is patterned upon the federal Sherman Anti-Trust Act and both derive their basic provisions from the common law policy against restraint of trade; thus, cases decided under the Sherman Act are applicable as an aid to decision in interpreting the Cartwright Act.

CA(4) [4]

Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals.

--While the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) is couched in terms of prohibited conduct with criminal sanctions, and the Attorney General is charged with its public enforcement, private enforcement is also authorized and encouraged.

CA(5) [5]

Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations.

--A combination as defined by the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) does not give rise to a cause of action unless a civil wrong has been committed which results in damage. Where a complaint charges conspiratorial conduct and the commission of a wrongful act, the significance of the conspiracy charge is to implicate each member participating in the common plan and thus place liability on the entity that acquiesced in the plan to commit the wrong, as well as on the entity that actually perpetrated it. The conspiracy can be inferred from the nature of the acts done, the relationship of the alleged conspirators, the interests of the parties, and the individual circumstances surrounding each case.

CA(6) [6]

Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals—Pleading.

--In order to maintain a cause of action for a combination in restraint of trade, the complaint must allege: The formation and operation of the conspiracy; the illegal acts done pursuant thereto; and the damage caused by such acts. General allegations of a conspiracy are sufficient if the unlawful acts are pleaded with particularity. However, multifarious facts illustrative of nefarious agreements need not be alleged if the pleadings, liberally construed, are capable of an interpretation exhibiting the existence of facts constituting the combination, its object, and achievement in restraint of trade.

CA(7a)[] (7a) CA(7b)[] (7b) CA(7c)[] (7c)**Monopolies and Restraints of Trade § 8—Under Cartwright Act—Offenses.**

--In a class action to recover damages under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) brought by a purchaser of a new home in a residential development, on behalf of himself and other homeowners, against the company selling the homes, a lending corporation and escrow corporation owned and controlled by the company, a decorating center selling and installing carpeting that was an operating division of the company, and against the corporation that owned and controlled the company, plaintiffs complaint, though not as artistically drawn as might be desired, was sufficient to withstand a general demurrer and stated a cause of action for damages resulting from a combination in restraint of trade against all defendants, where the complaint alleged facts indicating that defendants' activities in agreeing to require home buyers to use defendants' escrow services, loan services, and decorating service, and in preventing competing businesses from buying or leasing space in the development, had the effect of preventing competition and restricting trade, and of making the cost of the goods and services supplied by defendant higher than they would have been had competition been allowed in the development, and that plaintiff was thereby damaged.

CA(8)[] (8)**Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals—Pleading.**

--While allegations of the purposes of a conspiracy to combine to restrain trade under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) must normally be specific, inferences as to purpose may be drawn where the effect of the combination is apparent from the face of the complaint.

CA(9)[] (9)**Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals.**

--In an action for damages under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), the alleged anti-trust violation need not be the sole or controlling cause of the plaintiff's injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury.

CA(10)[] (10)**Monopolies and Restraints of Trade § 2—Definitions and Distinctions.**

--While both the Sherman Act and the Cartwright Act purport to prohibit all restraints of trade, each has been interpreted to permit restraints found to be reasonable.

CA(11a)[] (11a) CA(11b)[] (11b)**Monopolies and Restraints of Trade § 8—Under Cartwright Act—Offenses—Tying Arrangement.**

--In an action for damages for a combination in restraint of trade under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*) by a new home purchaser against a company selling the homes and an escrow company owned and controlled by it, the complaint alleged an illegal tying arrangement in violation of *Bus. & Prof. Code, §§ 16720* and *16726*, where it alleged that a homebuyer wishing to upgrade the floorcovering in the purchased home was required to do so before the close of escrow, pursuant to an agreement between the selling company and the escrow

company, and was also required to purchase the upgraded product from the company's decorating center in order to receive credit for the standard floorcovering.

CA(12) [] (12)

Monopolies and Restraints of Trade § 8—Under Cartwright Act—Offenses—Tying Arrangement.

--A tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Tying arrangements are illegal per se whenever a party has sufficient economic power with respect to the tying product to appreciably restrain competition in the market for the tied product. Although coercion is an element which must be pleaded and proved in all tying arrangements, a less stringent test exists that examines the utilization of economic power in bringing about the alleged injury.

CA(13) [] (13)

Monopolies and Restraints of Trade § 9—Under Cartwright Act—Offenses—Prosecution.

--In an action for damages by a new home buyer against a real estate development company selling the homes, and against a lending corporation and escrow corporation owned and controlled by the company, sufficient facts were alleged to establish the participation of the corporation which owned and controlled the development company in the allegedly unlawful combinations, where it was alleged that the parent corporation owned all of the stock of the company, which in turn owned all of the stock of the escrow corporation and the lending corporation, and that the parent corporation was aware of the development company's plans and operations, supported them, and any change in such plans could be effected only by action of the parent's board of directors.

CA(14) [] (14)

Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals—Standing.

--A new home buyer in a real estate development had standing to bring an action for damages for a combination in restraint of trade under the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*), against several related corporations which sold the homes and provided loans and escrow services, where the plaintiff sustained injury as an immediate result of the policies of the related companies which restricted competition and caused plaintiff to pay higher prices for the services controlled by defendants. The fact that plaintiff was not a competitor of defendants presented no obstacle to recovery, since the Cartwright Act does not confine its protection to consumers, or to purchasers, or to competitors or to sellers, but is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices.

Counsel: Hafif & Shernoff and Alton H. Saxon for Plaintiff and Appellant.

McKenna & Fitting, Aaron M. Peck, Michael D. Berk and Michael R. Grzanka for Defendants and Respondents.

Judges: Before Tamura, Acting P. J., Kaufman, J. and McDaniel, J.

Opinion by: THE COURT

Opinion

[*12] [**329] Mission Viejo is a big, modern, fast-growing, multimillion dollar complex in Orange County being developed by the [*13] Mission Viejo Company. It presently consists of 4,000 homes and nearly 20,000 people. When a person decides to buy a home, the sales force presents him with an attractive, complete package: financing is provided by M.V.C. Financial Corporation; title services and title policies are handled by M.V.C. Escrow Corporation; the standard carpeting installed in the new homes is furnished by the Mission Viejo Decorating Center; if the buyer wants a higher grade [***2] of carpeting, he may have the same installed and receive a credit for the value of the standard floor coverings, provided he purchases it from the Decorating Center.

Mission Viejo Company owns and controls the M.V.C. Escrow Corporation, the M.V.C. Financial Corporation and the Mission Viejo Decorating Center. In turn, Philip Morris, Inc. owns and controls Mission Viejo Company.

Alton H. Sixer purchased a home in Mission Viejo and subsequently filed a class action to recover damages under the Cartwright Act upon behalf of himself and the other homeowners ("Plaintiff" and [***30] "Appellant") against Philip Morris, Inc., Mission Viejo Company, M.V.C. Financial Corporation and M.V.C. Escrow Corporation ("Defendants" and "Respondents"). Demurrers were sustained and leave granted to amend the original, the first, second and third amended complaints. Following the filing of the fourth amended complaint, demurrers were sustained without leave to amend.

Sixer appeals on the basis that the three counts contained in the fourth amended complaint properly charge an unlawful combination in restraint of trade against all of the defendants.

We have determined that Sixer has stated a case [***3] against each corporate defendant and reverse the judgment of dismissal.

Facts

Soon after its formation, the Mission Viejo Company ("Company") became a major developer and seller of new residential real estate in Orange County; in fact, it rapidly became one of the largest real estate development-sales firms in the county. The development consists of 11,000 acres, 4,000 homes, and 17,000 residents. For all practical purposes, it is a city, with all the business, commercial and cultural enterprises necessary to service a metropolitan area.

[*14] In May 1969, Philip Morris commenced negotiations to acquire the Company. In January 1970, it consummated a series of agreements whereby it acquired (through a convertible note and option agreements) the right to purchase the capital stock of the firm and the right to select the majority of directors.

After acquiring voting control, the Company's board of directors was increased from 9 to 12 members and the 7 existing vacancies were filled by Philip Morris' own officials. In September 1972, Philip Morris acquired all of the remaining stock in Company.

In March 1970, M.V.C. Escrow Corporation was formed and ownership and control [***4] was assumed by the Company.

In May 1970, M.V.C. Financial Corporation, a corporation subject to control through the Company's directors, sought to qualify as an approved Veterans Administration lender. (It had been previously authorized to make F.H.A. loans.) In November 1971, Financial Corp. began making F.H.A. and V.A. loans.

All newly built homes were furnished with standard floor coverings installed by the Company's Mission Viejo Decorating Center. However, in the event a homebuyer wanted a higher quality of floor covering ("upgraded floor covering") installed before the close of escrow, he had the right to select a better carpeting at a higher price; inasmuch as the standard floor coverings were included in the base price of the home, the Decorating Center would give him a credit for the standard floor coverings and deduct the same from the purchase price of the upgraded carpeting desired, providing the better carpeting was purchased exclusively from the Decorating Center.

In early 1972, Sixer purchased a new home built by the Company. The escrow was handled by Escrow Corp. The F.H.A. insured loan was provided by Financial Corp. at an 8 percent annual percentage rate (A.P.R.). [***5] Sixer selected a nonstandard grade of carpeting and it was installed by the Decorating Center prior to the close of escrow.

At the time Sixer purchased his home, Philip Morris, by virtue of its stock ownership and control of the Company and, in turn, through the Company's ownership and control of Financial Corp., Escrow Corp., and its ownership of the Decorating Center, was in a position to supply an exclusive "package deal" in connection with the sale of all homes within [*15] the Mission Viejo community, to wit, the land and improvements, the escrow service, the F.H.A. and V.A. financing, and the installation of the upgraded carpeting.

First Cause of Action

The fourth amended complaint contains the customary jurisdiction and venue allegations: [**331] each of the corporate defendants is a California corporation, or is headquartered in Orange County, or is doing substantial business within Orange County, and has agents and employees therein.

It sets out the class action allegations: Sixer purchased a home in Mission Viejo from the Company; obtained an F.H.A. insured loan from Financial Corp.; utilized the escrow services of Escrow Corp.; and purchased upgraded [***6] floor coverings from the Decorating Center; the action is filed on behalf of all homeowners who purchased homes in the community of Mission Viejo during the four years immediately preceding the filing of the complaint and who have paid for escrow services provided by Escrow Corp.; have obtained F.H.A. or V.A. financing through Financial Corp.; have paid for upgraded (nonstandard) floor coverings which were purchased from the Decorating Center prior to the close of escrow; that joinder of all parties-plaintiff would be impracticable; that there are common questions of law and fact, with the principal questions all relating to the application of the Cartwright Act to the purchase of real property, escrow services, financing and nonstandard floor coverings by the plaintiff and members of the class from the defendants; that the common questions of law and fact predominate over any affecting individual members only; and that Sixer is a typical member of the class and can fairly represent the members thereof.

After pleading the jurisdictional, venue and class action essentials, plaintiff reached the heart of the lawsuit: Philip Morris, after acquiring control of the Company, Financial Corp. [***7] and Escrow Corp., entered into a conspiracy with its newly acquired subsidiaries to restrain trade in the sale of escrow services required by purchasers of Company-built houses and to increase the price of such escrow services; the conspiratorial agreement to monopolize the escrow business and to charge higher prices than could be obtained at other reputable escrow firms involved the following practices: Salespersons were instructed to fill in and complete deposit receipts on new home sales for the purpose of designating Escrow Corp. as the escrow agent; Escrow Corp. was to be [*16] notified whenever a new home was sold by the Company; buyers were to be referred exclusively to Escrow Corp. for the purpose of opening escrows; and a corporate decision was made that no independent escrow company would be permitted to either buy land or lease space for the purpose of conducting an escrow business within the community of Mission Viejo; officers of the Company and the Escrow Corp. also agreed upon a price schedule for the services to be provided by Escrow Corp., which price schedule reflected prices in excess of those charged by 25 independent escrow firms situated within a 15-mile [***8] radius of Mission Viejo; by reason of Company's regular, systemized practice of channeling the purchasers to Escrow Corp., very rarely were outside firms contacted by buyers for the purpose of providing escrow services; independent firms were willing and able to provide escrow services to Mission Viejo buyers but were directly excluded from that home market and were prevented from competing for such business by virtue of the agreement between Company and Escrow Corp. not to allow said firms to buy or lease facilities and by the Company's practice of channeling all buyers directly to Escrow Corp.; by reason of said practices, Escrow Corp. was in a position to charge higher fees; that by virtue of the unlawful combination existing between Company and Escrow Corp. and as a consequence of it, Escrow Corp. has the only escrow service in Mission Viejo and exacts higher fees than independent escrow firms in the surrounding area.

Second Cause of Action

After Philip Morris acquired control of Mission Viejo's board and assets, the Company combined with Financial Corp. to restrain trade for two purposes: (1) To increase the price of new homes sold, enabling [**332] Company to reap [***9] a higher profit; and (2) to prevent outside lending institutions from making any F.H.A. and V.A. guaranteed loans to Mission Viejo homebuyers, thereby assuring Financial of a monopoly in lending.

Enhanced purchase prices were to be realized by the Company by a simple expedient: The first trust deed lender (Financial Corp.) merely charged the seller (Company) an excessive amount of points (loan discounts) for making the loan; the cost of the loan was passed on to the buyer in the form of a higher purchase price for the house.

To accomplish the second purpose of excluding all independent lenders, a series of agreements between the corporate defendants were [*17] entered into for the purpose of making Financial Corp. the sole lending agency for certain tracts in Mission Viejo. These agreements to eliminate outside lenders involved employment of the following practices: (1) Instructions to salespersons and escrow employees to use Financial as sole lender; (2) price-fixing was to be accomplished by charging higher loan discounts (points); and (3) the adoption of a formula for pricing new homes in order to compensate Company for the excessive loan discount charged by Financial.

[***10] Many independent first trust deed lenders were located within a short range of the community who would have been willing to provide F.H.A. or V.A. loans at a lesser annual percentage rate of interest by simply charging a lower loan discount.

When Sixer purchased his home and entered into escrow in January 1972, the purchase was contingent upon obtaining an F.H.A. loan. Financial Corp. provided the F.H.A. loan at an annual percentage rate (A.P.R.) of 8 percent (8%) at a time when similar loans were available at 7 3/4 percent or less. Financial charged the Company five points for making the loan; thus accounting for the excessive annual percentage rate of 8 percent. Independent firms, if allowed to operate in Mission Viejo, would have charged the seller (Company) less points, thus accounting for the lesser A.P.R. of 7 3/4 percent.

Third Cause of Action

Commencing in March 1970, the Company and Escrow Corp. unlawfully combined for the following purposes: (1) To prevent competition and restrict trade in the sale of upgraded (nonstandard) floor coverings to buyers of newly built residences; and (2) to increase the price of upgraded coverings sold to the purchasers.

It is [***11] a common practice for Mission Viejo homebuyers to upgrade the floor coverings in their new homes; it happens 75 percent of the time. Standard carpeting is generally included in the purchase price of the house. Corporate employees were instructed to inform new homebuyers who desired a better grade of carpeting that they would receive no credit for the standard floor coverings if upgraded floor coverings were purchased from any source other than the Decorating Center. In the event a buyer wished to upgrade the standard floor coverings and did not wish to purchase from the Decorating Center, he not only would not get the credit but would not be allowed to have the desired floor coverings [*18] installed prior to the close of escrow. All new homebuyers were directed to the Decorating Center where all upgraded carpeting was sold at a higher price than could be obtained elsewhere. Finally, all independent retail carpeting suppliers were to be excluded from Mission Viejo by simply refusing to sell or lease land to them within Mission Viejo's boundaries.

Sixer and other buyers purchased nonstandard carpeting from the Decorating Center at a price higher than they would have had to [***12] pay if it was not for the unfair competition and restraint of trade engaged in by the defendants.

Damages

Saxer complains that he and other homebuyers could have purchased the escrow services at lower cost elsewhere; that more favorable F.H.A. or V.A. loans at lesser interest rates were available elsewhere; [**333] and that upgraded floor coverings at a lesser cost or better floor coverings for the same price were available at other suppliers.

Contentions And Disposition

CA(1)[] (1) **HN1[]** The sole issue involved in a hearing on a demurrer is whether the complaint, as it stands, unconnected with extraneous material, states a cause of action. (*Griffith v. Department of Public Works, 141 Cal.App.2d 376, 381 [296 P.2d 838]*.) **HN2[]** In testing the legal sufficiency of a pleading against a general demurrer, all properly pleaded allegations, including those that arise by reasonable inference, are deemed admitted regardless of the possible difficulty of proof at trial. (*Universal By-Products, Inc. v. City of Modesto, 43 Cal.App.3d 145, 151 [117 Cal.Rptr. 525]*; see also *Alcorn v. Anbro Engineering, Inc., 2 Cal.3d 493, 496 [86 Cal.Rptr. 88, 468 P.2d 216]*; 3 Witkin, Cal. [***13] Procedure (2d ed. 1971) Pleading, § 800, pp. 2413-2414.) The allegations must be liberally construed with a view toward substantial justice between the parties. (*Code Civ. Proc., § 452; Buxbom v. Smith, 23 Cal.2d 535, 542 [145 P.2d 305]; Cameron v. Wernick, 251 Cal.App.2d 890, 892 [60 Cal.Rptr. 102]*.)

CA(2)[] (2) (See fn. 1.) Sixer contends that the fourth amended complaint alleges sufficient facts to state three causes of action for restraint of trade in violation of the Cartwright Act (*Bus. & Prof. Code, § 16700 et seq.*).¹ [*19] He asserts two bases for this claim: First, that the agreements among the defendants constitute a combination of capital, skill or acts to restrict trade in violation of *sections 16720* and *16726*; second, that such agreements are tying arrangements also violative of *sections 16720* and *16726*.

[***14] **CA(3)[]** (3) **HN3[]** The Cartwright Act is patterned upon the federal Sherman Anti-Trust Act and both derive their basic provisions from the common law policy against restraint of trade; thus cases decided under the latter act are applicable as an aid to decision in interpreting the former. (*Chicago Title Ins. Co. v. Great Western Financial Corp., 69 Cal.2d 305, 315 [70 Cal.Rptr. 849, 444 P.2d 481]*; *Widdows v. Koch, 263 Cal.App.2d 228, 234 [69 Cal.Rptr. 464]*.)² **CA(4)[]** (4) While the Cartwright Act is couched in terms of prohibited conduct with criminal sanctions and the Attorney General is charged with its public enforcement private enforcement is also authorized and encouraged. (*Chicago Title, supra, 69 Cal.2d at p. 322*; see also *Radovich v. Nat. Football League, 352 U.S. 445, 453-454 [1 L.Ed.2d 456, 462-463; 77 S.Ct. 390, 395]*.)

[***15] **CA(5)[]** (5) **HN4[]** A combination does not give rise to a cause of action unless a civil wrong has been committed which results in damage. Where a complaint charges conspiratorial conduct and the commission of a [**334] wrongful act, the significance of the conspiracy charge is to implicate each member participating in the

¹ Defendants contend that Sixer should not be allowed to act as both class representative and as one of the attorneys for the class. This contention lacks merit inasmuch as the court in *Daar v. Yellow Cab Co., 67 Cal.2d 695 [63 Cal.Rptr. 724, 433 P.2d 732]*, implicitly sanctioned such dual representation.

² The Cartwright Act provides in part: "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. . . . (c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity. . . . (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 any of the following: . . . (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." (*Bus. & Prof. Code, § 16720*.)

Section 16702 of the Business and Professions Code defines "persons" as ". . . corporations, firms, partnerships and associations existing under or authorized by the laws of this State or any other State, or any foreign country."

Section 16726 of the Business and Professions Code states: "Except as provided [herein] . . . , every trust is unlawful, against public policy and void."

common plan and thus place liability on the entity that acquiesced in the plan to commit the wrong as well as on the entity that actually perpetrated it. (*Chicago Title, supra, 69 Cal.2d at p. 316*.) The conspiracy can be inferred from the nature of the acts done, the relationship of the alleged conspirators, the interests of the parties, and the individual circumstances surrounding each case. (*Chicago [*20] Title, supra*; see also *Jones v. H. F. Ahmanson & Co., 1 Cal.3d 93, 119 [81 Cal.Rptr. 592, 460 P.2d 464]*.)

CA(6)[[↑]] (6) HN5[[↑]] In order to maintain a cause of action for a combination in restraint of trade, the complaint must allege: (1) The formation and operation of the conspiracy; (2) the illegal acts done pursuant thereto; and (3) the damage caused by such acts. (*Chicago Title, supra, 69 Cal.2d at p. 316*.)³ General allegations of a conspiracy are sufficient [***16] if the unlawful acts are pleaded with particularity. (*Ibid*, at p. 316.) However, multifarious facts illustrative of nefarious agreements need not be alleged if the pleadings, liberally construed, are capable of an interpretation exhibiting the existence of facts constituting the combination, its object, and achievement in restraint of trade. Plaintiff has exceeded these requirements in the present case.

CA(7a)[[↑]] (7a) Numerous agreements were alleged describing the formation of the combinations. Indeed, defendants do not seriously controvert the conclusion that sufficient facts were pleaded to indicate such formation with respect to the first two causes of action. As to the cause of action dealing with the sale of upgraded floor covering, defendants [***17] argue that various instructions given by Company to Escrow Corp. concerning the handling of escrows for the sale of homes were insufficient to establish the formation of a combination. Sixer alleges, in pertinent part, that Company instructed personnel of Escrow Corp. to communicate with employees of the Decorating Center (a separate operating division of Company) to ascertain whether payment had been received on the purchase of any upgraded floor coverings; purchasers were required to obtain a written statement from the Decorating Center acknowledging receipt of payment before being allowed to close escrow; the Decorating Center was directed to furnish Escrow Corp. with duplicates of all documents relating to a homebuyer's purchase of upgraded floor coverings; whenever a new home purchase involved a loan, the Decorating Center was not to place an order until Escrow Corp. had notified it of loan approval; and that floor coverings purchased from any source other than the Decorating Center could not be installed prior to the close of escrow.

Defendants assert that these are the type of instructions which would be given to any escrow agent retained to handle the transaction and [*21] [***18] merely illustrate the business practices of Company. While we agree that such allegations evidence the business policies and practices of Company, we disagree with defendants' contention that they are merely innocuous facts not indicative of a combination. It can hardly be assumed that a separate escrow agent would have followed Company's instructions and prevented the close of escrow until the Decorating Center had received payment for upgraded floor coverings. Nor is it likely that Company could have compelled another escrow agent to ascertain whether or not payment had been received before allowing escrow to close. Nor [**335] could it have forced the purchaser to produce a "clearance" from the Decorating Center prior to the close of escrow.

Plaintiff next contends that the purposes of such combinations are adequately alleged. **CA(8)[[↑]] (8) HN6[[↑]]** While allegations of the purposes of the conspiracy must normally be specific, inferences as to purpose may be drawn where the effect of the combination is apparent from the face of the complaint. (*Jones v. H. F. Ahmanson & Co., supra, 1 Cal.3d 93, 119*.) We need not resort to inference in the instant controversy for plaintiff has alleged [***19] an array of facts indicative of the purposes of the combinations.

CA(7b)[[↑]] (7b) The first cause of action alleges that Company and Escrow Corp. combined for the purpose of preventing competition and restricting trade in the sale of escrow services and for the further purpose of establishing the price of such services in excess of those charged by other firms in the surrounding area. The second cause of action alleges that Company and Financial Corp. combined for the purpose of preventing competition and restricting trade in the making of F.H.A. and V.A. loans. It also alleges that another purpose of the

³ Sixer initially argues that *section 16756 of the Business and Professions Code* outlines the pleading requirements for a Cartwright Act violation in a civil action. However, this contention was considered and rejected in *Chicago Title, supra, 69 Cal.2d at pages 317-318*.

combination was to increase the price of new homes inasmuch as Company was charged an excessive amount of points (loan discounts) by the lender. The third count contains similar averments as to restriction of trade and excessive prices for upgraded floor coverings. Unlike the *Chicago Title* and *Ahmanson* cases, where the purpose of the combinations was either alleged in vague, general terms or not at all, the allegations herein specify the purposes with the requisite precision.

Plaintiff also contends that the claimed combinations effected an illegal restraint of trade. This, of course, [***20] is the essence of the case. [HN7](#) For plaintiff to successfully maintain this position, facts must be alleged indicating the creation or accomplishment of restrictions on trade. ([Bus. & Prof. Code, § 16720, subd. \(a\)](#); [Corwin v. Los Angeles Newspaper](#) [*22] *Service Bureau, Inc.*, 4 Cal.3d 842, 853 [94 Cal.Rptr. 785, 484 P.2d 953]; [Sherman v. Mertz Enterprises](#), 42 Cal.App.3d 769, 776 [117 Cal.Rptr. 188].)

The first count alleges that Company organized Escrow Corp. and then unlawfully combined with it to restrain trade in the sale of escrow services; that Company's salespersons were instructed in the procedure for completing new home deposit receipts so that Escrow Corp. was designated as the escrow agent; that purchasers were specifically directed to Escrow Corp. for the purpose of opening escrows; and that independent escrow agents were prevented from purchasing land or leasing space within the Mission Viejo development for the purpose of conducting an escrow business.

The second count alleges that Company combined with Financial Corp. to prevent competition and restrain trade in the F.H.A. and V.A. loan market; that other qualified F.H.A./V.A. first trust deed [***21] lenders were prevented from competing with Financial Corp. in certain tracts or units of tracts pursuant to an agreement between Company and Financial Corp.; that Company and Financial Corp. agreed upon a formula for determining the size of the loan discount to be charged Company by Financial Corp.; and that the price of new homes within the relevant tracts was formulated so that Company would be compensated for the excessive loan discount charged by Financial Corp.

The third count alleges that Company and Escrow Corp. combined to restrain trade and prevent competition in the sale of upgraded floor coverings; that personnel of the respective companies were instructed to inform purchasers wishing to upgrade the floor coverings in their homes that not only would no credit be allowed for the standard floor coverings if upgraded products were purchased from a supplier other than Company's Decorating Center, but also that such "outside" products could not be installed prior to the [**336] close of escrow; and that an agreement was reached whereby carpeting suppliers were precluded from either leasing space or purchasing land in Mission Viejo.

The plaintiff has also alleged that the [***22] antitrust violations were the proximate cause of his injuries. (See [Jones v. H. F. Ahmanson & Co., supra](#), 1 Cal.3d at p. 119; [Chicago Title, supra](#), 69 Cal.2d at pp. 317-318; [Overland Pub. Co. v. H. S. Crocker Co.](#), 193 Cal. 109, 114-115 [222 P. 812]; [Highland Supply Corp. v. Reynolds Metals Co.](#) (8th Cir. 1964) 327 F.2d 725, 732.) An extended discussion on proximate cause need not be [*23] undertaken at this time since much of the law in this area has been developed in "standing to sue" cases which shall be discussed *infra*.

The complaint indicates that because of the alleged unlawful combinations in restraint of trade, the cost of the goods and services in question was higher than they would have been had independent firms been allowed to compete in Mission Viejo and that plaintiff thereby sustained injury. [CA\(9\)](#) (9) [HN8](#) The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury. ([Mulvey v. Samuel Goldwyn Productions](#) (9th Cir. 1970) 433 F.2d 1073, 1075, fn. 3, cert. den., 402 U.S. 923 [28 L.Ed.2d 662, 91 S.Ct. 1377].) [***23] It would strain credulity to hold that insufficient facts were alleged illustrative of the manner in which defendants' conduct was a substantial factor in bringing about plaintiff's injuries.

Subjecting the complaint to a liberal construction, as we must, it can hardly be concluded, as defendants urge, that such allegations are innocuous and that any restraint is, at most, *de minimis*. [CA\(10\)](#) (10) (See fn. 4.) We

cannot say, as a matter of law, that the purported restraints are not unreasonable.⁴ This is a question of fact to be determined at trial. ([Corwin, supra, 4 Cal.3d at p. 855](#)) If the plaintiff can prove the existence of these restraints on trade, they are violative of the Cartwright Act unless shown to be reasonable. ([Corwin, supra, 4 Cal.3d at p. 854](#).) **HN9**[] In deciding whether the restrictions are reasonable, "the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to [**24] be obtained, are all relevant facts.' [Citation.] The court should consider 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize. . . .' [Citations.]" ([Corwin, supra, 4 Cal.3d at pp. 854-855](#).)

CA(11a)[] (11a) Plaintiff contends that the actions of defendants also constitute a tying arrangement violative of [sections 16720](#) and [16726](#).

[*24] **CA(12)**[] (12) **HN11**[] "For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will [***25] not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed "tying agreements serve hardly any purpose beyond the suppression of competition." [Citation.]" [*337] They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power of leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons **HN12**[] "tying agreements fare harshly under the laws forbidding restraints of trade." [Citation.]' (Fns. omitted.) (*Northern Pac. R. Co. v. United States, supra*, 356 U.S. 1, 5-6 [2 L.Ed.2d 545, 550, 78 S.Ct. 514].) Tying arrangements are illegal per se 'whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product' (*Northern Pac. R. Co. v. United States, supra*, 356 U.S. at p. 6 [2 L.Ed.2d at p. 550]; *Fortner Enterprises v. U.S. Steel, supra*, 394 U.S. 495, [*26] 499, 503 [22 L.Ed.2d 495, 502, 505, 89 S.Ct. 1252]) and when 'a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie' (*Fortner Enterprises v. U.S. Steel, supra*, 394 U.S. at p. 501 [22 L.Ed.2d at p. 504].)" ([Corwin, supra, 4 Cal.3d at pp. 856-857](#).)

HN13[] Although coercion is an element which must be pleaded and proved in all tying arrangements, it is slowly being eroded in favor of a somewhat less stringent test that examines the utilization of economic power in bringing about the alleged injury. ([Corwin, supra, 4 Cal.3d 842](#); [Sherman v. Mertz Enterprises, supra, 42 Cal.App.3d 769](#).) Even under the latter test, we find no tying arrangement alleged with respect to the first and second causes of action. **CA(11b)**[] (11b) As to the third cause of action a tying arrangement is clearly alleged. A homebuyer wishing to upgrade his floor coverings must do so before the close of escrow and must also purchase the upgraded product from Company's Decorating Center in order to receive credit for his standard floor covering.⁵

[***27] *Philip Morris*

CA(13)[] (13) Plaintiff contends that sufficient facts have been alleged to establish the participation of Philip Morris in the allegedly unlawful [*25] combinations. We agree. The relevant allegations are as follows: Philip Morris owns all of the stock of Company, which in turn owns all of the stock of Escrow Corp. and Financial Corp.; a majority of Company's board of directors were officers and directors of Philip Morris; Philip Morris has had complete

⁴ **HN10**[] While both section 1 of the Sherman Act and [sections 16720](#) and [16726](#) of the Cartwright Act purport to prohibit all restraints on trade, each has been interpreted to permit restraints found to be reasonable. ([Standard Oil Co. v. United States, 221 U.S. 60](#) [55 L.Ed. 619, 645, 31 S.Ct. 502, 516]; [Corwin, supra, 4 Cal.3d at p. 853](#).)

⁵ Defendants contend that the homes and floor coverings are a single product rather than separate items. This is a question of fact to be resolved at trial. ([Corwin, supra, 4 Cal.3d at pp. 858-859](#).)

knowledge of and has been a participant in the illegal acts perpetrated by the other defendants; Escrow Corp. came into existence after Philip Morris had obtained control of Company; the president of Company was appointed a vice-president of Philip Morris and the chairman of Company was elected to Philip Morris' board of directors after Philip Morris acquired control of Company; an upper echelon management employee of Philip Morris was named a vice-president of Company; there were numerous communications between officers of Company and officers of Philip Morris concerning the operation of Company; and a resolution was unanimously approved at a Company board of directors meeting acknowledging, in substance, that Philip [**28] Morris was aware of Company's plans and operations, supported them, and that any change in such plans could be effected only by action of the board.

In contrasting this case with *Chicago Title, supra*, which defendants contend is controlling as a matter of law, several distinctions are readily apparent. In *Chicago Title*, the plaintiffs joined a defendant, [**338] Lehman Brothers, not upon the basis of its own misconduct, but rather, upon the misconduct of corporations which were controlled by companies in which Lehman Brothers owned a major or controlling interest. The only facts alleged as to Lehman Brothers were as follows: It was a partnership; it owned stock in Great Western and Financial; and, at times, it had two or more directors concurrently on the boards of Great Western and Financial, respectively. Therefore, Lehman Brothers could be reached only by way of factual allegations of conduct on the part of related defendants from which a conspiracy or combination with the intent to jeopardize plaintiffs' business could be inferred. An identical analysis was deemed applicable to Great Western and Financial in their passive administrative role as holding companies; [**29] Great Western S and L as a lending institution relatively remote from the scene; and even Security, which, as title insurer, simply issued the policies which formed the subject matter of plaintiffs' claims.

It can be seen that Philip Morris did not occupy a passive role relatively remote from the other defendants. Unlike *Chicago Title*, in ascending the corporate chain of command in the instant controversy only one step is required to reach Philip Morris. Indeed, defendants have [*26] argued, albeit in another context but also applicable here, that all of them are so closely united in interest that they constitute a single business enterprise. Thus, at least an inference of knowing and willful participation by Philip Morris in the allegedly illegal conduct can be gleaned from the pleadings.

Standing

CA(14)[] (14) Defendants contend that even if a combination has been alleged, Sixer and others similarly situated lack standing to bring this suit. **HN14[]** In order to have standing to maintain an action for violation of the antitrust laws the plaintiff must be within the "target area" of the alleged violation -- "the area which it could reasonably be foreseen would be affected" by the [**30] antitrust violation. (*Twentieth Century Fox Film Corporation v. Goldwyn* (9th Cir. 1964) 328 F.2d 190, 220, cert. den., 379 U.S. 880 [13 L.Ed.2d 87, 85 S.Ct. 143]; see also *Hoopes v. Union Oil Company of California* (9th Cir. 1967) 374 F.2d 480, 485; *Karseal Corporation v. Richfield Oil Corporation* (9th Cir. 1955) 221 F.2d 358, 362-365.)

Defendants argue that their potential competitors, who had been excluded from the Mission Viejo development, were the target of any policy to restrain trade. Defendants' argument, however, ignores the fact that plaintiff has sustained injury as an immediate result of their policies. Plaintiff's injuries were not "secondary" or "consequential," since they did not result from injury to third parties; they were not "remote," for they were the direct result of the allegedly illegal conduct. (*Hoopes v. Union Oil Company of California, supra*; *Conference of Studio Unions v. Loew's, Inc.* (9th Cir. 1951) 193 F.2d 51, 54-55, cert. den., 342 U.S. 919 [96 L.Ed. 687, 72 S.Ct. 367].) The fact that plaintiff was not a competitor of defendants presents no obstacle to recovery for "The statute does not confine its protection [**31] to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. [Citations.] **HN15[]** The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." (*Mandeville Farms v. Sugar Co.*, 334 U.S. 219, 236 [92 L.Ed. 1328, 1340, 68 S.Ct. 996, 1006], reh. den., 334 U.S. 835 [92 L.Ed. 1761, 68 S.Ct. 1343].)

CONCLUSION

CA(7c)[] (7c) While the complaint may not be as artistically drawn as might be desired, it is the exception rather than the rule to discover a model [*27] pleading in antitrust litigation. Perhaps this is the result of the very nature of the action itself. Antitrust schemes generally are conceived in secrecy [**339] and live their lives in relative obscurity. It is only when they are called to face their creator that they betray their theretofore seemingly innocuous existence. As Mr. Justice Mosk said in his dissent in *Chicago Title, supra, 69 Cal.2d at p. 328*: "This case should not be decided on the pleadings. . . . [A court should not] impose upon plaintiffs a pleading straitjacket neither compelled [***32] by precedent nor consistent with the design of antitrust statutes." To do so would hardly comport with the spirit underlying such statutes. Thus, we conclude that plaintiff is entitled to a day in court on his general theory of a conspiracy and combination in restraint of trade as to all causes of action and also upon his claim of an illegal tying arrangement as to the third cause of action. We also hold that plaintiff may proceed to trial on his complaint without the necessity of amending. (*Sherman v. Mertz Enterprises, supra, 42 Cal.App.3d at p. 780.*)

The judgment of dismissal is reversed.

End of Document



Lowell v. Mother's Cake & Cookie Co.

Court of Appeal of California, First Appellate District, Division Two

March 22, 1978

Civ. No. 40822

Reporter

79 Cal. App. 3d 13 *; 144 Cal. Rptr. 664 **; 1978 Cal. App. LEXIS 1368 ***; 6 A.L.R.4th 184; 1978-1 Trade Cas. (CCH) P62,003

FRED LOWELL, JR., Plaintiff and Appellant, v. MOTHER'S CAKE & COOKIE COMPANY, Defendant and Respondent

Prior History: [***1] Superior Court of Alameda County, No. 475207-5, Robert H. Kroninger, Judge.

Disposition: The judgment insofar as it dismisses the first cause of action of the second amended complaint (interference with prospective economic advantage) is reversed; the judgment insofar as it dismisses the second cause of action of the original complaint (relating to claims under the Cartwright Act and the California Unfair Practices Act) is affirmed. Each party to bear their own costs.

Core Terms

cause of action, demurrer, prospective economic advantage, unfair practice, leave to amend, commerce, damages, business relationship, prospective business advantage, privileged, italics, amended complaint, interfered, antitrust

LexisNexis® Headnotes

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

Torts > Business Torts > General Overview

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Business Relationships > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN1[] Intentional Interference, Defenses

The basic principles underlying the tort of inducing breach of contract have been extended to impose liability for intentional interference with business relations or advantages which are merely prospective and not subject to an existing, legally binding agreement. While the criteria of this new tort are developing and admittedly vague, it is widely recognized that in order to be actionable the interference with prospective economic advantage or advantageous business relationship must be unjustified and/or without privilege. One who unjustifiably interferes

with an advantageous business relationship to another's damage may be held liable therefor. One who, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another is liable to the other for the harm caused thereby.

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN2 [] **Intentional Interference, Defenses**

The unjustifiability or wrongfulness of the act interfering with business relations or advantages may consist of the methods used and/or the purpose or motive of the actor. On one hand it is emphasized that the wrong consists of intentional and improper methods of diverting or taking business from another which are not within the privilege of fair competition. On the other, it is underscored that the cases involving interference with prospective business advantage have turned almost entirely upon the defendant's motive or purpose, and the means by which he has sought to accomplish it.

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN3 [] **Intentional Interference, Defenses**

As in the case of interference with contract, any manner of intentional invasion of the plaintiff's interests may be sufficient if the purpose is not a privileged one. An action for interference with prospective business advantage will lie where the right to pursue a lawful business is intentionally interfered with either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN4 [] **Defenses, Demurrs & Objections, Affirmative Defenses**

Justification is an affirmative defense and may not be considered as supporting the trial court's action in sustaining a demurrer unless it appears on the face of the complaint.

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Defects of Form

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Demurrs

HN5 [] **Defenses, Demurrs & Objections, Defects of Form**

The facts alleged in the complaint for the purpose of a demurrer must be regarded as true.

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN6 [] **Intentional Interference, Defenses**

Even if the means used by the defendant are entirely lawful, intentional interference with prospective economic advantage constitutes actionable wrong if it results in damages to the plaintiff, and the defendant's conduct is not excused by a legally recognized privilege or justification.

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

Torts > Business Torts > Commercial Interference > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN7 [] **Intentional Interference, Defenses**

As a general rule, the determination of whether the defendant's conduct of interfering with existing contracts with third persons or prospective economic advantage is privileged comprises a factual issue to be decided upon all the circumstances of the case. Whether an intentional interference by a third party is justifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances including the nature of the actor's conduct and the relationship between the parties.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN8 [] **Commercial Interference, Prospective Advantage**

In determining whether there is a fair and reasonable privilege to act that provides a defense to a claim of interference with a business advantage, the following are important factors: (a) the nature of the actor's conduct, (b) the nature of the expectancy with which his conduct interferes, (c) the relations between the parties, (d) the interest sought to be advanced by the actor and (e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand. The question on the issue of privilege is whether the actor's conduct was fair and reasonable under the circumstances.

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Business & Corporate Law > ... > Management Duties & Liabilities > Rights of Partners > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Torts > Business Torts > General Overview

HN9[] Management Duties & Liabilities, Rights of Partners

One who has a financial interest in the business of another is privileged purposely to cause him not to enter into or continue a relation with a third person in that business if the actor (a) does not employ improper means, and (b) acts to protect his interest from being prejudiced by the relation. The financial interest ipso jure privilege is an interest in the nature of an investment (i.e., interest of a part owner, partner, stockholder and the like). However, it is clear that the interest of a person who looks to the other for business and will lose business opportunities if the other enters into the business relations involved is not a financial interest within the meaning of the ipso jure privilege.

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN10[] Commercial Interference, Prospective Advantage

The ipso jure privilege is at most a qualified privilege which depends for its existence upon the circumstances of the case. It is essentially a state-of-mind privilege, and therefore its existence cannot be satisfactorily determined on the basis of the pleadings alone. The resolution of the issue turns on the defendant's predominant purpose in inducing the breach and consequently the matter is to be determined on the basis of proof rather than of pleading.

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Defects of Form

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrs & Objections > Demurrs

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN11[] Defenses, Demurrs & Objections, Defects of Form

The imprecision or uncertainty of a complaint is considered a curable defect which is subject to special, rather than general, demurrer. It is axiomatic that where the complaint is sufficient against a general demurrer, the sustaining of the demurrer without leave to amend is totally unwarranted for uncertainties or ambiguities in the pleadings.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN12[] Monopolies & Monopolization, Conspiracy to Monopolize

The Cartwright Act, [Cal. Bus. & Prof. Code §§ 16700-16758](#), prohibits the combination of resources of two or more independent interests for the purpose of restraining commerce and preventing market competition in the variety of ways listed in the statute. Though not specifically listed, monopoly is a prohibited restraint of trade. The offense of

monopoly involves the willful acquisition of the power to control prices or exclude competition from commerce in a particular geographic area with respect to a specific product.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Torts > Business Torts > General Overview

HN13 [blue icon] **Monopolies & Monopolization, Conspiracy to Monopolize**

In order to be actionable the injury to the plaintiff's business must flow directly from the unlawful combination or trust which was brought about to restrict trade or commerce within the meaning of the Cartwright Act, [Cal. Bus. & Prof. Code § 16700-16758](#). The damages recoverable under the foregoing provisions of the act must be such, and could only be such, as resulted directly from the fact of the existence of the unlawful combination or trust and flowed solely from restrictions in trade or commerce fostered thereby.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN14 [blue icon] **Monopolies & Monopolization, Conspiracy to Monopolize**

While one whose business or property has been injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the anti-trust law for double the damages he has actually suffered from the injury so inflicted, yet he could not maintain an action based upon said law if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, did not arise by reason of the restrictions in trade or commerce carried out by such trust or combination.

Torts > Business Torts > Unfair Business Practices > General Overview

HN15 [blue icon] **Business Torts, Unfair Business Practices**

The California Unfair Practices Act, [Cal. Bus. & Prof. Code § 17000 et seq.](#), prohibits selling articles below cost, or giving them away for the purpose of injuring competitors or destroying competition.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A complaint for interference with prospective economic advantage, and for violations of the Cartwright Act ([Bus. & Prof. Code, §§ 16700-16758](#)), and the California Unfair Practices Act ([Bus. & Prof. Code, § 17000 et seq.](#)), alleged that plaintiff had owned a trucking firm that derived 40 percent of its business from an oral contract with defendant, that upon plaintiff's attempt to sell the firm defendant had informed prospective buyers that the contract would be terminated upon sale, that defendant had acted for the purpose of depressing the firm's market value, and that as a result plaintiff had sold to defendant for a price substantially below true value. The trial court sustained general demurrers to the complaint and amended complaint and dismissed the action. (Superior Court of Alameda County, No. 475207-5, Robert H. Kroninger, Judge.)

The Court of Appeal affirmed the dismissal of the cause of action relating to the Cartwright Act and the California Unfair Practices Act, but reversed as to the cause of action for interference with prospective economic advantage,

holding that the complaint alleged interference, culpable intent and damages sufficient to establish the cause of action, and that an affirmative defense of justification or privilege did not appear on the face of the complaint. (Opinion by Kane, J., with Taylor, P. J., and Rouse, J., concurring.)

Headnotes

CA(1a) [] (1a) CA(1b) [] (1b)

Interference § 6—Interference With Business Relations—Interference With Prospective Economic Advantage.

--A cause of action for interference with prospective economic advantage or advantageous business relationship will lie where defendant intentionally interferes, either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification or privilege, with plaintiff's right to pursue a lawful business.

CA(2) [] (2)

Interference § 8—Interference With Business Relations—Justification, Privilege, Defenses—Justification as Affirmative Defense—Pleading.

--While defendant's culpable intent and the damages resulting from interference must be pleaded and proved by plaintiff in an action for intentional interference with prospective economic advantage, defendant's justification constitutes an affirmative defense and may not be considered as supporting a trial court's action in sustaining a demurrer unless it appears on the face of the complaint.

CA(3) [] (3)

Interference § 7—Interference With Business Relations—Actions and Remedies—Interference With Prospective Economic Advantage.

--A complaint for intentional interference with prospective economic advantage was sufficient as against a general demurrer, where the complaint alleged that plaintiff had owned a trucking firm, that deliveries for defendant pursuant to an oral contract had constituted 40 percent of the firm's business, and that when plaintiff attempted to sell the firm, defendant informed prospective buyers that the delivery contract would be terminated upon sale. The complaint further alleged that defendant had acted intentionally to depress the firm's market value and that, as a result, the firm had been sold to defendant at a price substantially below true market value.

CA(4) [] (4)

Interference § 8—Interference With Business Relations—Justification, Privilege, Defenses—Giving Advice.

--One of the conditions for establishing that an intentional interference with prospective economic advantage was justified as the giving of advice is that the advice must have been requested.

CA(5) [] (5)

Interference § 8—Interference With Business Relations—Justification, Privilege, Defenses—Question of Fact.

--Whether defendant's conduct in interfering with prospective economic advantage was privileged or justified comprises an issue of fact to be decided upon a balancing of the importance, social and private, of the objective

advanced by the interference as against the importance of the interest with which defendant interfered, considering all the circumstances including the nature of defendant's conduct and the relationship between the parties.

CA(6) (6)

Interference § 8—Interference With Business Relations—Justification, Privilege, Defenses—Privilege—Financial Interest in Business.

--A financial interest in a business, sufficient to provide a qualified privilege to interfere with its prospective business relations, is an interest in the nature of an investment in the business, such as a partner or stockholder.

CA(7) (7)

Interference § 8—Interference With Business Relations—Justification, Privilege, Defenses—Financial Interest—State of Mind of Defendant.

--The existence of a qualified privilege to interfere with the business relations of another on the basis of a financial interest in the other's business is a state of mind privilege, the existence of which cannot be satisfactorily determined on the basis of the pleadings alone.

CA(8) (8)

Pleading § 31—Demurrer to Complaint—Hearing and Determination—Amendment After Special Demurrer Sustained—Uncertainty or Imprecision.

--Imprecision or uncertainty of a complaint is a curable defect subject to a special, rather than general, demurrer, and where a complaint is sufficient as against a general demurrer, it is improper to sustain a demurrer without leave to amend for uncertainties or ambiguities.

CA(9) (9)

Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations.

--The Cartwright Act ([Bus. & Prof. Code, §§ 16700-16758](#)), prohibits the combination of resources of two or more independent interests for the purpose of restraining commerce and preventing market competition in the variety of ways listed in the statute.

CA(10) (10)

Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—Monopoly.

--Monopoly is a prohibited restraint of trade under the Cartwright Act ([Bus. & Prof. Code, §§ 16700-16758](#)).

CA(11) (11)

Monopolies and Restraints of Trade § 2—Definitions and Distinctions—Monopoly.

--Monopoly involves the wilful acquisition of the power to control prices or exclude competition from commerce in a particular geographical area with respect to a specific product.

CA(12) [] (12)

Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individual—Necessity for Direct Injury.

--In order to be actionable under the Cartwright Act ([Bus. & Prof. Code, §§ 16700-16758](#)), the alleged injury to plaintiff's business must flow directly from the unlawful combination or trust that was brought about to restrict trade or commerce within the meaning of the act. Thus, a general demurrer to a complaint alleging a violation of the Cartwright Act was properly sustained without leave to amend where the complaint alleged plaintiff's injury arose from the fact that, in an effort to depress the market price of plaintiff's business, defendant actively discouraged potential purchasers of the business and thus forced plaintiff to sell to defendant at substantially below market value.

CA(13) [] (13)

Unfair Competition § 3—Unfair Practices Act.

--The California Unfair Practices Act ([Bus. & Prof. Code, § 17000 et seq.](#)), prohibits selling articles below cost or giving them away for the purpose of injuring competitors or destroying competition.

Counsel: Carr, Smulyan & Hartman and George M. Carr for Plaintiff and Appellant.

Knox, Ricksen, Snook, Anthony & Robbins and Thomas A. Palmer for Defendant and Respondent.

Judges: Opinion by Kane, J., with Taylor, P. J., and Rouse, J., concurring.

Opinion by: KANE

Opinion

[*17] [**667] Plaintiff, Fred Lowell, Jr., the sole owner of Lowell Freight Lines, Inc., a common carrier, appeals from a judgment of dismissal entered after respondent's demurrer to the second amended complaint was sustained without leave to amend.

Appellant filed his original complaint (Complaint) on January 30, 1976, alleging causes of action for interference with prospective economic advantage, and violations of the Cartwright Act ([Bus. & Prof. Code, ¶¶ 16700-16758](#)) and the California Unfair Practices Act ([Bus. & Prof. Code, § 17000 et seq.](#)). Respondent's demurrer to the Complaint was sustained with leave to amend as to the cause of action for wrongful interference with prospective economic advantage, and without leave to amend as to the second cause of action charging violations under the Cartwright Act and the Unfair Practices Act. Appellant filed his first amended complaint on May 20, 1976, alleging a single cause of action predicated on the theory of wrongful interference with prospective economic advantage. After respondent's demurrer to the first amended complaint was sustained with leave to amend, appellant filed his second amended complaint (hereafter Second Complaint) reiterating his cause of action based on tortious interference with prospective economic advantage. Respondent demurred to the Second Complaint on the grounds that it failed to state a cause of action and that it was uncertain. This time the trial court sustained respondent's demurrer without leave to amend, and dismissed the action.

The principal issues on appeal are whether the complaints to which the demurrs were sustained without leave to amend [***3] alleged actionable wrongs (1) for tortious interference with prospective business advantage; and (2) for violations of the antitrust and unfair practices statutes.

CA(1a)[[↑]] (1a) Intentional Interference With Prospective Business Advantage: In addressing the first issue, we initially note that **HN1[[↑]]** the basic principles underlying the tort of inducing breach of contract have been extended to impose liability for intentional interference with business relations or advantages which are merely prospective and not subject to an existing, legally binding agreement ([Buckaloo v. Johnson \(1975\) 14 Cal.3d 815, 823 \[122 Cal.Rptr. 745, 537 P.2d **668\] 865](#); [Dryden v. Tri-Valley Growers \(1977\) 65 Cal.App.3d 990, 994 \[135 Cal.Rptr. 720\]](#); 4 Witkin, Summary of Cal. Law (8th ed. 1974) § 392, p. 2643). While the criteria of this new tort are developing and admittedly vague, it is widely recognized that in [*18] order to be actionable the interference with prospective economic advantage or advantageous business relationship must be *unjustified and/or without privilege*. As has been pointed out, "one who *unjustifiably* interferes with an advantageous business relationship to another's [***4] damage may be held liable therefor." ([Diodes, Inc. v. Franzen \(1968\) 260 Cal.App.2d 244, 255 \[67 Cal.Rptr. 19\]](#), italics added. See also [Speegle v. Board of Fire Underwriters \(1946\) 29 Cal.2d 34, 39 \[172 P.2d 867\]](#); [Shida v. Japan Food Corp. \(1967\) 251 Cal.App.2d 864, 866 \[60 Cal.Rptr. 43\]](#); [Masoni v. Board of Trade of S.F. \(1953\) 119 Cal.App.2d 738, 741 \[260 P.2d 205\]](#).) Restatement of Torts section 766, likewise provides in part that "one who, *without a privilege* to do so, induces or otherwise purposely causes a third person not to . . . (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby." (Italics added.)

HN2[[↑]] The unjustifiability or wrongfulness of the act may consist of the *methods used and/or the purpose or motive* of the actor. On one hand it is emphasized that the wrong consists of intentional and *improper methods* of diverting or taking business from another which are not within the privilege of fair competition ([A. F. Arnold & Co. v. Pacific Professional Ins., Inc. \(1972\) 27 Cal.App.3d 710, 715 \[104 Cal.Rptr. 96\]](#); 4 Witkin, Summary of Cal. Law, *supra* [***5]). On the other, it is underscored that the cases involving interference with prospective business advantage "have turned almost entirely upon the *defendant's motive or purpose, and the means by which he has sought to accomplish it*. **HN3[[↑]]** As in the case of interference with contract, *any manner of intentional invasion of the plaintiff's interests may be sufficient if the purpose is not a privileged one . . .*" ([A. F. Arnold & Co. v. Pacific Professional Ins., Inc., supra, at p. 716](#), italics added; Prosser on Torts (4th ed. 1971) p. 952). In accordance therewith it has been held that an action for interference with prospective business advantage will lie where the right to pursue a lawful business is intentionally interfered with either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification ([Chicago Title Ins. Co. v. Great Western Financial Corp. \(1968\) 69 Cal.2d 305, 319 \[70 Cal.Rptr. 849, 444 P.2d 481\]](#); [Willis v. Santa Ana etc. Hospital Assn. \(1962\) 58 Cal.2d 806, 810 \[26 Cal.Rptr. 640, 376 P.2d 568\]](#); [Guillory v. Godfrey \(1955\) 134 Cal.App.2d 628, 632 \[286 P.2d 474\]](#); [Masoni v. Board of Trade of S.F., ***61 supra, 119 Cal.App.2d at p. 741](#)). **CA(2)[[↑]] (2)** Finally, it bears special emphasis that while the defendant's culpable intent and the damages resulting from the interference are elements of the cause of action which must be pleaded and proved by the plaintiff, the defendant's justification is not an ingredient of the cause [*19] of action, but rather constitutes an affirmative defense ([A. F. Arnold & Co. v. Pacific Professional Ins., Inc., supra, at p. 714](#); Prosser on Torts, *supra*, at p. 953). As has been said in [Herron v. State Farm Mutual Ins. Co. \(1961\) 56 Cal.2d 202, 207 \[14 Cal.Rptr. 294, 363 P.2d 310\]](#), **HN4[[↑]]** "Justification is an affirmative defense and may not be considered as supporting the trial court's action in sustaining a demurrer unless it appears on the face of the complaint." (Accord: [Gold v. Los Angeles Democratic League \(1975\) 49 Cal.App.3d 365, 376 \[122 Cal.Rptr. 732\]](#); [A. F. Arnold & Co. v. Pacific Professional Ins., Inc., supra](#).)

CA(3)[[↑]] (3) When examined in light of the foregoing principles we believe the Second Complaint alleges facts sufficient to state a cause of action for tortious interference with prospective business advantage and at the [***7] same time the requisite justification fails to appear upon the face of the complaint. As a consequence, we hold that the trial court erred in sustaining respondent's demurrer to the Second Complaint and in dismissing appellant's action.

[**669] The Second Complaint in essence avers that appellant was the sole owner of Lowell Freight Lines, Inc., a trucking firm (Company). For over five years the Company performed delivery services for respondent pursuant to an oral contract. The revenue derived from that contract amounted to approximately 40 percent of the gross

income of appellant's business. Appellant intended to sell the Company, and he received several offers from potential purchasers. One of these offers, which was conditioned on the Company's continued business with respondent, was for approximately \$ 200,000. Respondent, however, intentionally interfered with the consummation of this agreement by informing the prospective purchasers that the delivery contract would be terminated if the Company was sold to a third person. The purpose of the interference was to discourage potential buyers from purchasing the Company from appellant and thereby depress its purchase price [***8] substantially below its market value. Respondent succeeded in its scheme. The Company was sold to respondent for about \$ 17,400 instead of its true market value of \$ 200,000, and as a result appellant suffered damages in the sum of \$ 183,000.

HN5[] The facts alleged in the Second Complaint, which for the purpose of a demurrer must be regarded as true (*Mercer v. Elliott* (1962) 208 Cal.App.2d 275, 279 [25 Cal.Rptr. 217]), thus clearly establish that respondent intentionally interfered with a prospective advantageous business relationship, and that the interference resulted in substantial [*20] damages to appellant. These allegations, of course, are sufficient to state a valid cause of action for interference with prospective economic advantage *unless it can be said that the facts averred in the complaint show justification or privilege as a matter of law* (*A. F. Arnold & Co. v. Pacific Professional Ins., Inc., supra*; Prosser on Torts, *supra*, at p. 953).

This leads us to the very heart of the dispute, i.e., whether the facts alleged in the Second Complaint divulge upon their face that the acts complained of were justified or privileged. Respondent, in effect, [***9] argues that in the absence of a binding contract it was free to terminate its business relationship with appellant or any potential successor, and was also at liberty to inform the future buyers that respondent did not intend to utilize the services of the Company if the latter changed hands. Since the means adopted and utilized by respondent were entirely proper and lawful, continues the argument, no actionable wrong was alleged or committed, even if the Second Complaint charged that the steps complained of were taken for an improper purpose or motive. Respondent's position is unacceptable for a number of considerations.

CA(1b)[] (1b) **CA(4)**[] (4) (See fn. 1.) One, as spelled out above, **HN6**[] even if the means used by the defendant are entirely lawful, intentional interference with prospective economic advantage constitutes actionable wrong *if it results in damages to the plaintiff, and the defendant's conduct is not excused by a legally recognized privilege or justification* (*Chicago Title Ins. Co. v. Great Western Financial Corp., supra*, 69 Cal.2d 305, 319; *A. F. Arnold & Co. v. Pacific Professional Ins., Inc., supra*, at p. 716; Rest., Torts, § 766).¹

[***10] **CA(5)**[] (5) Two, **HN7**[] as a general rule, the determination of whether the defendant's conduct of interfering with existing contracts with third persons or prospective economic advantage is privileged comprises a factual issue to be decided upon all the circumstances of the case. "Whether an intentional interference by a third party is justifiable [*670] depends upon a balancing of the importance, social and private, of the objective [*21] advanced by the interference against the importance of the interest interfered with, considering all circumstances including the nature of the actor's conduct and the relationship between the parties." (*Herron v. State Farm Mutual Ins. Co., supra*, 56 Cal.2d at p. 206, italics added; *Greenberg v. Hollywood Turf Club* (1970) 7 Cal.App.3d 968, 977 [86 Cal.Rptr. 885]; see also *Freed v. Manchester Service, Inc.* (1958) 165 Cal.App.2d 186 [331 P.2d 689]; *Masoni v. Board of Trade of S.F., supra*, 119 Cal.App.2d 738.) In harmony therewith, Restatement of Torts section 767, provides that **HN8**[] "In determining whether there is a privilege to act in the manner stated in § 766, the following are important factors: [para.] [***11] (a) the nature of the actor's conduct, [para.] (b) the nature of the expectancy with which his conduct interferes, [para.] (c) the relations between the parties, [para.] (d) the interest sought to be advanced by the actor and [para.] (e) the social interests in protecting the expectancy on the one hand and the

¹ Respondent at oral argument advanced for the first time the theory of justification based upon the giving of advice as described in the **Restatement of Torts section 772**, and discussed in *Walsh v. Glendale Fed. Sav. & Loan Assn.* (1969) 1 Cal.App.3d 578, 588-589 [81 Cal.Rptr. 804]. Reliance on this theory is misplaced since, as pointed out in comment a to the **Restatement of Torts section 772**, one of the conditions of such justification is "(1) that the advice be requested, . . ." In the case at bench nothing in the allegations of the Second Complaint remotely suggests that respondent was requested by the prospective purchasers to give them any advice concerning the purchase of appellant's business.

actor's freedom of action on the other hand." Significantly enough, comment d to section 767 spells out that "*the question on the issue of privilege is whether the actor's conduct was fair and reasonable under the circumstances . . .*" (italics added).

CA(6) [6] (6) Three, but aside from the general rule, respondent's interference here may not *eo ipso* be justified by virtue of certain special privileges carved out for competitors and persons having a financial interest in the business of the person induced either (*Rest., Torts*, §§ 768, 769). Section 768 of the Restatement of Torts explicitly provides that the privilege accorded therein applies only to a competitor of the defendant.² Appellant and respondent here were involved in entirely different kinds of businesses, and by no stretch of the imagination may they be said to have been competitors to each other. At [***12] the same time respondent fails to qualify for an *ipso jure* privilege under *Restatement of Torts*, section 769, as well. The latter states that **HN9** [7] "One who has a financial interest in the business of another is privileged purposely to cause him not to enter into or continue a relation with a third person in that business if the actor [para.] (a) does not employ improper means, and [para.] (b) acts to protect his interest from being prejudiced by the relation." Clarifying the meaning of this section, comment a emphasizes that the financial interest privileged under section 769 is an interest in the nature of an investment (i.e., interest of a part owner, partner, stockholder and the like). However, it is made clear that the interest of a person who looks to the other for business and will lose business opportunities if the other enters [*22] into the business relations involved is not a financial interest within the meaning of section 769. **CA(7)** [7] (7) Even more to the point, the case law underlines that **HN10** [8] the privilege that arises by reason of section 769 is at most a qualified privilege which depends for its existence upon the circumstances of the case. It is essentially a state-of-mind [***13] privilege, and therefore its existence cannot be satisfactorily determined on the basis of the pleadings alone. The resolution of the issue turns on the defendant's predominant purpose in inducing the breach and consequently the matter is to be determined on the basis of proof rather than of pleading (*Culcal Stylco, Inc. v. Vornado, Inc.* (1972) 26 Cal.App.3d 879, 883 [103 Cal.Rptr. 419]; see also *Tye v. Finkelstein* (D.Mass. 1958) 160 F.Supp. 666, 668; *Rest., Torts*, § 769, com. b).

The foregoing discussion clearly indicates that the privilege or justification which would exempt respondent from liability as a matter of law does not appear on the face of the Second Complaint. It follows that it constitutes an affirmative defense which may be raised only by answer (*Code Civ. Proc.*, [***14] § 430.30).

Respondent's contentions that the general demurrer to the Second Complaint [**671] was properly sustained for the additional reasons that no causal relationship between respondent's conduct and appellant's damages was alleged, and that the Second Complaint was uncertain, may be briefly disposed of. The Second Complaint as a whole demonstrates that the damages alleged therein were incurred by the appellant due to the respondent's unlawful interference with the prospective business deal between appellant and the potential buyers. Thus, the requisite nexus or causation between appellant's damages and respondent's act was sufficiently alleged. **CA(8)** [8] (8) With regard to respondent's second argument, suffice it to say **HN11** [9] that the imprecision or uncertainty of a complaint is considered a curable defect which is subject to special, rather than general, demurrer. It is axiomatic that where, as here, the complaint is sufficient against a general demurrer, the sustaining of the demurrer without leave to amend is totally unwarranted for uncertainties or ambiguities in the pleadings (*Lemoge Electric v. County of San Mateo* (1956) 46 Cal.2d 659, 664 [297 P.2d 638]; *Wennerholm* [***15] v. Stanford Univ. Sch. of Med. (1942) 20 Cal.2d 713, 718-719 [128 P.2d 522, 141 A.L.R. 1358]).

Antitrust and Unfair Practices Violations: While we hold that the allegations of the Second Complaint gave rise to a cause of action for tortious interference with prospective business advantage and therefore [*23] the sustaining of the demurrer to that cause of action was reversible error, we are unable to agree with appellant that the facts alleged in the original complaint established a separate and distinct cause of action under the Cartwright Act and the California Unfair Practices Act.

² **Restatement of Torts** section 768, sets out in part that "(1) One is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor." (Italics added.)

CA(9)³ (9) The Cartwright Act (Act) is the popular name for the California antitrust law which is contained in Business and Professions Code³ sections 16700-16758. Section 16720 sets forth specific categories of conduct which violate the Act. In sum, **HN12**³ the Act prohibits the combination of resources of two or more independent interests for the purpose of restraining commerce and preventing market competition in the variety of ways listed in the statute (Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal.App.2d 672 [73 Cal.Rptr. 494]). **CA(10)**³ (10) Though not specifically listed, monopoly is a prohibited ***16 restraint of trade. **CA(11)**³ (11) The offense of monopoly involves the willful acquisition of the power to control prices or exclude competition from commerce in a particular geographic area with respect to a specific product (United States v. Grinnell Corp. (1966) 384 U.S. 563 [16 L.Ed.2d 778, 86 S.Ct. 1698]; United States v. Aluminum Co. of America (2d Cir. 1945) 148 F.2d 416).

The allegations of the Complaint here totally failed to establish the existence of monopoly proscribed by both the federal and state antitrust laws. On the contrary, the averments set out in the Complaint ipso facto ruled out that the acquisition of a trucking company which derived only 40 percent of its revenue from the carriage of respondent's goods, could or would grant the respondent the power to control prices in the cookie or transportation markets or to exclude competition in any market area with respect to either ***17 activity.

CA(12)³ (12) But, quite apart from the aforesaid reasons, there is another consideration why we are compelled to conclude that the Complaint failed to state a cause of action under the Act. It is well recognized that **HN13**³ in order to be actionable the injury to the plaintiff's business must flow directly from the unlawful combination or trust which was brought about to restrict trade or commerce within the meaning of the Act. As pointed out in Clark v. Lesher (1951) 106 Cal.App.2d 403, 407 [235 P.2d 71]: "It was early pointed out by the appellate courts of the state that *the damages recoverable under the foregoing provisions of the act must be such, and could only be such, as resulted directly from the fact of the [*24] existence of the unlawful combination or trust and flowed solely from restrictions in trade or commerce fostered thereby.* We ***672 quote the following from Munter v. Eastman Kodak Co., 28 Cal.App. 660, 665 [153 P. 737]:

"... **HN14**³ While one whose business or property has been injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the ***18 provisions of the anti-trust law for double the damages he has actually suffered from the injury so inflicted, *yet he could not maintain an action based upon said law if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, did not arise by reason of the restrictions in trade or commerce carried out by such trust or combination.*" (Italics partially added. See also Weissensee v. Chronicle Publishing Co. (1976) 59 Cal.App.3d 723, 728 [129 Cal.Rptr. 188].)

In the instant case, the Complaint clearly articulates that the damage sued for arose not because of any restriction in trade or commerce but rather from the alleged wrongful act of the respondent which "by threats and intimidations frightened away prospective purchasers and by threats and coercion forced the plaintiff to sell his corporation to defendant Mother's . . . at substantially less money . . . than what plaintiff would have made had he continued to operate the truck line or if it had been sold at a competitive price on the open market."

In sum, the Complaint fails to claim the existence of a combination or trust for the purpose of restricting ***19 the flow of trade or commerce. Furthermore, the Complaint alleges that the damages arose not by reason of any restriction of trade or commerce, but rather from the distinct fact that in an effort to depress the market price of the Company respondent scared away the potential buyers by threats and intimidations and forced appellant to sell his firm to respondent at substantially below its market value. Since the facts alleged in the Complaint did not state a cause of action cognizable under the Act, and there was no reasonable probability that the defects could be cured by an eventual amendment, the sustaining of the demurrer without leave to amend as to the second cause of action was entirely proper (Vater v. County of Glenn (1958) 49 Cal.2d 815, 821 [323 P.2d 85]; Sackett v. Wyatt (1973) 32 Cal.App.3d 592, 603 [108 Cal.Rptr. 219]).

³Unless otherwise indicated, all references will be made to the California Business and Professions Code.

[*25] **CA(13)** [13] Finally, we briefly observe that the allegations of the Complaint did not state a cause of action under the Unfair Practices Act either (§ 17000 et seq.). In essence, **HN15** [this latter statute prohibits selling articles below cost, or giving them away for the purpose of injuring competitors or destroying competition (1 Witkin, [*20] Summary of Cal. Law, *supra*, § 458, at p. 387). The Complaint is entirely devoid of any allegation or claim that respondent's conduct constituted prohibited pricing policy or marketing method proscribed by the Unfair Practices Act.

The judgment insofar as it dismisses the first cause of action of the second amended complaint (interference with prospective economic advantage) is reversed; the judgment insofar as it dismisses the second cause of action of the original complaint (relating to claims under the Cartwright Act and the California Unfair Practices Act) is affirmed. Each party to bear their own costs.

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Scheuch v. Western World Ins. Co.

Court of Appeal of California, Second Appellate District, Division One

June 21, 1978

Civ. No. 52421.

Reporter

145 Cal. Rptr. 294 *; 1978 Cal. App. LEXIS 1649 **; 82 Cal. App. 3d 31

JULIE SCHEUCH, Plaintiff and Appellant, v. WESTERN WORLD INSURANCE COMPANY, Defendant and Respondent.

Notice: NOT CITABLE - SUPERSEDED BY GRANT OF REVIEW

Subsequent History: [**1] Hg. granted Aug. 31, 1978 (L.A. 31015)

June 27, 1979, cause retrans. to Ct. of App., 2d Dist., Div. 1, for reconsideration in light of [Royal Globe Insurance Co. v. Superior Court \(1979\) 23 Cal3d 880](#). Opn. filed Oct. 9, 1979, not for publication

Prior History: Superior Court of Los Angeles County, No. C-200129, Robert I. Weil, Judge.

Core Terms

insured, settlement, duty to settle, good faith, settle, unfair

Counsel: David S. Sperber for Plaintiff and Appellant.

Vletas & Greer and Barry E. Shanley for Defendant and Respondent.

Opinion by: LILLIE

Opinion

[*295] LILLIE, Acting P. J.

In her complaint plaintiff alleged that defendant Western World Insurance Company, Inc., had breached a duty assertedly arising out of [Insurance Code section 790.03, subdivision \(h\)](#), to enter into good faith negotiations to settle her claim for injuries resulting from the negligence of Western World's insured. The complaint was met with demurrer which was sustained without leave to amend.¹ The determination of this appeal from the ensuing order of dismissal turns on whether any such duty was owed to plaintiff.

[**2] Because this appeal arises following the sustaining of a demurrer there can be no dispute regarding the operative facts of the matter. As the result of the negligence of one of the employees of Circle K Riding Stables

¹ Though the complaint purported to state only one cause of action, it also alleged a breach of contract, with plaintiff claiming to be a third party beneficiary of the insurance contract between Western World and its insured. In her response to demurrer plaintiff characterized this allegation as "surplusage," and no question with respect thereto is raised on appeal. It would appear in any event that third party beneficiary analysis would avail plaintiff nothing.

plaintiff fell from a horse and was injured while at the stables. Her demand on Circle K for compensation was reported to its insurer, Western World, which undertook the defense prior to July 21, 1974. Prior to October 17 the same year the liability of the stables had become reasonably clear. Plaintiff wrote to Western World advising the extent of her injuries and requesting to enter into settlement discussions; shortly thereafter plaintiff authorized defendant Circle K to obtain copies of all of her medical treatments. About August 21, 1975, plaintiff informed Western World of a similar case in which a girl with medical payments of \$4,000 had recovered a verdict of more than \$41,000; plaintiff's medicals were then more than \$8,000. A month later plaintiff further advised Western World that her injuries were very severe, though their full nature and extent were still not known, that she had been hospitalized again in August, and that her estimated medical bills were [**3] approximately \$10,000. Trial of the cause against Circle K was set for December 15, 1976. Beginning July 1976 plaintiff demanded \$30,000 in settlement; defendant made no offer to settle. At the mandatory settlement conference plaintiff predicted a verdict of \$60,000 but repeated her offer to settle for \$30,000; the court agreed with plaintiff's estimate of the jury verdict. Western World offered to settle for \$1,000. The matter proceeded to trial; the jury rendered a plaintiff's verdict in the amount of \$56,611 and, as plaintiff was found to have been 55 percent comparatively negligent, judgment was entered for \$25,474.95.

The complaint herein further alleges that at all times mentioned therein Circle K [*296] Riding Stables' liability to plaintiff had become reasonably clear; that Western World's refusal to negotiate was oppressive and malicious for the purpose of intimidation and forcing an unreasonable settlement; that Western World acted unfairly and in bad faith, made no good faith attempt to effectuate a prompt, fair and equitable settlement and had adopted a policy of so acting in such cases; that Western World was thus guilty of an unfair method of competition and an [**4] unfair and oppressive deceptive act or practice under [Insurance Code section 790.03](#); that the reasonable settlement value of plaintiff's case was \$30,000 and a reasonably prudent insurance carrier would have entered into settlement negotiations and settled for this amount. Plaintiff claimed general damages of \$2.5 million, unspecified specials, and punitives of \$15 million.

[Section 790.03, subdivision \(h\)](#),² provides that it is an unfair method of competition and unfair and deceptive act or practice in the business of insurance to knowingly commit or perform with such frequency as to indicate a general business practice. "Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." The section is part of article 6.5 of the Insurance Code, the purpose of which is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in what is known as the McCarran-Ferguson Act ([15 U.S.C.A. §§ 1011-1015](#)). (§ 790.) Until the decision of the Supreme Court in [United States v. Underwriters Assn. \(1944\) 322 U.S. 533 \[88 L.Ed. 1440, 64 S.Ct. 1162\]](#), regulation [**5] of the business of insurance had been considered to fall exclusively within the province of the states.³ Following the Underwriters Assn. decision, Congress acted to enable the states to retain this traditional authority.⁴ The Sherman and Clayton Antitrust Acts and the Federal Trade Commission Act were declared applicable to the business of insurance only to the extent such business is not regulated by state law.⁵ ([15 U.S.C.A. § 1012](#).) Article 6.5 of the Insurance Code does so regulate the insurance business. ([Addisu v. Equitable Life Assurance Society of U. S. \(9th Cir. 1974\) 503 F.2d 725, 728](#).) In short, this portion of the Insurance Code is essentially an antitrust provision which, as the more specific act, supersedes the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) which encompasses the general **antitrust law** of California. ([Chicago Title Ins. Co. v. Great](#)

² Unless otherwise indicated all statutory references are to the Insurance Code.

³ The reason for this was that the business of insurance was not deemed commerce within the meaning of the Commerce Clause (U.S. [Const., art. I, § 8, cl. 3](#)). ([Paul v. Virginia \(1868\) 75 U.S. \(8 Wall.\) 168, 183 \[19 L.Ed. 357, 361\]](#).)

⁴ "Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier or taxation of such business by the several states." ([15 U.S.C.A. § 1011](#).)

⁵ "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." (15 U.S.C.A. § 1013b.)

Western Financial Corp., 69 Cal.2d 305, 322 [70 Cal.Rptr. 849, 444 P.2d 481]; Greenberg v. Equitable Life Assur. Society, 34 Cal.App.3d 994, 999, fn. 2 [110 Cal.Rptr. 470].) Except for Cancino v. Farmers Ins. Group, 80 Cal.App.3d 335 [145 Cal.Rptr. 503], the few cases involving section 790.03 have been classic [**6] antitrust actions. (Shernoff v. Superior Court, 44 Cal.App.3d 406 [118 Cal.Rptr. 680]; Greenberg, supra, 34 Cal.App.3d 994; Addrisi, supra, 503 F.2d 725.) This court has previously determined, contrary to the position taken by at least one other jurisdiction (see Retail Clerks Welfare Fund v. Continental Cas. Co. (1961) 71 N.J. Super. 221 [176 A.2d 524]), that ". . . the person to whom the civil liability runs may enforce it by an appropriate action" irrespective of governmental action against the insurer for violation of a provision of the Insurance Code. (Greenberg, supra, 34 Cal.App.3d 994, 1001.)

[**7] Appellant's position is that section 790.03, subdivision h), imposes on the insurer an independent duty to one injured by the insurer's insured to enter into good faith settlement negotiations with the injured person once the insured's liability to that person has become reasonably clear.⁶ This is rather a startling proposition.⁷ The covenant of good faith and fair dealing which requires an insurer to effect reasonable settlement of a claim against the insured within its policy limits arises out of the contract of insurance. (Johansen v. California State Auto. Assn. Inter-Ins. Bureau, 15 Cal.3d 9, 18 [123 Cal.Rptr. 288, 538 P.2d 744]; Crisci v. Security Ins. Co., 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173]; Comunale v. Traders & General Ins. Co., 50 Cal.2d 654, 658-659 [328 P.2d 198, 68 A.L.R.2d 883].) The duty arising out of the implied covenant is enforceable by the named insured and, under the third party beneficiary doctrine, one on the same footing as the named insured. (Cancino v. Farmers Ins. Group, 80 Cal.App.3d 335, 339-340 [145 Cal.Rptr. 503] [one loading insured vehicle--"insured"]; Northwestern Mut. Ins. Co. v. Farmers' Ins. Group, 76 Cal.App.3d 1031, [**8] 1042-1044 [*297] [143 Cal.Rptr. 415] [permissive user--"insured"]; see also Johanson v. California State Auto. Assn. Inter-Ins. Bureau, 15 Cal.3d 9 13-14 [123 Cal.Rptr. 288, 538 P.2d 744].) Neither the third party beneficiary doctrine nor any other theory, however, has successfully extended the duty of the insurer beyond these limits. Murphy v. Allstate Ins. Co., 17 Cal.3d 937, 944 [132 Cal.Rptr. 424, 553 P.2d 584], and Zahn v. Canadian Indem. Co., 57 Cal.App.3d 509, 514 [129 Cal.Rptr. 286] expressly reject the contention that the third party beneficiary doctrine creates any duty to settle on the part of the insurer vis-a-vis an injured claimant not insured under the policy. Murphy, supra, 17 Cal.3d at page 944, also rejected the notion that the Financial Responsibility Law (Veh. Code, § 16000 et seq.) creates any such duty.⁸ We believe appellant's effort to found such a duty on section 790.03, subdivision (h), must be similarly rejected.

[**9] The duty to settle, and its attendant obligation to enter into good faith settlement discussions, is one aspect of the covenant of good faith and fair dealing (Crisci, supra, 66 Cal.2d at p. 430; Comunale, supra, 50 Cal.2d at p. 659) which is implied in law. (Gruenberg v. Aetna Ins. Co., 9 Cal.3d 566, 574 [108 Cal.Rptr. 480, 510 P.2d 1032].) "The duty to settle is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble--on which only the insured might lose." (Murphy, supra, 17 Cal.3d at p. 941.) Where there is no such risk to the insured there is no duty to settle. (Ibid.; see Shapero v. Allstate Ins. Co., 14 Cal.App.3d 433 [92 Cal.Rptr. 244].) Obviously the interests of the person injured by the insured are remote from those considerations which gave rise to judicial declaration of an implied in law duty to settle.

Section 790.03, subdivision (h), imposes no duty on an insurer which had not already [*298] been judicially declared prior to its enactment in 1972. In the Greenberg case already cited, while reaching the conclusion that the person to whom civil liability runs for breach of section 790.03 may [**10] enforce it by appropriate action, we noted "Any other construction would overturn by implication the rule of Crisci v. Security Ins. Co., 66 Cal.2d 425 [58 Cal.Rptr. 13, 426 P.2d 173]. Insurance Code section 790.03 was amended after the trial of the case at bench to add

⁶ It does not appear that the amount of the judgment against Circle K Riding Stables was in excess of its insurance coverage. In any case appellant did not sue as assignee of any right of action Circle K might have against its insurer.

⁷ The granting of petition for hearing in Royal Globe Ins. Co. v. Superior Court (3 Civ. 17489) on June 1, 1978, places the issue before our Supreme Court.

⁸ Of related interest is the court's rejection (17 Cal.3d at p. 946) of the further argument that plaintiff could proceed against the insurer for breach of the duty owed to its insured by way of a creditors' suit under Code of Civil Procedure, section 720.

subdivision (h) which defines as an unfair trade practice by an insurer the refusal to exercise good faith to effectuate settlements of claims." ([34 Cal.App.3d at p. 1001, fn. 5.](#)) What was implicit there we now make explicit: [Section 790.03, subdivision \(h\)](#), represents a legislative embodiment of the law for the purpose of regulating the business of insurance, as previously declared by the Supreme Court of this state. Appellant would have us hold that the Legislature not only endorsed judicial declaration of the duty to settle but greatly expanded it to include injured claimants not the insureds among the persons to whom the duty is owed. We find no justification for such a conclusion.

The order of dismissal is affirmed.

Thompson, J., and Hanson, J., concurred.

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Younger v. Jensen

Court of Appeal of California, Second Appellate District, Division One

July 11, 1978

Civ. No. 52440, 52975.

Reporter

147 Cal. Rptr. 410 *; 1978 Cal. App. LEXIS 1712 **; 82 Cal. App. 3d 689

EVELLE J. YOUNGER, as Attorney General, etc., Plaintiff and Appellant, v. JOHN JENSEN et al., Defendants and Respondents.

Notice: NOT CITABLE - SUPERSEDED BY GRANT OF REVIEW

Subsequent History: [**1] Hg. granted Sept. 7, 1978 (See [26 C.3d 397](#))

Prior History: Superior Court of Los Angeles County, Nos. C-170995, and C-184173, John L. Cole, Judge.

Core Terms

natural gas, anti trust law, producers, funding agreement, regulation, transportation, interstate, antitrust, preemption, rates, certificate, contracts, transit system, federal law, consumers, petitions, clauses, cases, advance payment, favored nation, provisions, commerce, pipeline, prices, state **antitrust law**, delegated, wholesale, shortage, charges, sales

LexisNexis® Headnotes

Governments > State & Territorial Governments > Claims By & Against

[HN1](#) [blue icon] **State & Territorial Governments, Claims By & Against**

See [Cal. Gov't Code § 11180\(a\)-\(c\)](#).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Constitutional Law > Supremacy Clause > Federal Preemption

Constitutional Law > Supremacy Clause > General Overview

Constitutional Law > Supremacy Clause > Supreme Law of the Land

[HN2](#) [blue icon] **Public Enforcement, State Civil Actions**

The doctrine of preemption has its source in the supremacy clause (U.S. Const. art. VI, [cl. 2](#)): The California Constitution, and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Constitutional Law > Supremacy Clause > General Overview

Governments > Legislation > Interpretation

[**HN3**](#) Constitutional Law, Supremacy Clause

In the final analysis, a court's function is to determine whether the challenged statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Transportation Law > Interstate Commerce > General Overview

Constitutional Law > Congressional Duties & Powers > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Natural Gas Industry > General Overview

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Exports & Imports

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

Energy & Utilities Law > Utility Companies > General Overview

Energy & Utilities Law > Utility Companies > Buying & Selling of Power

Governments > Federal Government > US Congress

[**HN4**](#) Natural Gas Industry, Natural Gas Act

In the § 1b of the Natural Gas Act of 1938, [15 U.S.C.S. § 717b](#), Congress drew three things within its own regulatory power, delegated by the act to its agent, the Federal Power Commission. These were: the transportation of natural gas in interstate commerce, its sale in interstate commerce for resale, and natural gas companies engaged in such transportation or sale. Congress did not exercise its authority to constitutional limits. Instead, Congress envisioned a comprehensive scheme of dual state and federal authority.

Energy & Utilities Law > Pipelines & Transportation > Certification & Licenses

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

147 Cal. Rptr. 410, *410 1978 Cal. App. LEXIS 1712, **1

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

Energy & Utilities Law > Pipelines & Transportation > Pipelines > General Overview

HN5 Pipelines & Transportation, Certification & Licenses

A "jurisdictional" pipeline transports natural gas in interstate commerce and for that reason is subject to Federal Power Commission certification jurisdiction. The "jurisdictional" label is also sometimes used to apply to sales, in which case it refers to interstate sales for resale, which are subject to Commission rate regulation.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Natural Gas Industry > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Utility Companies > General Overview

Energy & Utilities Law > Utility Companies > Buying & Selling of Power

Energy & Utilities Law > Utility Companies > Ownership & Restructuring

Governments > Public Improvements > General Overview

HN6 Natural Gas Industry, Distribution & Sale

The Federal Power Commission has the authority to make rules and regulations necessary or appropriate to carry out the provisions of the Natural Gas Act of 1938, [15 U.S.C.S. §§ 717-717\(w\)](#). The Natural Gas Act of 1938, [15 U.S.C.S. § 717\(o\)](#).

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Natural Gas Industry > General Overview

HN7 Natural Gas Industry, Distribution & Sale

Federal Power Commission price regulation of the natural gas industry is pervasive. The federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas, or for state regulations which would indirectly achieve the same result.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

147 Cal. Rptr. 410, *410 1978 Cal. App. LEXIS 1712, **1

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

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HN8 [down] Procedural Matters, Jurisdiction

The Federal Power Commission, in passing on any given transaction within its jurisdiction, must consider anticompetitive consequences thereof.

Constitutional Law > Supremacy Clause > Federal Preemption

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Constitutional Law > Supremacy Clause > General Overview

Energy & Utilities Law > Administrative Proceedings > Preemption

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HN9 [down] Supremacy Clause, Federal Preemption

Where one is considering the relationship of two federal laws there is no preemption, i.e., supremacy clause, problem.

Energy & Utilities Law > Administrative Proceedings > Preemption

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HN10 [down] Administrative Proceedings, Preemption

When Congress has unmistakably ordained that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.

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Opinion by: LILLIE

Opinion

[*412] LILLIE, Acting P. J.

In January 1976 the Attorney General of the State of California, purportedly acting under the provisions of Government Code section 11180¹ et seq., delegated authority to certain named persons "to conduct an investigation into the ownership, production, sale and distribution of Prudhoe Bay, Alaska, natural gas insofar as it affects the State of California, to determine the existence, nature, and scope of violations of the federal and state antitrust laws pertaining to price fixing, monopolization, division of markets, and restraint of trade, and to hold hearings, issue subpoenas, inspect books and records, take [*2] testimony, hear complaints, and administer oaths in connection therewith" as the delegates might deem necessary. The following April, subpoenas to attend and testify and to produce books, records, papers and documents were served on Pacific Lighting Gas Development Company (PLGD) and Exxon Corporation (Exxon)² and certain officers thereof. PLGD and Exxon each produced some documents in response to the subpoenas, and a representative of each company appeared to testify. The Attorney General was not satisfied with the extent of compliance. Cooperative efforts to effect a compromise as to what further compliance was necessary ultimately were unavailing. The Attorney General petitioned the superior court for orders compelling compliance. The two petitions were jointly heard for argument, PLGD and Exxon raising substantially identical grounds in opposition thereto. The court denied the petitions, ruling that the Attorney General's investigation was preempted by federal law, namely the Natural Gas Act of 1938 (15 U.S.C.A. §§ 717-717w) and the Alaska Natural Gas Transportation Act of 1976 (id., §§ 719-719o).³ The court did not reach other matters raised in objection, principally [*3] commerce clause and Fourth Amendment arguments. On this appeal from orders denying petitions, we affirm for the same reason the superior court denied the petitions -- federal preemption.

[**4] [*413] The facts relevant to this inquiry are not in dispute. Exxon and Atlantic Richfield Company (ARCO) are two of the three major producers of Prudhoe Bay, Alaska natural gas, the largest reservoir of natural gas ever discovered in North America. Natural gas is, of course, an energy source of major importance to this country, and in recent years a natural gas supply shortage has become a matter of increasing concern. In 1970 the Federal Power Commission (FPC or Commission)⁴ took certain steps to alleviate the natural gas shortage. One of these allowed

¹ **HN1**  Section 11180, Government Code reads: "The head of each department may make investigations and prosecute actions concerning:

- "a) All matters relating to the business activities and subjects under the jurisdiction of the department.
- "b) Violations of any law or rule or order of the department.
- "c) Such other matters as may be provided by law."

² Actually the subpoena was served on Exxon Company, U.S.A., an operating division of Exxon Corporation. But it was Exxon Corporation that responded to the subpoena.

³ The court was of the opinion that "[I]f anything ever was a prime candidate for the application of the doctrine of preemption, this is it."

The Attorney General disputes whether the court relied on the Alaska Natural Gas Transportation Act. It is true this is not completely clear from the record, though the effect of this act was raised by respondents. Whether the court did in fact rely on this act is, however, immaterial inasmuch as we determine the correctness of the court's decision, not of its reasoning. (E.g., Olson v. County of Shasta, 5 Cal.App.3d 336, 343 [85 Cal.Rptr. 77].)

⁴ The Federal Energy Regulatory Commission has succeeded to the regulatory jurisdiction of the FPC (42 U.S.C.A. § 7172). For convenience we continue to refer to the Federal Power Commission.

natural gas pipelines, subject to certain conditions, to include in their rate base advance payments to natural gas producers for gas to be delivered at a future date. This measure was expected to stimulate natural gas production by affording producers ready capital investment to finance development and production; allowing rate base treatment for the advance payments provided the encouragement to pipelines to advance the funds. This action of the Commission was upheld in [Public Serv. Com'n, State of N.Y. v. Federal Power Com'n \(D.C.Cir. 1972\) 467 F.2d 361](#) as "a justifiable experiment in the continuing search for solutions **[**5]** to our nation's critical shortage of natural gas." (P. 371.)

The advance payments program was originally approved on a temporary basis. It was subsequently modified and continued on several occasions, and in December 1973 it was extended to Alaskan advances. In March 1975 ARCO and PLGD entered into an advance payments or funding agreement whereby ARCO agreed to "enter into exclusive good faith negotiations" with an affiliate of PLGD ⁵ for the right to purchase 60 percent of ARCO's gas reserves at Prudhoe Bay. ⁶ In return, PLGD and Southern California Gas Company (SoCal), another affiliate, promised to pay the interest and carrying charges on a production payment loan arranged by ARCO. The same month a similar agreement was reached between Exxon and Pacific Gas and Electric Company (PG&E). ⁷ This contract gave PG&E "the sole and exclusive initial right to negotiate" for 30 percent of Exxon's Prudhoe Bay gas production over a 20-year period in exchange for the advance of the cost of **[**6]** raising capital; Exxon would raise the capital.

[7]** Each of these agreements described certain of the terms to be included in the future contracts for sale should they actually be concluded. One of the terms was a "most favored nation" pricing provision according to which the buyer agreed to pay the seller the highest price provided in any other contract for sale of Prudhoe Bay natural gas to be delivered in the lower 48 states.⁸

⁵ PLGD explains in its appellate brief that it is a subsidiary of Pacific Lighting Corporation, a holding company with a number of subsidiaries.

⁶ ARCO was also served with an investigative subpoena. On June 14, 1976, upon application of ARCO the United States District Court for the Central District of California issued a temporary restraining order restraining the Attorney General from continuing his investigation as to ARCO and from enforcing the subpoena served pursuant to the investigation. Following a chain of events not relevant here, a preliminary injunction issued on September 29, 1977, on the basis of preemption. The Attorney General's appeal from this order is now pending before the Ninth Circuit Court of Appeals. All proceedings on the appeal have been stayed, however, apparently because the district court had indicated that ARCO's motion for summary judgment should be granted. On June 26, 1978, summary judgment was entered permanently enjoining the Attorney General's investigation.

⁷ PG&E was also served with an investigative subpoena. We are informed that in an enforcement action similar to those in this case the Superior Court for the City and County of San Francisco (Benson, J.) on November 19, 1976, substantially enforced the subpoena and denied constitutional challenges, including that of preemption by the Natural Gas Act.

⁸ The ARCO-PLGD most favored nation clause:

"The contract gas sales price under regulation shall be negotiated to be the highest of: a) the highest price provided in any other long-term Prudhoe Bay contract for delivery of substantial volumes of gas to the lower 48 states or b) the highest applicable just and reasonable rate adopted by the Federal Power Commission or c) the nation-wide area rate in effect in 1975 adjusted for applicable Alaska taxes and inflation to date of deliveries. Other pricing provisions shall include full BTU adjustment, tax reimbursement, excess royalty clause, escalation and redetermination clauses and Seller's right to file for special relief."

"The contract gas sales price absent regulation shall be negotiated to be the highest of: a) commodity value in Buyer's market less treating and transportation costs to such market, b) any higher price provided in any other long-term Prudhoe Bay contract for delivery of substantial volumes of gas to the lower 48 states, and c) a negotiated minimum price." (Emphasis added.)

The Exxon-PG&E provision was:

"Pursuant to the exercise of the sole and exclusive right to negotiate . . . EXXON and Corporation [P.G.& E.] will negotiate towards an agreement upon a firm schedule of minimum prices (in cents per MMBtu's) to be not less than the highest price then provided in any other contract for the sale of Prudhoe Oil Pool gas to be delivered in the lower forty-eight states or the estimated commodity value of natural gas at the time of first deliveries in the market to be served less applicable costs to the market. . . . There will also be a provision for redeterminations of a higher price in the event of: A. Regulatory authority adoption of higher

[**8] [*414] Apparently PG&E and SoCal submitted applications to the California Public Utilities Commission (PUC) for permission to pass on to consumers the costs entailed by the agreements with Exxon and ARCO respectively. These applications were approved though it seems the PUC was highly critical of the funding agreements. Sometime after the applications were submitted, the president of the PUC requested the opinion of the Attorney General regarding possible antitrust violations with respect to the funding agreements. A general concern was expressed as to the possibility of antitrust violations including market division by the gas producers, and two specific questions were asked: "1. Would a 'most favored nation' clause such as that contained in [the funding agreements], if incorporated in a gas purchase contract, constitute a violation of the antitrust laws? 2. Do the funding agreements containing such 'most favored nation' clauses constitute an antitrust violation prior to the formation of gas purchase contracts?" The Attorney General's opinion of January 2, 1976, concluded that serious antitrust questions were raised by the funding agreements and "the circumstances surrounding [**9] the proposed development and distribution of Prudhoe Bay natural gas," and recommended further investigation.⁹

On December 31, 1975, after the decision in *Public Serv. Com'n, State of N.Y. v. Federal Power Co. (D.C.Cir. 1975) 511 F.2d 338*,¹⁰ and upon further consideration, the Federal Power Commission terminated its advance payments program; termination of the Alaskan payments was retroactive to a date preceding the agreements [*415] of respondents. On January 12, 1976, PLGD and ARCO mutually agreed to terminate their funding agreement. SoCal then petitioned the PUC to rescind its approval of the agreement, which was done on January 27. PG&E and Exxon mutually agreed to terminate their funding agreement on February 9; PG&E petitioned the PUC to rescind its approval thereof, and this was done on April 13.

[**10] The Attorney General's "Delegation of Authority to Conduct Investigation and Hold Hearings in Connection Therewith" was signed January 19, 1976, and the subpoenas to PLGD and Exxon were served in April. While said delegation of authority purports to authorize an investigation of ownership, production, sale, and distribution of Prudhoe Bay natural gas insofar as it affects California to determine the existence, nature, and scope of violations of federal and state antitrust laws, the Attorney General does not now assert authority to investigate violations of federal law under the provisions of *Government Code section 11180*. Thus, our inquiry is limited to whether this investigation into the possibility of violation of state antitrust law is preempted by federal statutes. HN2 [↑]

The doctrine of preemption has its source in the supremacy clause (U.S. Const., art. VI, cl. 2): "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Numerous catchwords have been employed in [**11] preemption analysis. The Supreme Court "in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance;

allowed prices with Corporation [P.G. & E.] to agree to pay to Exxon such higher allowed prices. B. Regulation or de-regulation such that variable pricing provisions can be used, and one of such variable pricing provisions results in a higher price, in which event, the higher of the following will apply, such higher prices to be redetermined every six months beginning with the effective date of such re-regulation or de-regulation. (Specific details of these pricing provisions remain to be negotiated pursuant to the exercise of the sole and exclusive right to negotiate created in the instrument to which this Exhibit C is attached): 1. The highest price in the field paid by any U.S. buyer to any seller for significant quantities of gas produced from the North Slope of Alaska to be delivered in the lower forty-eight states, adjusted for any difference in transportation to a common point, quality, taxes and excess royalties. 2. The commodity value of natural gas in the market area of the Corporation adjusted for applicable cost to market." (Emphasis added.)

The underscored sections are known as three-party most favored nation clauses. (See *FPC v. Sunray DX Oil Co. (1968) 391 U.S. 9, 18, fn. 2* [20 L.Ed.2d 388, 395, 88 S.Ct. 1526].)

⁹ The opinion identified several areas of concern. Price-fixing by producers of natural gas, division of the California market, contracts in restraint of trade, and monopolization of natural gas part of which is to be distributed in California.

¹⁰ The court held that the FPC had failed to focus on significant issues arising out of the advance payments program and had neglected to provide a reasoned and responsive explanation of its decision to continue the program and expand the scope of the advances eligible for rate base treatment. The record was remanded to the FPC for further proceedings.

difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick." ([Hines v. Davidowitz \(1941\) 312 U.S. 52, 67 \[85 L.Ed. 581, 587, 61 S.Ct. 399\]](#), fn. omitted.) [HN3](#)¹¹ In the final analysis, a court's function is to determine whether the challenged statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Ibid.; [Perez v. Campbell \(1971\) 402 U.S. 637, 649 \[29 L.Ed.2d 233, 242, 91 S.Ct. 1704\]](#).)

In recent years cases involving the question of preemption seem to have arisen at an accelerating rate. To mention only a few of the more significant ones, [Ray v. Atlantic Richfield Co. \(1978\) -- U.S. -- \[55 L.Ed.2d 179, 98 S.Ct. --\]](#); [Jones v. Rath Packing Co. \(1977\) 430 U.S. 519 \[51 L.Ed.2d 604, 97 S.Ct. 1305\]](#); [De Canas v. Bica \(1976\) 424 U.S. 351 \[51 **12\] L.Ed.2d 43, 96 S.Ct. 933\]](#); [Kewanee Oil Co. v. Bicron Corp. \(1974\) 416 U.S. 470 \[40 L.Ed.2d 315, 94 S.Ct. 1879\]](#); [Goldstein v. California \(1973\) 412 U.S. 546 \[37 L.Ed.2d 163, 93 S.Ct. 2303\]](#); and [City of Burbank v. Lockheed Air Terminal \(1973\) 411 U.S. 624 \[36 L.Ed.2d 547, 93 S.Ct. 1854\]](#). If one includes cases involving labor law preemption one need only look to the last few months to find [Sears, Roebuck and Co. v. San Diego District Council of Carpenters \(May 15, 1978\) * -- U.S. -- \[- L.Ed.2d --, -- S.Ct. --\]](#) and [Malone v. White Motor Corp. \(April 3, 1978\) n * -- U.S. -- \[- L.Ed.2d --, -- S.Ct. --\]](#). Needless to say, such cases tend to add to the lexicon of terms used in preemption analysis, while the number and variety of separate opinions in these cases suggest how elusive is the exclusive constitutional yardstick. While it may be true that there are fairly discernible trends in the decisions over a period of time (see Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court (1975)* 75 Colum.L.Rev. 623), cases are not decided by trends. We confess we do not find even in the more recent decisions of the Supreme Court the consistent analytical [\[**13\]](#) standard discerned by some commentators (e.g., Catz and Lenard, *The Demise of the Implied Federal Preemption Doctrine (1977)* 4 Hastings Const.L.Q. 295). What we do see as clearly mandated by the authorities is a close consideration of the nature and purpose of the federal law with asserted preemptive effect and a respectful [\[*416\]](#) appreciation of the demands of a federalist system. As the court recently said: "Our prior cases on pre-emption are not precise guidelines . . . , for each case turns on the peculiarities and special features of the federal regulatory scheme in question." ([City of Burbank v. Lockheed Air Terminal, supra, 411 U.S. 624, 638 \[36 L.Ed.2d 547, 556\]](#).)

Natural Gas Act

The primary purpose of the Natural Gas Act was to protect consumers against exploitation at the hands of natural gas companies ([Power Comm'n v. Hope Gas Co. \(1944\) 320 U.S. 591, 610 \[88 L.Ed. 333, 349, 64 S.Ct. 281\]](#)) and to underwrite just and reasonable rates to consumers of natural gas ([Atlantic Rfg. Co. v. Pub. Serv. Comm'n \(1959\) 360 U.S. 378, 388 \[3 L.Ed.2d 1312, 1319, 79 S.Ct. 1246\]](#)) a related purpose being to assure adequate service to the consumer ([Southern Louisiana Area Rate Cases v. Federal Pow. Com'n \(5th Cir. 1970\) 428 F.2d 407, 435](#)). [HN4](#)¹¹ In section 1b) of the Natural Gas Act ([15 U.S.C.A. § 717b](#)) Congress drew three things within its own regulatory power, delegated by the act to its agent, the Federal Power Commission. These were: the transportation of natural gas in interstate commerce; its sale in interstate commerce for resale; and natural gas companies engaged in such transportation or sale. ([Panhandle Pipe Line Co. v. Comm'n \(1947\) 332 U.S. 507, 516 \[92 L.Ed. 128, 137, 68 S.Ct. 190\]](#).) Congress did not exercise its authority to constitutional limits. Instead, Congress envisioned a comprehensive scheme of dual state and federal authority. ([FPC v. Louisiana Power & Light Co. \(1972\) 406 U.S. 621, 631 \[32 L.Ed.2d 369, 379-380, 92 S.Ct. 1827\]](#).)

One of the Commissions' major powers involves the determination of just and reasonable rates and charges in the sale for resale and interstate transportation of natural gas. All rates and charges made, demanded or received by any natural gas company for or in connection with jurisdictional sales or transportation [\[**15\]](#)¹¹ must be just and

* Advance Report Citation: 46 U.S.L.Week 4446.

* Advance Report Citation: 46 U.S.L.Week 4295.

¹¹ [HN5](#)¹¹ A "jurisdictional" pipeline transports natural gas in interstate commerce and for that reason is subject to FPC certification jurisdiction. The "jurisdictional" label is also sometimes used to apply to sales, in which case it refers to interstate

reasonable (15 U.S.C.A. § 717ca)) and not unduly discriminatory (*id.*, subd. b)). To enable the Commission to exercise this oversight authority every natural gas company must file with it schedules showing rates and charges together with all contracts which in any manner affect or relate to such. (*Id.*, subd. c).)

Technically the establishment of rates remains a matter for private agreement. However, the Commission's inquiry into the reasonableness of rates may arise in one of several ways. At the inception of a transaction subject to the Commission's jurisdiction there is the requirement of a certificate of public convenience and necessity. (§ 717fc.)¹² The Commission may attach to the issuance of the certificate and to the exercise of rights [**16] granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. (*Id.*, subd. e.) With this power the Commission may condition the grant of a certificate upon the establishment of rates determined by it to be just and reasonable. (*Atlantic Refg. Co. v. Pub. Serv. Comm'n, supra, 360 U.S. 378, 391-392 [3 L.Ed.2d 1312, 1320-1321]*) In the case of a rate under an existing schedule the Commission may inquire into reasonableness on its own initiative or upon request of certain interested parties; if it finds that the rate is unjust, unreasonable, unduly discriminatory or preferential it determines the just and reasonable rate and fixes the same by order (§ 717da.) In such a case the Commission has no power to order reparation of charges received in excess of the just and reasonable rate. (See *United Gas v. Callery Properties I**4171 (1965) 382 U.S. 223, 229 [15 L.Ed.2d 284, 289, 86 S.Ct. 360].) When a natural gas company seeks to change its rates, assuming this is permitted by contract (see *United Gas Co. v. Mobile Gas Corp. (1956) 350 U.S. 332 [100 L.Ed. 373, 76 S.Ct. 373]*), the Commission may suspend operation of the new rate while [**17] it conducts a hearing concerning the lawfulness of the proposed change. The suspension may not last longer than five months; if the proceeding has not been completed in this time the rate may go into effect, but the Commission may require the natural gas company to furnish a bond and keep detailed records in order to make refund of the increase if, upon completion of the hearing and decision the Commission decides the increase is not justified. (§ 717c.)

The Commission's authority is not confined to rate regulation and certification proceedings. Under certain circumstances it may also require a natural gas company to extend or improve its facilities to establish connection with and sell natural gas to a person or municipality engaged in local distribution of natural gas to the public. (§ 717fa.) **HNG**¹³ The Commission has the authority to make rules and regulations necessary or appropriate to carry out the provisions of the act. (§ 717o.)

The broad responsibilities conferred on the FPC have been reinforced by a broad construction [**18] of Commission powers by the courts (see *Permian Basin Area Rate Cases (1968) 390 U.S. 747, 776 [20 L.Ed.2d 312, 341, 88 S.Ct. 1344]*); exemptions from the Commission's jurisdiction tend to be narrowly construed (see *Interstate Gas Co. v. Power Comm'n (1947) 331 U.S. 682, 689-693 [91 L.Ed. 1742, 1747-1750, 67 S.Ct. 1482]; Colorado Interstate Co. v. Comm'n (1945) 324 U.S. 581, 598 [89 L.Ed. 1206, 1220-1221, 65 S.Ct. 829]*). While it is true that the Natural Gas Act does not regulate natural gas from wellhead to burner tip, it is also true that "The Supreme Court has never formulated a clear test to determine precisely what areas in the natural gas industry are left open to state regulation." (*Public Service Com'n of W. Va. v. Federal Power Com'n (4th Cir. 1971) 437 F.2d 1234, 1238*.)

HN7¹⁴ Federal Power Commission price regulation of the natural gas industry is pervasive. (*McLeran v. El Paso Natural Gas Company (S.D.Tex. 1972) 357 F.Supp. 329, 331*.)¹³ The federal regulatory scheme leaves no room

sales for resale, which are subject to Commission rate regulation. (*FPC v. Louisiana Power & Light Co., supra, 406 U.S. 621, 626, fn. 1 [32 L.Ed.2d 369, 376-377]*.)

¹² Similar Commission approval on the basis of public convenience or necessity is required for the abandonment of facilities or service. (§ 717fb.).

¹³ "In 1954 the Supreme Court held, in the now-famous case of *Phillips Petroleum Co. v. Wisconsin (1954) 347 U.S. 672 [98 L.Ed. 1035, 74 S.Ct. 794]* that the rates of an 'independent producer,' one unaffiliated with but selling to interstate pipelines, were covered by the Natural Gas Act despite the 'production' exemption, because the producer was engaged in 'sales in interstate commerce of natural gas for resale.' By including producers, Phillips made possible the complete regulation of distributors' natural gas prices . . ." (Johnson, Producer Rate Regulation in Natural Gas Certification Proceedings: Catco in Context (1962) 62 Colum.L.Rev. 773, 774; see *id.*, for a history of producer rate regulation.)

either for direct state regulation of the prices of interstate wholesales of natural gas ([Natural Gas Co. v. Panoma Corp. \(1955\) 349 U.S. 44 \[99 L.Ed. 866, 75 S.Ct. 576\]](#)), or for state regulations [***19] which would indirectly achieve the same result ([Northern Gas Co. v. Kansas Comm'n \(1963\) 372 U.S. 84, 91 \[9 L.Ed.2d 601, 607, 83 S.Ct. 646\]](#).)

Because the antitrust inquiry of the Attorney General is directed at matters within the jurisdiction of the FPC, basically interstate wholesale sales of natural gas rather than local retail sales, a strong argument might be made that the FPC's pervasive and exclusive authority to regulate prices of interstate wholesale sales of natural [***20] gas itself precludes the investigation of the Attorney General. The general objective of all antitrust laws is to promote robust competition (Von Kalinowski & Hanson, The California Antitrust Laws: A Comparison With the Federal Antitrust Laws (1959) [6 UCLA L.Rev. 533](#)) which, it is supposed, will result in the fairest price to consumers. (See [Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 44 \[172 P.2d 867\]](#).) As an essentially price-directed measure, the application of state antitrust laws to a transaction within the jurisdiction of the FPC appears to run counter to the [*418] holding of [Northern Gas Co., supra, 372 U.S. 84](#), that even indirect efforts to control prices are forbidden the states, notwithstanding that the interstate wholesale sale of gas will have a direct effect on retail sales within the states. (Cf. [Public Utilities Comm'n v. Gas Co. \(1943\) 317 U.S. 456 \[87 L.Ed. 386, 63 S.Ct. 369\]](#).)

The Attorney General argues, however, that because FPC approval of a given transaction in the natural gas industry does not confer immunity from federal antitrust laws anti-competitive aspects of the transaction are a "peripheral concern" of federal regulation and therefore [***21] not preempted (see [De Canas v. Bica, supra, 424 U.S. 351, 360-361 \[47 L.Ed.2d 43, 51-52\]](#)). It is true that the federal scheme of regulation of the natural gas industry does not preclude application of federal antitrust laws to transactions within the jurisdiction of the FPC. ([Otter Tail Power Co. v. United States \(1973\) 410 U.S. 366, 373-375 \[35 L.Ed.2d 359, 365-367, 93 S.Ct. 1022\]](#).) But [HN8](#)[¹⁴] the FPC, in passing on any given transaction within its jurisdiction must consider anti-competitive consequences thereof. ([California v. Fed. Power Comm'n \(1962\) 369 U.S. 482, 485 \[8 L.Ed.2d 54, 57, 82 S.Ct. 901\]](#); [Atlantic Seaboard Corp. v. Federal Power Com'n \(D.C.Cir. 1968\) 404 F.2d 1268, 1272, fn. 10; Northern Natural Gas Co. v. Federal Power Com'n \(D.C.Cir. 1968\) 399 F.2d 953, 958](#).) To say that antitrust implications are a merely peripheral concern of the Federal Power Commission betokens a rather straitened conception of the "just and reasonable" and "public convenience and necessity" standards lying at the heart of the Natural Gas Act.

It is just not the case that because federal **antitrust law** applies to the natural gas industry despite the regulatory scheme of the Natural Gas Act that [***22] state antitrust laws also apply. (See [Connell Co. v. Plumbers & Steamfitters \(1975\) 421 U.S. 616, 635-636 \[44 L.Ed.2d 418, 433-434, 95 S.Ct. 1830\]](#); [Standard Radio & Television Co. v. Chronicle Pub. Co. \(1960\) 182 Cal.App.2d 293, 300-301 \[6 Cal.Rptr. 246\]](#).)¹⁴ The Natural Gas Act and the federal antitrust laws stand on an equal footing. If their operation tends to overlap it is because Congress has so decreed, and in the event of conflict it is necessary as far as possible to reconcile the operation of these laws.¹⁵ Simply put, [HN9](#)[¹⁵] where one is considering the relationship of two federal laws there is no preemption, i.e., supremacy clause, problem. It may be true that California's antitrust laws are harmonious with federal antitrust laws, but this is only two-part harmony as it leaves out of account the role of the FPC. Federal supremacy comprehends the possibility that one federal law may coexist uneasily with another.¹⁶ (See fn. 17.) This does not mean that the law must at the same time admit fifty additional guests claiming to be related to the one who cannot be put out.¹⁷

¹⁴ These cases also illustrate the rule that "the general applicability of a state cause of action is not sufficient to exempt it from pre-emption." ([Farmer v. Carpenters \(1977\) 430 U.S. 290, 300 \[51 L.Ed.2d 338, 350, 97 S.Ct. 1056\]](#).)

¹⁵ Implied repeal of the antitrust laws is not favored. "When there are two acts upon the same subject, the rule is to give effect to both if possible." ([United States v. Borden Co. \(1939\) 308 U.S. 188, 198 \[84 L.Ed. 181, 190-191, 60 S.Ct. 182\]](#).)

¹⁶ For a discussion of one aspect of competition in the natural gas industry and how procompetitive and regulatory goals interact see Smith, The Federal Power Commission and Pipeline Markets: How much competition? ((1969) 68 Colum.L.Rev. 664).

[**23] [*419] But it is not necessary to pursue the question in any broader form than that in which it arises in this instance. Nor is there much purpose in discussing cases finding various state laws preempted by the Natural Gas Act, which, though they may be interesting, only underscore what has already been said.¹⁸ Instead, we observe that not only does the Attorney General's investigation intrude generally on the jurisdiction of the Federal Power Commission but it is directed in large part at subjects on which the FPC has already acted. For example, the Attorney General has questioned whether the funding agreements containing most favored nation clauses to be included in contracts for the interstate wholesale of natural gas are contracts in restraint of trade. In the opinion letter of January 2, it is explained that under the "rule of reason" test (*Standard Oil Co. v. United States (1911) 221 U.S. 1 [55 L.Ed. 619, 31 S.Ct. 502]*) "Analysis of the validity of the SoCal Funding Agreement and the PG&E Letter Agreement requires the development of additional facts and surrounding circumstances, including the history, purposes, business justifications, and economic effect of both" [*24] the Funding Agreements in general and the 'most favored nation' clauses in particular." It will be remembered, of course, that the advance payments program had already been given express FPC approval, that the temporary program had been several times extended and modified to include Alaskan payments, and that the FPC's approval of the program had been challenged and upheld in federal court. But in addition, the FPC had earlier considered and passed upon the propriety of most favored nation clauses in sales contracts within its jurisdiction. Apparently such clauses have had a long and widespread use in the natural gas business. In 1962 the FPC expressly disapproved such clauses in contracts of independent producers¹⁹ for jurisdictional sales of natural gas. Only certain pricing provisions of independent producers are permissible,²⁰ any other being "inoperative and of no effect at law." (18 C.F.R. § 154.93.) Any contract executed on or after April 2, 1962, containing other than the permissible provisions "shall be rejected" so far as producer rates are concerned. (Ibid.) A producer's application for a certificate of public convenience and necessity "shall be rejected" if any contract [*25] submitted in support of it contains any of the forbidden provisions (id., § 157.25). So far as pipeline certificates are concerned, any producer contract executed after said date which contains an impermissible pricing clause "will be given no consideration in determining adequacy" of a pipeline

While it is often said that the federal antitrust laws, complement direct federal regulation (e.g., *Northern Natural Gas Co. v. Federal Power Com'n, supra, 399 F.2d 953, 959*) the fact that the Federal Power Commission, though it must consider, is not bound by the dictates of **antitrust law** (*id., at p. 958*) along with the fact that Federal Power Commission approval does not confer antitrust immunity reveals some basic tension.

¹⁷ Oddly enough the Supreme Court has not been called upon to authoritatively decide whether federal antitrust laws have preemptive effect on state antitrust laws. (See generally Note, The Commerce Clause and State Antitrust Regulation (1961) 61 Colum.L.Rev. 1469.) So far as this court is concerned it is settled that federal **antitrust law** does not preempt parallel state efforts to control unfair competitive practices. (*Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 49-51 [172 P.2d 867]; R. E. Spriggs Co. v. Adolph Coors Co., 37 Cal.App.3d 653, 659* et seq. [*112 Cal.Rptr. 585*].)

¹⁸ (See e.g., *FPC v. Louisiana Power & Light Co., supra, 406 U.S. 621; Public Utilities Comm'n v. Gas Co., supra, 317 U.S. 456; Illinois Gas Co. v. Public Service Co. (1942) 314 U.S. 498 [86 L.Ed. 371, 62 S.Ct. 384]; Public Service Com'n of W.Va. v. Federal Power Com'n, supra, 437 F.2d 1234; Federal Pr. Com'n v. Corporation Com'n of State of Okla. (W.D.Okla. 1973) 362 F.Supp. 522 aff'd., 415 U.S. 961 [39 L.Ed.2d 863, 94 S.Ct. 1548]; Cabot Corporation v. Public Service Com'n of W.Va. (S.D.W.Va. 1971) 332 F.Supp. 370; United Gas Pipe Line Co. v. Willmut Gas & Oil Co. (1957) 231 Miss. 700 [97 So.2d 530].)*

¹⁹ "Independent producer" for this purpose means one engaged in the production or gathering of natural gas who sells natural gas in interstate commerce for resale, but who is not engaged in the transportation of natural gas (other than gathering) by pipeline in interstate commerce. (18 C.F.R. § 154.91a) (1977.)

²⁰ The permissible provisions are defined in 18 Code of Federal Regulations, section 154.93: "a) Provisions that change a price in order to reimburse the seller for all or any part of the changes in production, severance, or gathering taxes levied upon the seller; b) Provisions that change a price to a specific amount at a definite date; b-1) Provisions that permit a change in price to the applicable just and reasonable area ceiling rate which has been, or which may be, prescribed by the Commission for the quality of the gas involved; and c) Provisions that, once in five-year contract periods during which there is no provision for a change in price to a specific amount (paragraph b) of this section), change a price at a definite date by a price-redetermination based upon and not higher than a producer rate or producer rates which are subject to the jurisdiction of the Commission, are not in issue in suspension or certificate proceedings, and, are in the area of the price in question"

company's gas supply (id., § 157.14a)v); see *Federal Power Comm'n v. Texaco* (1964) 377 U.S. 33, 35-36 [*12 L.Ed.2d 112, 114-115, 84 S.Ct. 1105*]). In *Superior Oil Company v. Federal Power Commission* (9th Cir. 1963) *322 F.2d 601*, this exercise of the Commission's rule-making power was upheld. The court rejected the contention that the action was discriminatory as not applying to pipelines, saying at page 621: "The Commission could well determine that there are practical differences between the operations of the two kinds of companies, which warrant different treatment with regard to price-changing clauses."

[**26] There might be given other examples both of the existence of federal authority and of its exercise in the areas into which the Attorney General would conduct his inquiry. But, while we believe the Natural Gas Act of itself precludes the exercise of authority asserted by the Attorney General, consideration of the Alaska Natural Gas Transportation Act will shorten our discussion and conclusively determine the question.

Alaska Natural Gas Transportation Act (ANGTA)

The purpose of ANGTA was to provide the means for making a sound decision as to the selection of a transportation system for delivery of Alaska natural gas to the lower 48 contiguous states and, if such a system were approved, to expedite its construction and initial operation by "limiting the jurisdiction of the courts to review the actions of Federal officers or agencies taken pursuant to the direction and authority of this chapter, and permitting the limitation of administrative procedures and effecting the limitation of judicial procedures related to such actions." (*15 U.S.C.A. § 719a*.) Significantly, it was added: "To accomplish this purpose it is the intent of the Congress to exercise its constitutional powers [**27] to the fullest extent in the authorizations and directions herein made, and particularly with respect to the limitations of judicial review of actions of Federal officers or agencies taken pursuant thereto." (*Ibid.*) Proceedings of the FPC to certificate a transportation system were suspended; the FPC was directed to review the contesting systems and report to the President; it was authorized to recommend approval of a particular system or advise that no system should be approved pursuant to the act. The President was authorized to decide whether a transportation system should be approved and if so to designate such a system and submit this recommendation to Congress for its approval. Of the several provisions in the act for informational input into the presidential decision-making process ²¹ one mandated a study by the Attorney General of the antitrust issues and problems relating to the production and transportation of Alaska natural gas.²² On September 22, 1977, President Carter made his decision recommending approval of the ALCAN proposal for an Alaskan natural gas pipeline.²³ On November 8 the decision was approved by joint resolution of Congress. (H.J.Res. No. 621, 95th Cong., [**28] 1st Sess. (1977) 91 Stat. 1268.)

The report accompanying the President's decision is especially interesting for its consideration of the [**29] antitrust implications of efforts to exploit Prudhoe Bay natural gas, and its illustration of the cooperative functioning of federal antitrust law and regulation under the Natural Gas Act. The antitrust and competitive effects of an Alaskan natural gas system were thoroughly studied [*421] by the Federal Power Commission and the Justice Department. These studies supported the conclusion that the ALCAN project would have no harmful effect on regional or national competition in the natural gas industry and that any potential competitive abuse could be cured by "proper federal regulation." The FPC and Justice Department agreed that certification of a transportation system for Alaskan natural gas would not have a significant impact upon competition in the natural gas transportation and distribution industries. Gas producers would have no ownership interest in the system; they would be permitted to

²¹ "In the second stage of the decision-making process, an opportunity is provided for Federal officers and agencies, State governors, other instrumentalities of government, and interested persons to comment on the recommendation and report of the Federal Power Commission. This device is seen as a means of equipping the President with a full range of information to enable him to arrive at a determination as to whether to submit a decision to the Congress designating a system for approval and, if so, to make an intelligent selection of the system to be designated." (H.R.Rep. No. 94-1658, 2d Sess. (1976) reprinted in 1976 U.S. Code Cong. & Admin. News, pp. 6643, 6644.)

²² Section 719I provides that nothing in the act or any action taken thereunder shall imply an amendment to or exemption from any provision of the antitrust laws.

²³ For a description of this and the competing system see House of Representatives Report No. 94-1658, second Session (1976) reprinted in 1976 United States Code Congressional and Administrative News, page 6643.

participate in financing the project only to the extent of guaranteeing portions of the project debt. The Attorney General concluded that "present Federal Power Commission regulation appears to preclude an opportunity for competitive abuse by the gas producers."²⁴ This section of the President's [**30] report concluded: "Any potential competitive problems can be guarded against through imposing proper conditions in the license to construct the transportation system . . . ; monitoring gas purchase contracts between gas producers and gas transmission companies; requiring the disclosure of any collateral agreements between producers and transmission companies; requiring government scrutiny and approval of any plans for gas reallocation or displacement, and government monitoring of any industry discussions to derive such plans; and imposing regulatory sanctions in any specific cases of abuse that may arise."²⁵

The intention of Congress, expressed in the first section of ANGTA, to "occupy the field" cannot be taken lightly. Granted, there is no precise definition of the field being occupied, but [**31] we think it clear that that field includes antitrust concerns related to the ownership, production, sale, and distribution of Prudhoe Bay natural gas. In passing ANGTA Congress acted to provide the United States prompt partial relief from the shortage of natural gas supplies. The availability of Alaska natural gas is a matter of urgent concern. "An early decision on whether or not consumers can rely upon receiving approximately a trillion cubic feet of Alaska natural gas per year in the early 1980's would greatly assist future planning and could alleviate severe hardships. If Alaska gas will be available, it could contribute significantly to reducing natural gas shortages. If Alaska natural gas will not be available, then the Nation needs to know so that planning can begin for alternate energy supplies. A prompt decision on an Alaska natural gas transportation system is also needed because construction costs for such large construction projects can and have escalated very rapidly. . . . The production and transportation of Alaska natural gas would be the largest private construction project ever undertaken. Substantial delays could cost consumers large sums of money and threaten the [**32] economic feasibility of any Alaska gas transportation system. Needless delay must be avoided in coming to a decision. However, time is needed for a considered analysis of alternatives, the selection of the most competent applicant to construct and operate the project, and if an Alaska-Canada system is chosen, careful coordination and negotiations with the government of Canada. The timetable established in the Committee substitute to S. 3521, in the judgment of the Committees, reflects these necessities and results in a decision at the earliest practicable time, consistent with prudent government decision-making. Moreover, a central purpose of this legislation is to prevent time-consuming administrative and judicial delay after a decision to construct a system has been made." (H.R.Rep. No. 94-1658, 2d Sess. (1976) reprinted in 1976 U.S. Code Cong. & Admin. News, pp. 6643, 6648-6649.)

When Congress, because of the national significance of Alaska natural gas, has curtailed [*422] its own procedures, and those of agencies established by it, to expedite resolution of this important question can it be supposed that Congress contemplated that the states were nevertheless free to interpose [**33] their antitrust laws as a further check to see that in the implementation of national goals local concerns were accorded proper deference? The Attorney General's investigation does not make for merely an imagined conflict with federal law. According to the House Committee on Interstate and Foreign Commerce "Final financing for an Alaskan natural gas transportation project cannot be arranged until the Alaskan natural gas producers execute sales contracts." (H.R.Rep. No. 95-739, pt. 2, 1st Sess. (1977) Code Cong. & Admin. News, pp. 3325, 3335.) If the Attorney General may investigate the 1975 funding agreements there is no reason why he may not investigate any other agreement relating to interstate sale for resale to a California purchaser.

No doubt California **antitrust law** is an area of local concern within the scope of the state's traditional police power, and for that reason the assumption is that there is no preemption unless that was the clear and manifest purpose of Congress. (*Rice v. Santa Fe Elevator Corp. (1947) 331 U.S. 218, 230 [91 L.Ed. 1447, 1459, 67 S.Ct. 1146]*.) "But **HN10** when Congress has 'unmistakably . . . ordained,' *Florida Lime & Avocado Growers, Inc. v. Paul*,

²⁴ There was a reservation expressed should wellhead prices of natural gas be decontrolled.

We do not, of course, speculate as to what our own decision might be should natural gas be significantly deregulated.

²⁵ It appears that item is a recommendation of the Attorney General based upon consideration of the Alaska advance payments program prior to the FPC's termination thereof.

373 [**34] U.S. 132, 142 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." (Jones v. Rath Packing Co., supra, 430 U.S. 519, 525 [51 L.Ed.2d 604, 614]; City of Burbank v. Lockheed Air Terminal, supra, 411 U.S. 624, 633 [36 L.Ed.2d 547, 553-554].)

We cannot but conclude that the Attorney General's challenged investigation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (Hines v. Davidowitz, supra, 312 U.S. 52, 67 [85 L.Ed. 581, 587]; De Canas v. Bica, *supra*, 424 U.S. 351, 363 [47 L.Ed.2d 43, 53]) as expressed in the Natural Gas Act of 1938 and the Alaska Natural Gas Transportation Act of 1976.

The orders and each of them are affirmed.

Thompson, J., and Hanson, J., concurred.

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Uneedus v. California Shoppers, Inc.

Court of Appeal of California, Fourth Appellate District, Division Two

December 1, 1978

Civ. No. 19570

Reporter

86 Cal. App. 3d 932 *; 150 Cal. Rptr. 596 **; 1978 Cal. App. LEXIS 2141 ***; 1979-2 Trade Cas. (CCH) P62,845

UNEEDUS, Plaintiff and Appellant, v. CALIFORNIA SHOPPERS, INC., et al., Defendants and Respondents

Subsequent History: [***1] As Modified December 14, 1978. A petition for a rehearing was denied December 21, 1978, and respondents' petition for a hearing by the Supreme Court was denied February 21, 1979.

Prior History: Superior Court of Riverside County, No. 112236, John H. Hews, Judge.

Disposition: In sum then, it is our view that the proper application of [section 17082](#) to the case proved by plaintiff entitles it to three times the damages awarded. In so holding, we are doing nothing more nor less than following the federal decisions which apply federal statutes similar in content and purpose to the California statute here under consideration. The judgment is ordered modified accordingly. As thus modified, the judgment is affirmed. However, plaintiff shall recover its costs on appeal.

Core Terms

treble damages, Practices, Unfair, anti trust law, mandatory, Robinson-Patman Act, damages, actual damage, Clayton Act, Antitrust, italics, interpreting, Cartwright Act, injunctive, urging

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

[**HN1**](#) **Regulated Practices, Trade Practices & Unfair Competition**

See [Bus. & Prof. Code § 17043.](#)

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

[**HN2**](#) **Regulated Practices, Trade Practices & Unfair Competition**

See [Cal. Bus. & Prof. Code § 17071.](#)

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN3 [down] Regulated Practices, Trade Practices & Unfair Competition

See [Cal. Bus. & Prof. Code § 17082.](#)

Antitrust & Trade Law > Robinson-Patman Act > Claims

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN4 [down] Robinson-Patman Act, Claims

The California Unfair Practices Act closely parallels the federal Robinson-Patman Act. Both proscribe three basic types of business practice: (1) price discrimination in its various forms; (2) sales below cost, or as referred to in the Robinson-Patman Act, sales at unreasonably low prices; and (3) the granting of rebates and discounts not made available to all buyers on like terms and conditions. "Price discrimination" means no more than price differentiation or the charging of different prices to different customers for goods of like grade and quality.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN5 [down] Regulated Practices, Trade Practices & Unfair Competition

The California Unfair Practices Act represents an attempt on the part of the legislature to regulate business as a whole by prohibiting practices which the legislature has determined constitute unfair trade practices. Its stated purpose is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage free, open and fair competition. Thus, the Unfair Practices Act is based on a strong public policy of fostering competition, and does not direct itself solely to the concerns of individual competitors.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN6 [down] Regulated Practices, Trade Practices & Unfair Competition

See [Cal. Bus. & Prof. Code § 17001.](#)

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN7 [down] Private Actions, Remedies

The public policy of "free, open and fair competition" underlies the concept of mandatory treble damages: The purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN8 [] **Regulated Practices, Trade Practices & Unfair Competition**

The California Unfair Practices Act has as one of its purposes an **antitrust law** objective.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN9 [] **Robinson-Patman Act, Claims**

Because treble damages are mandatory under federal antitrust laws where a private plaintiff brings a Robinson-Patman Act action pursuant to [15 U.S.C. § 13](#), [Cal. Bus. & Prof. Code § 17082](#) should similarly be interpreted as requiring treble damages in actions brought pursuant to the California Unfair Practices Act without regard to malice or any other judicially imposed qualifying condition.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN10 [] **Regulated Practices, Trade Practices & Unfair Competition**

By [Cal. Bus. & Prof. Code § 17082](#)'s own terms, a plaintiff can bring an action for injunctive relief without proving actual damages. However, to be entitled to treble damages a plaintiff must prove actual damages. Hence, the statutory word "entitled" signifies that a plaintiff "qualifies" for the right to mandatory treble damages once he proves actual damages. In the absence of such proof, treble damages are not permitted and a plaintiff is limited to an injunctive remedy.

Headnotes/Summary

Summary**CALIFORNIA OFFICIAL REPORTS SUMMARY**

In an action by a corporation seeking damages and injunctive relief against another corporation for various violations of the Unfair Practices Act, [Bus. & Prof. Code, §§ 17000-17208](#), the trial court awarded \$ 25,000 in general damages. However, the court denied plaintiff's request for treble damages under the Unfair Practices Act, [Bus. & Prof. Code, § 17082](#), providing that any plaintiff in any action under the act shall be entitled to three times the amount of actual damages, if any. The court found that the acts of defendants were not done with malice or oppression toward plaintiff nor were they of such magnitude to warrant the imposition of treble damages. (Superior Court of Riverside County, No. 112236, John H. Hews, Judge.)

The Court of Appeal modified the judgment to award plaintiff treble damages, and affirmed the judgment as modified. The court held that under the Unfair Practices Act, [Bus. & Prof. Code, § 17082](#), a private plaintiff who has proved actual damages is entitled to mandatory treble damages pursuant to the statute without regard to malice or any other judicially imposed qualifying condition. (Opinion by McDaniel, J., with Gardner, P.J., and Kaufman, J., concurring.)

Headnotes

[CA\(1a\)](#) [] (1a) [CA\(1b\)](#) [] (1b) [CA\(1c\)](#) [] (1c)

Unfair Competition § 3—Unfair Practices Act—Treble Damages.

--A private plaintiff who has proved actual damages under the Unfair Practices Act, [Bus. & Prof. Code, §§ 17000-17208](#), is entitled to mandatory treble damages without regard to malice or any other judicially imposed qualifying condition pursuant to [§ 17082](#), providing that in addition to injunctive relief, any plaintiff shall be entitled to recover three times the amount of actual damages. Thus, in an action by one corporation against another for damages and injunctive relief for various violations of the act, the trial court erred in denying plaintiff's request for treble damages under [§ 17082](#) on the ground the acts of defendants were not done with malice or oppression towards plaintiff nor were they of such magnitude to warrant the imposition of treble damages. The record indicated plaintiff was awarded a judgment of \$ 25,000 for actual damages.

[CA\(2\)](#) [] (2)

Monopolies and Restraints of Trade [§ 1](#)—Robinson-Patman Act and Clayton Act—Treble Damages.

--There are certain kinds of antitrust violations contemplated by the Robinson-Patman Act, [15 U.S.C. § 13](#), which, by reference to the Clayton Act, [15 U.S.C. §§ 12-44](#), dealing with remedies for antitrust violations, are subject to recovery of treble damages at the suit of a private plaintiff without regard to any proof of malice or any other kind of condition precedent.

[CA\(3\)](#) [] (3)

Unfair Competition § 3—Unfair Practices Act—Purpose.

--The purpose underlying the Unfair Practices Act, [Bus. & Prof. Code, §§ 17000-17208](#), is to regulate business as a whole by prohibiting practices which the Legislature has determined constitute unfair trade practices. Its stated purpose is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage free, open and fair competition. Thus, the act is based on a strong public policy of fostering competition and does not direct itself solely to the concerns of individual competitors. Likewise, the public policy of free, open and fair

competition underlies the concept of mandatory treble damages afforded by the act, and the act has as one of its purposes an antitrust law objective.

CA(4) [] (4)

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Federal Law as Aid in Interpretation.

--The Cartwright Act, Bus. & Prof. Code, § 16700 et seq., dealing with restraints of trade, is patterned on the federal Sherman Antitrust Act, 15 U.S.C. § 1 et seq., and both derive their basic provisions from the common law policy against restraint of trade. Thus cases decided under the latter act are applicable as an aid to decision in interpreting the former.

CA(5) [] (5)

Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals—Treble Damages.

--Under the Cartwright Act, Bus. & Prof. Code, § 16750, providing that any person who is injured by an unfair business practice may sue to recover three times the damages sustained by him, treble damages are mandatory once actual damages are shown.

CA(6) [] (6)

Appellate Review § 54—Presenting and Preserving Questions in Trial Court—Necessity for Motion for New Trial—Damages—Interpretation of Statute.

--The rule providing that a motion for a new trial is a condition precedent to urging inadequacy of damages on appeal does not apply to a case in which the amount of damages turns on the interpretation of a statute. The rule prevents plaintiff from urging inadequacy of damages without having moved for a new trial, but it does not prevent him from urging other errors.

Counsel: W. Mike McCray for Plaintiff and Appellant.

R. Michael Harding, Haight, Dickson, Brown & Bonesteel and Roy G. Weatherup for Defendants and Respondents.

Judges: Opinion by McDaniel, J., with Gardner, P. J., and Kaufman, J., concurring.

Opinion by: McDANIEL

Opinion

[*934] [597] Statement of Facts**

Uneedus (plaintiff), a California corporation, publishes a weekly advertising newspaper known as the "Hi-Liter." First published in [***2] late August 1974, by early March 1975, the Hi-Liter was a profitable enterprise operating a quality advertising service in five communities in [*935] Riverside County. These communities were characterized at trial as "not capable of supporting more than one advertising paper."

In early March 1975, California Shoppers, Inc., a California corporation and various individuals (defendant) began distribution of a similar advertising newspaper called the "California Shopper" in the communities where plaintiff

distributed the Hi-Liter. Overzealous in its desire to compete with plaintiff, defendant offered, without charge, large quantities of display ad space and sold such space below actual cost.

CA(1a)[¹] (1a) Plaintiff sought damages and injunctive relief against defendant alleging it had violated various sections of the California Unfair Practices Act. ([Bus. & Prof. Code, §§ 17000- 17208](#)) Specifically, plaintiff contended defendant's acts violated [section 17043](#) of that act,¹ [***3] and that it had engaged in such acts with the intent of injuring plaintiff and competition.² Defendant filed a cross-complaint alleging that plaintiff had engaged in similar activities.

At the conclusion of a nonjury trial, plaintiff was awarded judgment for \$ 25,000 in general damages and \$ 10,000 in attorney's fees. Additionally, the court ruled against defendant on its cross-complaint. However, the court denied plaintiff's request for [HN3\[¹\]](#) treble damages claimed under [section 17082](#) which reads in pertinent part: "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* [***4] *who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter.*" (Italics added.)

The court's rationale for denying treble damages was that "[the] Court further finds the acts of defendants were not done with malice or [^{*936}] oppression towards plaintiff nor were they of such magnitude to warrant the imposition of treble damages." (Finding of fact No. 23.)

Plaintiff appeals from the court's ruling claiming that the failure to award treble damages was error. In this case of first impression, it is our view that the trial court erred in refusing to award plaintiff treble damages. We hold that a private plaintiff who has proved actual damages under the California Unfair Practices Act is entitled to mandatory treble damages pursuant to [section 17082](#). Hence, the issue of whether defendant acted maliciously or whether its acts "were . . . of such magnitude to warrant the imposition of treble damages" is not present in the case.

Issue and Discussion

Fundamentally, plaintiff contends that the treble damage provision of [section 17082](#) mandating that a plaintiff "shall be entitled to recover three times the amount of the actual damages, if any, [***5] sustained by [**598] [him]" is analogous to section 4 of the Clayton Act, a part of the federal antitrust laws. That statute reads: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, *and shall recover threefold the damages by him sustained*, and the cost of suit, including a reasonable attorney's fee." ([15 U.S.C. § 15 \(1973\)](#), also referred to as § 4 of the Clayton Act, italics added.)

Because a private plaintiff's general damages are automatically trebled under the federal provision ([Locklin v. Day-Glo Color Corporation \(7th Cir. 1970\) 429 F.2d 873, 878](#), cert. den., [400 U.S. 1020](#) [27 L.Ed.2d 632, 91 S.Ct. 582]; [Kline v. Coldwell, Banker & Co., \(9th Cir. 1974\) 508 F.2d 226, 235](#), cert. den., [421 U.S. 963](#) [44 L.Ed.2d 449, 95

¹ All statutory references hereafter will be to the Business and Professions Code unless otherwise specified.[HN1\[¹\]](#)

[Section 17043](#) reads as follows: "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."

² [HN2\[¹\]](#) [Section 17071](#) reads as follows: "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."

S.Ct. 1950]), plaintiff urges that the treble damage portion of [section 17082](#) should similarly be automatic and beyond the scope of trial court discretion.

Defendant, alternatively, advances [***6] a number of arguments supporting its position "that the award of treble damage is within the sound discretion of the court[]." It first contends that the Unfair Practices Act is not an **antitrust law** and therefore federal decisions interpreting the Sherman³ and Clayton⁴ Acts cannot be used as a guide in interpreting [*937] [section 17082](#). Defendant next argues that treble damages are discretionary under [section 16750](#)⁵ (Cartwright Act) and hence should similarly be discretionary under [section 17082](#). Additionally, defendant argues, because it is a newspaper, that to award plaintiff treble damages would unconstitutionally infringe upon defendant's First Amendment rights. Finally, defendant opines that the word "entitled" in [section 17082](#) must be reasonably interpreted and does not ordinarily signify "an absolute and unqualified right" to treble damages.

[***7] We shall use these contentions as a vehicle for a discussion and resolution of the issue presented by this appeal.

I

Defendant concedes that the Sherman Act is an **antitrust law** and "is similar to California's Cartwright Act." It argues, however, that "[the] California Unfair Practices Act is similar to the Robinson-Patman Act, and is [therefore] *not an antitrust law*." Thus, according to the defendant, the federal cases relied upon by plaintiff in support of its mandatory treble damage argument are inapposite.

Defendant is correct in its observation that [HN4](#)↑ the Unfair Practices Act closely parallels the Robinson-Patman Act. Both proscribe three basic types of business practice: (1) price discrimination in its various forms; (2) sales below cost, or as referred to in the Robinson-Patman Act, sales at unreasonably low prices; and (3) the granting of rebates and discounts not made available to all buyers on like terms and conditions. (See, e.g., Cup, *The Unfair Practices Act* (1936) 10 So.Cal.L.Rev. 18, 21.) "Price discrimination" means no more than price differentiation or the charging of different prices to different customers for goods of like grade and quality. (*Continental* [***8] [Baking Co. v. Old Homestead Bread Co. \(10th Cir. 1973\) 476 F.2d 97, 103](#), cert. den., 414 U.S. 975 [38 L.Ed.2d 218, 94 S.Ct. 290].)⁶)

³ [15 United States Code section 1 et seq.](#)

⁴ [15 United States Code sections 12, 13](#), 14-21, 22-27 (1973).

⁵ [Section 16750](#) reads in relevant part: "(a) Any person who is injured in his 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, and shall be awarded a reasonable attorneys fees together with the costs of the suit." (Italics added.)

The Cartwright Act encompasses sections 16600-16804.

⁶ [15 United States Code section 13](#) (§ 1 of the Robinson-Patman Act which amended § 2 of the Clayton Act) consists of six subdivisions, (a) through (f). Subdivision (a) prohibits direct and indirect discrimination in price having specified effects on competition. Certain affirmative defenses are also permitted, notably cost justification of price differences. (See, Hills, Antitrust Adviser (2d ed. 1978) § 4.2, p. 293.) [Section 13](#) reads in part as follows:

"(a) It shall be unlawful for any person engaged in commerce in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly

[***9] [**599] The only significant difference between the Unfair Practices Act and the Robinson-Patman Act is that the state statute proscribes price discrimination between geographic localities only,⁷ but fails to proscribe such discrimination between individual purchasers. The Robinson-Patman Act, however, proscribes both types of price discrimination. (*Harris v. Capitol Records etc. Corp.*, *supra*, 64 Cal.2d 454, 459-460; see [15 U.S.C. § 13](#); cf. [15 U.S.C. § 13a \(1973\)](#).)

[***10] Defendant bases its argument that both acts are not antitrust laws on the United States Supreme Court's decision in [Nashville Milk Co. v. \[*939\] Carnation Co., 355 U.S. 373 \[2 L.Ed.2d 340, 78 S.Ct. 352\]](#), rehearing denied 355 U.S. 967 [2 L.Ed.2d 542, 78 S.Ct. 530].⁸ Its analysis of *Nashville Milk Co.* is faulty.

In that case, the [***11] plaintiff argued that it had been injured by a defendant's act of selling at unreasonably low prices in violation of section 3 of the Robinson-Patman Act. ([15 U.S.C. § 13a](#).⁹ [***12]) The plaintiff [**600]

receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . . *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

⁷ Section 17040 addresses the concept of locality discrimination:

"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."

The "smallest geographical unit [section 17040] envisages is the individual store or outlet, not the individual purchaser regardless of location." ([Harris v. Capitol Records etc. Corp., 64 Cal.2d 454, 460 \[50 Cal.Rptr. 539, 413 P.2d 139\]](#).)

⁸ Before the United States Supreme Court's decision in *Nashville Milk Co.* a conflict existed in the federal circuits concerning whether section 3 of the Robinson-Patman Act ([15 U.S.C. § 13a](#)) was an *antitrust law* for purposes of recovering treble damages. The Third Circuit viewed section 3 as an *antitrust law*. (See, e.g., [Dean Oil Company v. American Oil Company, \(D.C.N.J. 1956\) 147 F.Supp. 414](#), affd. *per curiam* (3d Cir.) [254 F.2d 816](#), cert. den. [358 U.S. 835 \[3 L.Ed.2d 72, 79 S.Ct. 58\]](#).) The Seventh Circuit viewed section 3 as not within the treble damage ambit. (See, e.g., [Mackey v. Sears Roebuck & Co. \(7th Cir. 1956\) 237 F.2d 869](#).)

⁹ [Section 13a](#) (§ 3 of the Robinson-Patman Act) provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

"Any person violating any of the provisions of this section, shall, upon conviction thereof, be fined not more than \$ 5,000 or imprisoned not more than one year, or both." ([15 U.S.C. § 13a](#); italics added.)

sought treble damages and injunctive relief under [15 United States Code sections 15](#) and [26](#).¹⁰ (§§ 4 and 16 of the Clayton Act.)

The Supreme Court held the plaintiff's "private cause of action [did] not lie for practices of forbidden *only* by § 3 . . ." ([Nashville Milk Co. v. Carnation Co., supra, 355 U.S. 373, 382 \[2 L.Ed.2d 340, 347\]](#), italics added.) The court technically reasoned that section 3 of the Robinson-Patman Act did not amend the Clayton Act and "[further], § 3 contains only penal sanctions for violations of its provisions; in the absence of a clear expression of congressional intent to the contrary, these sanctions should under familiar principles be considered exclusive, rather than supplemented by civil sanctions of a distinct statute. [Citations.]" ([Id., at p. 377 \[2 L.Ed.2d at p. 344\]](#), italics added.) Hence, the Supreme Court held the enforcement of section 3 was exclusively within the purview of public [\[*940\]](#) authority, and treble damages were not recoverable "except to [\[***13\]](#) the extent that violation of any of its provisions also constituted a violation of § 2 of the Clayton Act [\[15 U.S.C. § 13\]](#), and as such were subject to private redress under §§ 4 and 16 of that Act." ([Id., at p. 379 \[2 L.Ed.2d at p. 345\]](#), italics added.)

The critical point the Supreme Court made in *Nashville Milk Co.* which defendant here has ignored is that section 2 of the Clayton Act was amended by the first section of the Robinson-Patman Act of June 19, 1936. ([15 U.S.C. § 13](#), see fn. 6 *ante*.¹¹) Therefore, "the Robinson-Patman Act [\[15 U.S.C. § 13\]](#) [is an] '[antitrust law](#)' within § 4 [of the Clayton Act] and treble damage suits are . . . authorized by any person 'injured in his business or property' as a result of a violation of [that] provision." (Hills, Antitrust Adviser (2d ed. 1978) § 4.28, p. 353.) [CA\(2\)](#)[↑] (2) In other words, there are certain kinds of violations contemplated by the Robinson-Patman Act which, by reference to the Clayton Act, are subject to recovery of treble damages at the suit of a private plaintiff quite without regard to any proof of malice or any other condition precedent. Those violations are precisely the kind which [\[***14\]](#) occurred here under the California Unfair Practices Act.

Moreover, we note defendant appears to argue "that antitrust remedies [including treble damages] are based on public policy considerations" but Unfair Practices Act actions are not. The policy behind that act, according to defendant, is to protect individual competitors but not the public and "[thus], the extraordinary remedy of treble damages" is inappropriate.

[CA\(3\)](#)[↑] (3) Defendant, however, is incorrect concerning [HN5](#)[↑] the policy [\[***15\]](#) underlying the Unfair Practices Act. The California Supreme Court in upholding that act's constitutionality articulated its purpose as follows: "This act represents an attempt on the part of the legislature to regulate business as a whole by prohibiting practices which the legislature has determined constitute unfair trade practices. Its stated purpose ([sec. 13](#)) is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage free, open and fair competition." ([Wholesale T. Dealers v. \[*941\] National \[**601\] etc. Co., 11 Cal.2d 634, 643 \[82 P.2d 3, 118 A.L.R. 486\]](#), italics added.¹²) Thus, the Unfair Practices Act is based on a strong public policy of fostering competition, and does not direct itself solely to the concerns of individual competitors.

[\[***16\]](#) Likewise, [HN7](#)[↑] the public policy of "free, open and fair competition" underlies the concept of mandatory treble damages: [The] purposes of the antitrust laws are best served by insuring that the private action will be an

¹⁰ [15 United States Code section 26](#) (§ 16 of the Clayton Act) grants a private cause of action for injunctive relief "against threatened loss or damage by a violation of the antitrust laws."

¹¹ For purposes of clarity, it is important to understand that [15 United States Code section 13](#), and [15 United States Code section 13a](#), are two separate and independent sections of the Robinson-Patman Act. As noted by the United States Supreme Court in *Nashville Milk Co.*, [section 13a](#) includes its own independent penalty provision exclusive of [15 United States Code section 15](#), the treble damage provision. (See fn. 9 *ante*.) The United States Supreme Court in *Nashville Milk Co.* addressed [section 13a](#) only and not [section 13](#).

¹² Similarly, [HN6](#)[↑] [section 17001](#) articulates the purpose of the Unfair Practices Act: "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." (Italics added.)

ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. *The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition.* A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. [Citation.]" (*Perma Mufflers v. Int'l. Parts Corp.*, 392 U.S. 134, 139 [20 L.Ed.2d 982, 990, 88 S.Ct. 1981], italics added; see also *Antitrust Symposium: The Effectiveness of the Private Treble Damages Action as an Antitrust Enforcement Mechanism* [**17] (1976) 8 Sw.U.L.Rev. 505.) Thus, it can fairly be observed, based upon the foregoing, that [HN8](#)[↑] the Unfair Practices Act has as one of its purposes an antitrust law objective.

II

[CA\(1b\)](#)[↑] (1b) We next turn to defendant's contention concerning the mandatory nature of treble damages under the antitrust laws. [CA\(4\)](#)[↑] (4) Here again federal decisions are persuasive in construing California antitrust laws: "The Cartwright Act is patterned upon the federal Sherman Antitrust Act and both derive their basic provisions from the common law policy against restraint of trade; thus cases decided under the latter act are applicable as an aid to decision in interpreting the former. [Citations.]" (*Saxer v. Philip Morris, Inc.*, 54 Cal.App.3d 7, 19 [126 Cal.Rptr. 327].) [CA\(1c\)](#)[↑] (1c) [HN9](#)[↑] Because treble damages are mandatory under federal antitrust laws where a private plaintiff brings a Robinson-Patman Act action [*942] pursuant to [15 United States Code section 13](#), it is our view that [section 17082](#) should similarly be interpreted as requiring treble damages in actions brought pursuant to the Unfair Practices Act without regard to malice or any other judicially imposed qualifying condition.

Defendant's additional arguments [**18] against interpreting [section 17082](#) as providing for mandatory treble damages are also without merit. As previously noted, defendant contends that "[because] the Award of Treble Damages Is Not Mandatory Under [Section 16750](#) [Cartwright Act] . . . It Should Not Be Held Mandatory Under [Section 17082](#)." Defendant, however, fails to cite any cases supporting that proposition.

We note that a dearth of authority exists in California interpreting the Cartwright Act as well as the Unfair Practices Act, because few actions have been brought and even fewer appealed under either section. Since 1907 only about 20 major appellate decisions concerning the Cartwright Act have been litigated. (Fellmeth, *Antitrust Enforcement by Local Prosecutors: Impediments and Prospects* (1978) 14 Cal. Western L.Rev. 1, 15, fn. 59.)

[CA\(5\)](#)[↑] (5) Our research has failed to locate a decision deciding whether [section 16750](#)'s treble damage provision is mandatory or discretionary. Because, however, the Cartwright Act is one of our state antitrust laws and analogous to the federal Sherman Act as pointed out by defendants in their brief, we [**602] opine that [section 16750](#)'s treble damage provision is also mandatory. [**19] As previously noted, cases decided under the Sherman Act are applicable in interpreting the Cartwright Act. (*Saxer v. Philip Morris, Inc., supra*, 54 Cal.App.3d 7, 19.)

Regardless, because defendant cites no authority in support of its interpretation of [section 16750](#) and also because the issue of its interpretation is not presently before us, we decline to consider it and hence decline to consider any argument by way of analogy deriving from such interpretation.

III

Defendant additionally contends "[an] Award of Treble Damages in This Case Would Be Unconstitutional." It relies upon the United States Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 [41 L.Ed.2d 789, 94 S.Ct. 2997] as support for its theory. Defendant's reliance on that decision, however, is misplaced. We need only note that *Gertz* [*943] addressed the issue of awarding exemplary damages against a media defendant when that defendant engaged in defamatory speech. In the case before us treble damages are appropriate, not because of the type of speech engaged in, but because of unlawful business acts violative of the Unfair Practices Act.

IV

Finally, defendant's statutory [***20] interpretation argument is unpersuasive. Section 17082 provides that the plaintiff "shall be entitled to recover" treble damages. Defendant argues that "the issue of statutory interpretation hinges on the meaning of the word 'entitle'" and "entitle" means a plaintiff is qualified for treble damages but not automatically awarded treble damages. We disagree.

HN10[] By section 17082's own terms, a plaintiff can bring an action for injunctive relief without proving actual damages. However, to be *entitled* to treble damages a plaintiff must prove actual damages. Hence, we believe the word "entitled" signifies that a plaintiff "qualifies" for the right to mandatory treble damages once he proves actual damages. In the absence of such proof, treble damages are not permitted and a plaintiff is limited to an injunctive remedy.

CA(6)[] (6) Aside from the contentions raised by the plaintiff, a further point is worthy of comment. There is a rule applicable to appellate practice which requires a plaintiff who appeals from a judgment in his favor on the ground of inadequate damages to have moved for a new trial in order to have standing to raise such issue on appeal. Stated otherwise, "It is the law that [***21] such a motion is a condition precedent to urging inadequacy of damages on appeal. [Citation.]" (Mendoyoma, Inc. v. County of Mendocino, 8 Cal.App.3d 873, 877 /87 Cal.Rptr. 740.)

We raise the foregoing point to distinguish this case from one urging "inadequacy" of damages. Such a contention is one involving an evaluation of the evidence, and that is not the kind of error assigned in the case now before us. The error assigned which we hold to be well taken is one involving the interpretation of a statute, and in *Mendoyoma* it was noted that other kinds of errors could be raised on appeal without the necessity of a motion for a new trial. More particularly, "[but] the rule that prevents plaintiff from now urging inadequacy of damages does not prevent him from urging [other] errors . . ." (Id., at p. 877.)

[*944] In sum then, it is our view that the proper application of section 17082 to the case proved by plaintiff entitles it to three times the damages awarded. In so holding, we are doing nothing more nor less than following the federal decisions which apply federal statutes similar in content and purpose to the California statute here under consideration. [***22] The judgment is ordered modified accordingly. As thus modified, the judgment is affirmed. However, plaintiff shall recover its costs on appeal.



People ex rel. Freitas v. City and County of San Francisco

Court of Appeal of California, First Appellate District, Division Two

May 11, 1979

Civ. No. 43082

Reporter

92 Cal. App. 3d 913 *; 155 Cal. Rptr. 319 **; 1979 Cal. App. LEXIS 1732 ***; 1979-2 Trade Cas. (CCH) P62,747

THE PEOPLE ex rel. JOSEPH FREITAS, JR., as District Attorney, etc., et al., Plaintiffs and Appellants, v. CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents; RICHARD B. SPOHN, as Director, etc., Intervener and Appellant

Subsequent History: [***1] A petition for a rehearing was denied June 8, 1979, and the petition of the plaintiffs and appellants and the intervener and appellant for a hearing by the Supreme Court was denied July 26, 1979. Bird, C. J., did not participate therein.

Prior History: Superior Court of the City and County of San Francisco, No. 715624, John E. Benson, Judge.

Disposition: The judgment on the pleadings in favor of defendants on the first cause of action of both complaints, and on the eighth cause of action of the complaint in intervention, is affirmed.

Core Terms

taxicab, regulation, fares, Cartwright Act, public utility, powers, anti trust law, sovereign, Sherman Act, rates, cases, municipal, exempt, immunity, political subdivision, intermediate, plaintiffs', antitrust, cause of action, state action, transportation

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN1[] Regulated Practices, Price Fixing & Restraints of Trade

[Cal. Bus. & Prof. Code, § 16702](#), the Cartwright Act, defines "persons" to include "corporations, firms, partnerships and associations." This definition does not include cities.

Governments > Legislation > Interpretation

HN2[] Legislation, Interpretation

Fundamental rules of statutory interpretation require that a legislative act be read as a whole, and its various parts harmonized so as to give effect to legislative intent. Whenever possible, effect should be given to every word, phrase and clause so that no part or provision will be useless or meaningless.

Governments > Local Governments > General Overview

HN3 **Governments, Local Governments**

Municipal corporations are political subdivisions of the state. Subject only to its own laws and constitution, the state may create, expand, diminish or abolish such subdivisions, and all this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.

Energy & Utilities Law > Utility Companies > General Overview

Governments > Local Governments > Administrative Boards

Constitutional Law > State Constitutional Operation

Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Governments > Public Improvements > General Overview

HN4 **Energy & Utilities Law, Utility Companies**

See [Cal. Const. art. XII, § 8.](#)

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

A district attorney filed an antitrust complaint for injunction, civil penalties and other equitable relief against a city and county. One cause of action alleged a per se violation of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) by defendants' fixing of taxicab fares. Another cause of action by the Director of the California Department of Consumer Affairs, who was given permission to intervene, alleged that defendants had no lawful authority to set and fix taxicab fares, and that the section of the municipal code under which they purported to act was ultra vires and void. The trial court entered judgment for defendants on the pleadings on both causes of action. (Superior Court of the City and County of San Francisco, No. 715624, John E. Benson, Judge.)

The Court of Appeal affirmed. The court first held that federal antitrust cases had no relevance in determining whether the city was liable under the Cartwright Act, and that only California law needed to be consulted to determine whether the city could set taxicab fares under the act. The court further held that the city, as a political subdivision of the state, could not be sued under the act. While agreeing with the proposition that taxicab rates may be subject to regulation by the state Legislature through the Public Utilities Commission, the court pointed out that the Legislature has not yet claimed jurisdiction or sought control in this area; accordingly, the court held that absent an assertion by the state of its authority to regulate taxicab rates, the city had the power to do so. The court rejected plaintiffs' argument that even if the city was immune under the Cartwright Act, the individual members of the board of supervisors could be sued. (Opinion by Rouse, J., with Taylor, P. J., and Kane J., concurring.)

Headnotes**CA(1)[] (1)****Monopolies and Restraints of Trade § 6—Under Cartwright Act—Liability of City—Federal Law.**

--In an antitrust action against a city alleging a violation of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), arising out of the fixing of taxicab fares, federal antitrust cases did not have any relevance in determining whether the city has liability under the Cartwright Act. Because the state acts as an originator of the antitrust laws in question, not as an intermediate sovereign between the cities and the originator of the antitrust laws, only California law need be consulted.

CA(2a)[] (2a) CA(2b)[] (2b) CA(2c)[] (2c) CA(2d)[] (2d)**Monopolies and Restraints of Trade § 6—Under Cartwright Act—Liability of Cities.**

--In an antitrust action against a city alleging a violation of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)), arising out of the fixing of taxicab fares the trial court properly entered judgment for defendant on the pleadings. Because cities are political subdivisions of the state and are specifically defined as persons entitled to sue under the act ([Bus. & Prof. Code, § 16750](#)), while the definition of "persons" subject to the act does not include cities or political subdivisions, the Legislature did not intend for cities to be subject to the Cartwright Act. Moreover, since the city could not be sued under the act, and the board of supervisors was operating within the scope of its powers in setting taxicab rates, individual members of the board could not be held individually liable for the same immune conduct.

[See [Cal.Jur.3d](#), Monopolies and Restraints of Trade, §§ 19, [29: Am.Jur.2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 472](#).]

CA(3)[] (3)**Statutes § 39—Construction—giving Effect to Statute—Conformation of Parts.**

--A legislative act is to be read as a whole, and its various parts harmonized so as to give effect to legislative intent. Whenever possible, effect should be given to every word, phrase and clause so that no part or provision will be useless or meaningless.

CA(4)[] (4)**Municipalities § 13—Legislative Control—Cities as Political Subdivisions of State.**

--Municipal corporations are political subdivisions of the state. Subject only to its own laws and Constitution, the state may create, expand, diminish or abolish such subdivisions, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.

CA(5)[] (5)**Municipalities § 15—Powers—Police Power—Regulation of Business and Professions—Setting Taxicab Rates.**

--While taxicabs are common carriers and their rates may therefore be subject to regulation by the state Legislature through the Public Utilities Commission, the Legislature has not claimed jurisdiction nor sought control in this area. Accordingly, absent an assertion by the state of its authority to regulate taxicab rates, a city has the power to do so, and the fact that taxicabs occasionally or frequently venture beyond the city and county limits is irrelevant.

Counsel: Joseph Freitas, Jr., District Attorney, Judith D. Ford, Raymond T. Bonner, David C. Moon, Gary G. Devine and Maria P. Rivera, Assistant District Attorneys, for Plaintiffs and Appellants.

Harry M. Snyder and Luana Martilla as Amici Curiae on behalf of Plaintiffs and Appellants.

Richard A. Elbrecht, Steven M. Fleisher and A. Paul Griebel for Intervener and Appellant.

George Agnost, City Attorney, and Edmund A. Bacigalupi, Deputy City Attorney, for Defendants and Respondents.

Judges: Opinion by Rouse, J., with Taylor, P. J., and Kane, J., concurring.

Opinion by: ROUSE

Opinion

[*915] [**320] Plaintiffs appeal from a judgment on the pleadings entered in favor of [***2] defendants City and County of San Francisco and its board of supervisors (hereafter City and Board). We are asked to decide whether the provisions of the Cartwright Act apply to the City and whether San Francisco has the authority, under the California Constitution, to set taxicab fares.

The instant action was initiated by the District Attorney of the City and County of San Francisco (hereafter District Attorney), who filed an antitrust complaint for injunction, civil penalties and other equitable [*916] relief. Permission to intervene was then granted to Richard Spohn, Director of the California Department of Consumer Affairs. Intervener's complaint was identical to that filed by the District Attorney, except that it added an eighth cause of action. The judgment on the pleadings was granted as to the first cause of action of both complaints and as to the eighth cause of action of the complaint in intervention.¹

[***3] The first cause of action alleged a per se violation of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) by defendants' fixing of taxicab fares. The eighth cause of action in intervenor's complaint alleged that defendants City and Board had no lawful authority to set and fix taxicab fares, and that the section of the San Francisco Municipal Code under which they purported to act is ultra vires and void.

The following facts were established by plaintiffs' request for admissions and defendants' response thereto: The Board fixes the fares which all taxicab companies operating in San Francisco must charge. Since January 1971, Yellow Cab has submitted five requests for fare increases to the Board. Although an increase was granted in response to all five requests, defendants denied that the fare was set at the level requested by Yellow Cab in every instance.

¹ All counts of plaintiffs' complaint relating to defendants City and Board were decided by the trial court; therefore, the one final judgment rule permits this appeal. (6 Witkin, Cal. Procedure (2d ed. 1971) Pt. I, § 42, p. 4057.)

Summary judgment for defendants was granted as to the third cause of action; however, this decision is not being appealed. The second, third, fourth, fifth, sixth and seventh causes of action do not run against the City or the Board and are therefore irrelevant to this appeal.

The portion of this action concerning Westgate California Corporation, Yellow Cab Company and Charles O'Connor were stayed by pending bankruptcy proceedings; as a result of these proceedings, the action against Yellow Cab was dismissed without prejudice.

[**321] Plaintiffs' ² first four arguments on appeal are all based on the presumption that federal case law under the Sherman Anti-Trust Act (hereafter Sherman Act; [15 U.S.C.A. 1](#)) should be followed in this case.³ They reason that since cases interpreting the Sherman Act are applicable to the California Cartwright [***4] Act ([Marin County Bd. of Realtors, Inc. v. Palsson \(1976\) 16 Cal.3d 920, 926 \[130 Cal.Rptr. 1, 549 P.2d 833\]](#)), recent changes in the federal law compel the conclusion that San Francisco is not exempt under the Cartwright Act.

[*917] Defendants' major argument is that [Widdows v. Koch \(1968\) 263 Cal.App.2d 228 \[69 Cal.Rptr. 464\]](#), controls in this case. That case held that municipalities were not "persons" under [section 16702 of the Business and Professions Code](#) and therefore were not subject to the provisions of the Cartwright Act (p. 235). Defendants also contend that even though the Sherman Act cases are applicable, they can be distinguished from this case. Finally, they rely [***5] upon [In re Martinez \(1943\) 22 Cal.2d 259 \[138 P.2d 10\]](#), which held that a municipality has the power to set taxicab rates for taxicabs operating within its boundaries.

CA(1)[] (1) The first question to be addressed, then, is whether federal antitrust cases have any relevance in determining whether a city has liability under the California Cartwright Act. Our analysis of the federal cases and California law leads us to conclude that, in this limited instance, federal case holdings provide no guide to the interpretation of California [antitrust law](#). Accordingly, plaintiffs' contention that federal law is pertinent to this case must fail.

In [Parker v. Brown \(1943\) 317 U.S. 341 \[87 L.Ed. 315, 63 S.Ct. 307\]](#), the United States Supreme Court held that federal antitrust laws were not intended by Congress to apply to state action. The court reasoned that there was "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally [***6] subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." (Pp. 350-351 [[87 L.Ed. p. 326](#)].) It was pointed out that although previous cases had held that a state could sue under the federal antitrust laws, the legislative history of the act indicated that it prevented only "'business combinations.'" (P. 351 [[87 L.Ed. p. 326](#)].) The act "must be taken to be a prohibition of individual and not state action." The state, acting as sovereign, is not prohibited by the Sherman Act from imposing a restraint as an act of government. (P. 352 [[87 L.Ed. p. 326](#)].)

[Goldfarb v. Virginia State Bar \(1975\) 421 U.S. 773 \[44 L.Ed.2d 572, 95 S.Ct. 2004\]](#), held that the state action exemption announced in *Parker* was inapplicable to a minimum fee schedule for lawyers published by a local bar association and enforced by the state bar. In order to come within *Parker*, anticompetitive activities must be compelled by direction of the state acting as a sovereign. (P. 791 [[44 L.Ed.2d p. 587](#)].) The Virginia Supreme Court was authorized to regulate the practice of law, and had [*918] [***7] adopted ethical codes which dealt in part with fees, "and far from exercising state power to authorize binding price fixing, explicitly directed lawyers not 'to be controlled' by fee schedules." (P. 789 [[44 L.Ed.2d p. 586](#)].) When the state bar provided for disciplinary action for deviation from fee schedules, it "voluntarily joined in what is essentially a private anticompetitive activity" which is within the reach of the Sherman Act. (Pp. 791-792 [[44 L.Ed.2d p. 587](#)].)

In [Cantor v. Detroit Edison Co. \(1976\) 428 U.S. 579 \[49 L.Ed.2d 1141, 96 S.Ct. 3110\]](#), a [**322] private utility distributed, without additional charge, lightbulbs to residential customers, under a longstanding practice antedating state regulation of electric utilities. This practice, challenged as an unlawful "tie-in" of bulbs to electricity, was described in the utilities tariffs, which were binding on the utility until changed. Nevertheless, the challenged tie-in was held not to be immune from antitrust laws. The court pointed out that Chief Justice Stone in *Parker* had carefully selected language which plainly limited the court's holding to official action taken by state officials. (P. 591 [***8] [[49 L.Ed.2d p. 1150](#)].) "The cumulative effect of these carefully drafted references unequivocally differentiates between official action, on the one hand, and individual action (even when commanded by the State),

² The District Attorney filed a written brief on appeal. Intervener adopts and joins in all arguments in District Attorney's brief.

³ An amicus curiae brief filed on behalf of Consumers Union of United States, Inc. and the Gray Panthers of San Francisco takes essentially the same position as plaintiffs.

on the other hand." (P. 591, fn. 24 [94 L.Ed.2d p. 1150].) The court emphasized that *Cantor* was distinguishable from *Parker* because the only defendant in *Cantor* was a public utility and there was no claim that any state action violated the antitrust laws. Since *Parker* involved the issue of whether the sovereign state itself was subject to the antitrust laws, it was not controlling in *Cantor*. (Pp. 591-592 [49 L.Ed.2d p. 1150].) Therefore, since the state had merely approved but had not mandated the "tie-in" arrangement, the state action "exemption" did not apply.

By contrast, a Sherman Act immunity was found in [*Bates v. State Bar of Arizona \(1977\) 433 U.S. 350 \[53 L.Ed.2d 810, 97 S.Ct. 2691\]*](#). The United States Supreme Court found that a ban on price advertising, adopted by the Arizona Supreme Court, did not violate the Sherman Act, because the state court itself had adopted the challenged rule, and the state bar's role was completely defined. [***9] The court found the restraint to be compelled by direction of the state acting as sovereign. (P. 360 [53 L.Ed.2d p. 821].) Nevertheless, the ban on advertising was invalidated on the ground that it violated the First Amendment because of overbreadth. (Pp. 383-384 [53 L.Ed.2d pp. 835-836].)

Finally, in [*Lafayette v. Louisiana Power & Light Co. \(1978\) 435 U.S. 389 \[55 L.Ed.2d 364, 98 S.Ct. 1123\]*](#), the court held that cities were not [*919] exempt from the federal antitrust laws, when they owned and operated electric utility systems both within and beyond their city limits. The court pointed out that cities have long been "persons" under the Sherman Act (citing [*Chattanooga Foundry v. Atlanta \(1906\) 203 U.S. 390 \[51 L.Ed. 241, 27 S.Ct. 65\]*](#).) The court concluded that the "*Parker* doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." (P. 413 [55 L.Ed.2d p. 383].)

On the basis of their analysis of the above cases, plaintiffs conclude that, before local government can deprive the public [***10] of the benefits of competition, the conduct must be thoroughly analyzed, and the government must establish that it has been compelled by the state to engage in the otherwise unlawful activity.

Defendants subscribe to the concept that federal cases interpreting the Sherman Act are applicable to the Cartwright Act. ([*Widdows v. Koch, supra, 263 Cal.App.2d at p. 234*](#).) However, they conclude that the federal cases can be used to support their position that San Francisco can regulate taxicab fares.

As previously stated, we have concluded that, under the limited circumstances of this case, the federal holdings are irrelevant. All parties ignore the problem of equating the system under which federal **antitrust law** is developed with the system under which California **antitrust law** is developed.

The Sherman Act cases are all based on the concept of state sovereignty. A city's antitrust liabilities and exemptions under the federal act are derived through an intermediate state sovereign located between the city and the federal government which enacted the law. Thus, in the framework of the federal act, San Francisco would have an antitrust exemption only if it was compelled to set [***11] taxicab fares by the State of California, the intermediate sovereign. [**323] It appears to us that the above described analysis is meaningless when attempting to determine a city's liability under the Cartwright Act. California is no longer an intermediate sovereign; it is the originator of the **antitrust law**. Cities are no longer acting through an intermediate sovereign as under the Sherman Act. In California, cities are operating under constraints imposed by the Cartwright Act, and their liabilities are determined solely by the California Legislature. In this instance, the state is acting as an originator of the antitrust laws, not as an intermediate sovereign under federal antitrust [*920] concepts. To determine if San Francisco can set taxicab fares under the Cartwright Act, we need look only to California law. There is no intermediate sovereign between the cities and the originator of the antitrust laws.

CA(2a)[↑] (2a) To determine the nature and extent of San Francisco's responsibilities under the Cartwright Act, we should first determine whether, in enacting the Cartwright Act, the Legislature intended to allow cities to be sued as defendants. All parties argue the merits [***12] of [*Widdows v. Koch, supra, 263 Cal.App.2d 228*](#), which held that cities were not "persons" under the act. While the reasoning of *Widdows* may be questionable, the basic

holding is correct.⁴ [HN1](#) The Cartwright Act defines "persons" to include "corporations, firms, partnerships and associations." ([Bus. & Prof. Code, § 16702](#).) It is apparent that this definition does not include cities.

[***13] On the other hand, we note that [section 16750 of the Business and Professions Code](#), which is located in the Enforcement section of the Cartwright Act, does include a city within its definition of a person. Subdivision (a) of this section provides, in pertinent part, that "Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor . . ." Subdivision (b) states that "The state and any of its political subdivisions and public agencies shall be deemed a person within the meaning of this section."

[CA\(3\)](#) (3) [HN2](#) Fundamental rules of statutory interpretation require that a legislative act be read as a whole, and its various parts harmonized so as to give effect to legislative intent. Whenever possible, effect should be given to every word, phrase and clause so that no part or provision will be useless or meaningless. ([Smith v. Regents of University of California \(1976\) 58 Cal.App.3d 397, 403 \[130 Cal.Rptr. 118\]](#).)

[CA\(2b\)](#) (2b) It seems reasonable to assume that, in order to prevent its provisions from being useless, and to harmonize it with the earlier definition of "person," the Legislature included [subdivision \(b\) of \[***14\] section 16750](#) because it had not intended to include the state and its political [*921] subdivisions under the definition of "person" in [section 16702](#). Subdivision (b) speaks in terms of "this section," i.e., [section 16750](#). Thus it is clear that the state and its political subdivisions can sue as plaintiffs under the authority of this section. However, since they are "persons" only under that section, it is implicit that they cannot be sued as defendants. Therefore, if San Francisco is a political subdivision of the state, it cannot be sued under the Cartwright Act.

The City is a municipal corporation known by the name of San Francisco. (City & County of S.F. Charter (1978) art. I, § 1.100.)

[CA\(4\)](#) (4) [HN3](#) Municipal corporations are political subdivisions of the state. Subject only to its own laws and Constitution, the state may create, expand, diminish or abolish such subdivisions, and all this may be done, [**324] conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. ([Weber v. City Council \(1973\) 9 Cal.3d 950, 957 \[109 Cal.Rptr. 553, 513 P.2d 601\]](#).)

[CA\(2c\)](#) (2c) It appears that, since San Francisco is a political subdivision [***15] of the state, the Legislature did not intend for it to be subject to the Cartwright Act. Accordingly, we conclude that the judgment on the pleadings in favor of defendants on the first cause of action must be affirmed.

Plaintiffs next argue that defendants have no authority to fix taxicab fares. This issue was raised in the eighth cause of action in the complaint in intervention.

Plaintiffs cite in part from [article XII, section 23, of the California Constitution of 1879](#), as it read prior to the 1911 and 1914 amendments: "From and after the passage by the Legislature of laws conferring powers upon the Railroad Commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this State, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission; provided, however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement [***16] of local, police, sanitary and other regulations, other than the fixing of rates . . ." (Italics added.)

⁴The internal reasoning of *Widdows* appears to us to be inconsistent. After determining that municipalities do not come within the definition of "persons," the court writes: "The city . . . made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly, but imposed the restraint as an act of government which the Cartwright Act did not undertake to prohibit." (P. 235.) Implicit in this language is the concept that a city is liable under the Cartwright Act if its actions are not characterized as an act of government. This is not consistent with its earlier holding that cities are not "persons" and are not subject to Cartwright Act restrictions.

[*922] Plaintiffs rely on the emphasized portion to support their position that cities cannot fix rates. They point out that, notwithstanding the repeal of this section in 1974, the portion thereof which relates to the setting of fares is still in effect.⁵

However, when the entire clause is read in context, plaintiffs' argument that the emphasized portion of section 23, article XII, *ante*, stands for the proposition that cities are not permitted to fix fares, must fail.

The relevant portion of article XII, section 23, provided, in pertinent part: "From and after the passage by the Legislature of laws conferring powers upon the Railroad [***17] Commission . . . all powers respecting such public utilities vested in boards of supervisors . . . of the several . . . cities and counties . . . shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission . . ." (The Railroad Commission is the predecessor of the Public Utilities Commission.) This phrase indicates that, if there is a conflict between local laws and the powers granted to the commission by the Legislature, the commission powers override.

The next phrase qualifies the foregoing: "[Provided], however, that this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates . . ." This provision means that the Legislature cannot give the commission powers over local enforcement of local, police, sanitary or other regulations, with one exception, the setting of rates. Thus, if it so chooses, the Legislature can give the commission power to set rates. However, the clear implication is that if the Legislature fails to do so, the local government can fill the void with its own regulation.

This [***18] interpretation is supported by the present constitutional provision concerning regulation of public utilities. In 1974, the electors approved a new article XII which was entitled "Public Utilities" and discussed the powers of the Public Utilities Commission. [HN4](#)[↑] Section 8 of article XII now provides that: "A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission. This section does not affect [**325] power over public utilities relating to the making and enforcement of police, sanitary, and other [*923] regulations concerning municipal affairs pursuant to a city charter existing on October 10, 1911, unless that power has been revoked by the city's electors, or the right of any city to grant franchises for public utilities or other businesses on terms, conditions, and in the manner prescribed by law." This section simply restates an existing rule that local government bodies may not regulate in areas in which the commission acts. Implicit in this provision is that, if the Legislature does not grant powers to the commission, then a city may regulate. Thus, to decide whether San Francisco has the power [***19] to regulate taxicab fares, it must first be determined if the Legislature has authorized the Public Utilities Commission to act in that area.

The California Constitution classifies taxicabs and their owners as public utilities. "Private corporations and persons that own, operate, control or manage a . . . system for the transportation of people or property . . . are public utilities subject to control by the Legislature." ([Cal. Const., art. XII, § 3.](#)) The Legislature has asserted this control in the Public Utilities Code.

Chapter 8 of the Public Utilities Code is entitled the "Passenger Charter-Party Carriers' Act." ([Pub. Util. Code, § 5351 et seq.](#)) A charter-party carrier of passengers is "every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in this State." ([Pub. Util. Code, § 5360.](#)) There are exceptions to this definition, one of which is taxicabs. "The provisions of this chapter do not apply to: . . . Taxicab transportation service licensed and regulated by a city or county, by ordinance or resolution, rendered in vehicles designed for carrying not more than eight persons [***20] excluding the driver." ([Pub. Util. Code, § 5353, subd. \(g\).](#))

Thus, it is clear that the Legislature has not given the Public Utilities Commission authority to regulate taxicab fares if they are already licensed and regulated by a city. The Legislature has thereby implicitly approved of local regulation of taxicabs; therefore, it follows that San Francisco is not precluded from regulating them.

⁵ Plaintiffs rely on article XII, section 9, of the 1974 amendment, which reads: "The provisions of this article restate all related provisions of the Constitution in effect immediately prior to the effective date of this amendment and make no substantive change."

Plaintiffs argue that, even if cities can regulate taxicabs, they are nowhere authorized to set fares. They contend that the words "licensed" and "regulated" in section 5353, subdivision (g), of the Public Utilities Code, are not synonymous with "setting fares." They claim that they can find no authority which permits a city to set fares.

[*924] In the case of In re Martinez, supra, 22 Cal.2d 259, the California Supreme Court held that the Railroad Commission (forerunner of the Public Utilities Commission) did not have jurisdiction over the regulation of taxicabs and that the City of Sacramento was acting within its power when it chose to fix fares for taxicab companies within the municipality.

Plaintiffs rely on People v. Western Air Lines, Inc. (1954) 42 Cal.2d 621 [268 P.2d 723], which overruled "Anything in the Martinez case which is out of harmony with these conclusions . . ." (P. 642.)

Western Air Lines, Inc., held that an airline was a public utility within the meaning of the California Constitution. (P. 639.) In reaching this conclusion, the Supreme Court expressed concern about the confusion which is alleged to have resulted from divergent holdings of the court on the question of whether a carrier, which is in fact a common carrier transportation company, should be subject to rate regulation by the commission although not specifically mentioned in the Constitution or the statute. (P. 639.)

The court first examined Western Assn. etc. R. R. v. Railroad Comm. (1916) 173 Cal. 802 [162 P. 391, 1 A.L.R. 1455], where it was held that the commission had jurisdiction over certain motor truck and transportation companies despite the fact that they were not specifically mentioned in the Constitution or statutes. (People v. Western Air Lines, Inc., supra, 42 Cal.2d at p. 640.) The court then contrasted that case with In [**326] re Martinez, supra, 22 Cal.2d 259, which had reasoned that since taxicabs were not specifically [**22] mentioned in the Constitution or statutes, they could *not* be regulated by the commission. (Western Air Lines, Inc., supra, 42 Cal.2d at p. 641.) In order to resolve an apparent inconsistency, the *Western Air Lines, Inc.* court overruled this reasoning in *Martinez*.

What remains of *Martinez* is the reasoning that the Legislature intended to exempt taxicabs from state regulation. This portion of the case finds independent support in an amicus curiae brief filed by the commission stating that the commission had consistently taken the position that its jurisdiction did not extend to the regulation of local taxicabs and for that reason it had never attempted to regulate their operation. (People v. Western Air Lines, Inc., supra, 42 Cal.2d at p. 641.) Thus, we conclude that the basic holding of *Martinez* that taxicab rates can be set by cities because the Legislature has not given this power to the commission is still good law. For this reason, plaintiffs' argument that there is no authority for the setting of taxicab fares by a city must fail.

[*925] Plaintiffs also argue that In re Martinez, supra, 22 Cal.2d 259, is inapposite because it established [**23] only the limited rights of local governments to regulate taxicab companies operating wholly within the city or county involved. Since taxis regulated by San Francisco are not wholly operated within the City, it is argued that *Martinez* does not apply. Plaintiffs contend that the growth of the taxicab business compels the conclusion that local jurisdictions no longer have the authority to regulate them; "If there is to be any regulation, it must be by the state."

CA(5)[] (5) We have no quarrel with the proposition that, as common carriers, taxicab rates may be subject to regulation by the state Legislature through the Public Utilities Commission. We observe, however, that the Legislature has not yet claimed jurisdiction, nor has it sought control in this area. Accordingly, we hold that, absent an assertion by the state of its authority to regulate taxicab rates, the city has the power to do so. Such holding is not "out of harmony" with People v. Western Air Lines, Inc., supra, 42 Cal.2d at page 642. Until the state does assume such jurisdiction, the fact that taxicabs occasionally (or even frequently) venture beyond the city and county limits is of no moment.

Plaintiffs' final [**24] argument is that even if the City is immune under the Cartwright Act, the individual members of the Board can be sued.

In Martelli v. Pollock (1958) 162 Cal.App.2d 655 [328 P.2d 795], the court found that members of the city council had immunity from liability toward persons affected by decisions made within the scope of their powers. The court reasoned that there was no question but that the council was empowered to pass ordinances and, despite

allegations of wrongful motive, are protected by the doctrine of legislative immunity. (Pp. 658-659.) To support this, the court relied on [Hardy v. Vial \(1957\) 48 Cal.2d 577 \[311 P.2d 494\]](#). In that case, the California Supreme Court stated, "The rule of absolute immunity, notwithstanding malice or other sinister motive, is not restricted to public officers who institute or take part in *criminal* actions. First recognized for the protection of judges [citation], it has been extended by the federal decisions to all executive public officers when performing within the scope of their power acts which require the exercise of discretion or judgment." ([Hardy, supra, p. 582.](#)) In addition, a city attorney and a clerk-administrator [***25](#) have immunity when acting within the scope of their employment. ([Martelli, supra, at pp. 659-660.](#))

[CA\(2d\)](#) **(2d)** Here, the Board was operating within the scope of its powers. Its setting of taxicab rates did not violate the Cartwright Act. It strikes us as [*926](#) both illogical and unreasonable to hold that the City cannot be sued under the Cartwright Act, and then permit the Board members to be individually liable for the same immune conduct.

[\[**327\]](#) The judgment on the pleadings in favor of defendants on the first cause of action of both complaints, and on the eighth cause of action of the complaint in intervention, is affirmed.

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People v. Mobile Magic Sales, Inc.

Court of Appeal of California, Fourth Appellate District, Division One

August 20, 1979

Civ. No. 18350

Reporter

96 Cal. App. 3d 1 *; 157 Cal. Rptr. 749 **; 1979 Cal. App. LEXIS 2034 ***; 1979-2 Trade Cas. (CCH) P62,940

THE PEOPLE, Plaintiff and Respondent, v. MOBILE MAGIC SALES, INC., et al., Defendants and Appellants

Prior History: [***1] Superior Court of San Diego County, No. 414439, Ross G. Tharp, Judge.

Disposition: We conclude: No abuse of discretion in issuing the preliminary injunction is shown. The order granting the preliminary injunction is affirmed.

Core Terms

mobilehome, preliminary injunction, Mobile, injunction, homesites, trial court, lease, retail dealer, tying arrangement, mobile home park, tying agreement, Cartwright Act, Sherman Act, space, conditioning, displayed, mandatory, dealer, rights, restraint of trade, tied product, competitors, issuance, restrain

LexisNexis® Headnotes

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN1](#) [down arrow] **Standards of Review, Substantial Evidence**

The substantial evidence rule applies to appeal court review of preliminary injunctions. Also the familiar rule requires, when evaluating the trial court's exercise of discretion in granting a preliminary injunction, that the facts be viewed in the light most favorable to the order.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[HN2](#) [down arrow] **Price Fixing & Restraints of Trade, Tying Arrangements**

A "tying" arrangement is defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.

96 Cal. App. 3d 1, *1 157 Cal. Rptr. 749, **749 1979 Cal. App. LEXIS 2034, ***1

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3 [down] **Injunctions, Preliminary & Temporary Injunctions**

Cal. Code Civ. Proc. § 527 provides: An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4 [down] **Injunctions, Preliminary & Temporary Injunctions**

The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the right claimed by him.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN5 [down] **Injunctions, Preliminary & Temporary Injunctions**

The general purpose of a preliminary injunction is the preservation of the status quo until a final determination of the merits of the action. Thus, the court examines all of the material before it in order to consider whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it. In making that determination the court will consider the probability of the plaintiff's ultimately prevailing in the case and, it has been said, will deny a preliminary injunction unless there is a reasonable probability that plaintiff will be successful in the assertion of his rights. In the last analysis the trial court must determine which party is the more likely to be injured by the exercise of its discretion, and it must then be exercised in favor of that party.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN6 [down] **Standards of Review, Abuse of Discretion**

The granting or denial of a preliminary injunction, even though the evidence with respect to an absolute right therefor may be conflicting, rests in the sound discretion of the trial court and may not be disturbed on appeal except for an abuse of discretion.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN7 [down] **Standards of Review, Abuse of Discretion**

Discretion is abused in the legal sense whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontradicted evidence.

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Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Evidence > ... > Preliminary Questions > Admissibility of Evidence > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN8 [down] **Standards of Review, Substantial Evidence**

Appellate review of the issuance of a preliminary injunction requires a determination whether substantial evidence supports the discretion exercised by the trial court.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Contracts Law > Defenses > Illegal Bargains

Civil Procedure > ... > Summary Judgment > Appellate Review > General Overview

HN9 [down] **Summary Judgment, Entitlement as Matter of Law**

On a motion for summary judgment, the function of the trial court is not issue determination but rather issue finding.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

HN10 [down] **Antitrust & Trade Law, Sherman Act**

The California antitrust law -- the Cartwright Act, Cal. Bus. & Prof. Code §16700 et seq., is patterned after the federal Sherman Act, 15 U.S.C.S. § 1 et seq. Both have their roots in the common law; federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act. In 1961 California incorporated section 3 of the federal Clayton Act, 15 U.S.C.S. § 12 et seq., in Cal. Bus. & Prof. Code § 16727. The Clayton Act goes beyond common law and the Sherman Act to inhibit trade restraints at their inception; federal interpretations thereof are similarly applicable.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN11 [down] **Antitrust & Trade Law, Sherman Act**

The provisions of the Sherman Act, 15 U.S.C.S. § 1 et seq., and therefore §§ 16720 and 16726 of the Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq., codify the common law prohibition against combinations in restraint of trade.

Antitrust & Trade Law > Sherman Act > General Overview

[**HN12**](#) [L] Antitrust & Trade Law, Sherman Act

Both federal and state decisional law hold trade or commerce in real estate, or property rights in real estate, to be within the protections of the Sherman Act. [15 U.S.C.S. § 1 et seq.](#)

Antitrust & Trade Law > Clayton Act > General Overview

[**HN13**](#) [L] Antitrust & Trade Law, Clayton Act

Section 3 of the Clayton Act, [15 U.S.C.S. § 12 et seq.](#), and its California counterpart, [§ 16727](#) of the Cartwright Act - are restricted to transactions involving commodities. [Cal. Bus. & Prof. Code § 16727](#). And realty or property rights in realty have been denied the status of commodity under the Clayton Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

[**HN14**](#) [L] Tying Arrangements, Clayton Act

Tying arrangements involving rights in real property are not removed from the prohibitions of the antitrust laws, for such tying arrangements are made unlawful by [section 1](#) of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), and [Cal. Bus. & Prof. Code §§ 16720](#) and [16726](#) of the Cartwright Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN15**](#) [L] Tying Arrangements, Sherman Act Violations

A "tying arrangement" is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product or at least agrees that he will not purchase that product from any other supplier.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN16**](#) [L] Tying Arrangements, Clayton Act

Tying agreements serve hardly any purpose beyond the suppression of competition. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons tying agreements fare harshly under the laws forbidding restraints of trade.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Real Property Law > Mobilehomes & Mobilehome Parks > Purchase & Sale

Real Property Law > Mobilehomes & Mobilehome Parks > General Overview

HN17 [blue icon] **Price Fixing & Restraints of Trade, Tying Arrangements**

The reasonableness of a tying arrangement is a question of fact.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN18 [blue icon] **Injunctions, Preliminary & Temporary Injunctions**

The designation given an injunction by the trial court does not determine whether the decree is prohibitive or mandatory. Instead, the appellate court must examine the terms and effect of the injunction in order to discover its character.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN19 [blue icon] **Injunctions, Preliminary & Temporary Injunctions**

The purpose of mandatory relief is to compel the performance of a substantive act or a change in the relative positions of the parties. By contrast, the prohibitive order seeks to restrain a party from a course of conduct or to halt a particular condition. The character of prohibitory injunctive relief, however, is not changed to mandatory in nature merely because it incidentally requires performance of an affirmative act.

Real Property Law > Zoning > General Overview

Real Property Law > Mobilehomes & Mobilehome Parks > General Overview

Real Property Law > Mobilehomes & Mobilehome Parks > Installation & Transportation

Real Property Law > Mobilehomes & Mobilehome Parks > Maintenance & Use Issues

HN20 [blue icon] **Real Property Law, Zoning**

Under the provisions [Cal. Veh. Code § 11709\(c\)](#), it is unlawful to display mobile home model homes within a mobile home park after that park has reached 70 percent occupancy.

Headnotes/Summary

Summary**CALIFORNIA OFFICIAL REPORTS SUMMARY**

In an action by the People for civil penalties and injunctive relief against mobilehome dealers and the operator of a mobilehome park, the trial court granted a preliminary injunction which prohibited the conditioning of the lease or purchase of sites in mobilehome parks on the purchase or lease of a mobilehome from defendant dealers, prohibited defendants from misrepresenting the availability of mobilehome homesites, and required retail dealers to remove mobilehome models displayed in violation of Veh. Code, § 1709, subd. (c), which makes it unlawful to display mobilehome model homes within a mobilehome park after that park has reached 70 percent occupancy. (Superior Court of San Diego County, No. 414439, Ross G. Tharp, Judge.)

The Court of Appeal affirmed, holding no abuse of discretion in issuing a preliminary injunction was shown. With respect to the provisions prohibiting conditioning availability of homesites on purchase or lease of a mobilehome from defendants, the court held the evidence, viewed in the light most favorable to the order, warranted an inference that an illegal restraint of commerce was ongoing. Prohibiting defendants from misrepresenting availability of mobilehome sites was held merely to require defendants to conform their conduct to the standards of honest and fair dealing under the Unfair Practices Act ([Bus. & Prof. Code, § 17200](#)). In conclusion, the court rejected defendants' contention the injunction provision requiring retail dealers to remove illegally displayed mobilehome models was mandatory in character and therefore improperly granted. The requirement of the affirmative act of removal, the court held, was incidental to the injunction's prohibitive objective to restrain further violation of a valid statutory provision. (Opinion by Staniforth, J., with Brown (Gerald), P. J., and Cologne, J., concurring.)

Headnotes**CA(1) [D] (1)****Injunctions § 21—Preliminary Injunctions—Appeal—Factual Matters.**

--In evaluating a trial court's exercise of discretion in granting a preliminary injunction, the facts must be viewed in the light most favorable to the order.

CA(2) [D] (2)**Injunctions § 15—Preliminary Injunctions—Effect and Purpose.**

--The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the right claimed by him. The general purpose of such an injunction is the preservation of the status quo until a final determination of the merits of the action.

CA(3) [D] (3)**Injunctions § 18—Preliminary Injunctions—Hearing and Order.**

--In determining whether to grant or deny a preliminary injunction, the court examines all of the material before it in order to consider whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it. In making that determination the court will consider the probability of the plaintiff's ultimately prevailing in the case. In the last analysis, the trial court must determine which party is more likely to be injured by the exercise of its discretion and it must then be exercised in favor of that party.

CA(4) [] (4)**Injunctions § 15—Preliminary Injunctions—Discretion of Trial Court.**

--The granting or denial of a preliminary injunction, even though the evidence with respect to an absolute right therefor may be conflicting, rests in the sound discretion of the trial court and may not be disturbed on appeal except for an abuse of discretion. Discretion is abused in the legal sense whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontradicted evidence.

CA(5) [] (5)**Injunctions § 21—Preliminary Injunctions—Appeal—Scope of Review.**

--Appellate review of the issuance of a preliminary injunction requires a determination whether substantial evidence supports the discretion exercised by the trial court.

CA(6) [] (6)**Monopolies and Restraints of Trade § 6—Under Cartwright Act —Applicability of Federal Decisions.**

--The California antitrust law--the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#))--is patterned after the federal Sherman Act, and federal cases involving the Sherman Act are applicable with respect to the Cartwright Act.

CA(7) [] (7)**Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—"Tying" Arrangements.**

--A "tying arrangement" (an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product or at least agrees that he will not purchase that product from any other supplier) involving rights in real property is made unlawful by provisions of the Cartwright Act ([Bus. & Prof. Code, §§ 16720, 16726](#)).

CA(8) [] (8)**Mobile Homes, Trailers and Parks § 3—Regulation—Injunctive Relief—Illegal Trade Practices—"Tying" Arrangements.**

--A provision of a preliminary injunction prohibiting the conditioning of the lease or purchase of sites in mobilehome parks on the purchase or lease of a mobilehome from defendant dealers was a reasonable exercise of the trial court's discretion. Though the legality or illegality of the arrangement was a matter for trial determination, the uncontradicted facts before the court showed agreements or business practices fitting the judicial definition of an illegal tying agreement. The evidence was ample to show economic hardship on consumers and competitors resulted from the device, and warranted an inference that an illegal restraint of commerce was ongoing. Moreover, the injunction did not prevent defendants from selling their mobilehomes or leasing or selling their property interests in the homesites and therefore posed only an insignificant inconvenience to their business.

CA(9) [] (9)

Mobile Homes, Trailers and Parks § 3—Regulations—Injunctive Relief—Misrepresentation of Homesite Availability.

--In an action by the People for civil penalties and injunctive relief against mobilehome dealers and the operator of a mobilehome park, the trial court properly exercised its statutory injunctive powers by a provision of a preliminary injunction prohibiting defendants from misrepresenting the availability of mobilehome homesites. The provision merely required that defendants conform their conduct to the standards of honest and fair dealing under the Unfair Practice Act ([Bus. & Prof. Code, § 17200](#)).

[CA\(10a\)](#) [] (10a) [CA\(10b\)](#) [] (10b)**Mobile Homes, Trailers and Parks § 3—Regulation—Injunctive Relief—Unlawful Display of Models.**

--In an action by the People for civil penalties and injunctive relief against mobilehome dealers and the operator of a mobilehome park, the trial court did not abuse its discretion by a provision of a preliminary injunction requiring retail dealers to remove mobilehome models displayed in violation of [Veh. Code, § 11709, subd. \(c\)](#), which makes it unlawful to display mobilehome model homes within a mobilehome park after that park has reached 70 percent occupancy. Though removal as required by the order was an affirmative act, it was incidental to the injunction's prohibitive objective to restrain further violation of a valid statutory provision.

[CA\(11\)](#) [] (11)**Injunctions § 2—Mandatory and Prohibitory Injunctions Distinguished—Determination of Nature of Order.**

--The designation given an injunction by the trial court does not determine whether the decree is prohibitive or mandatory. An appellate court must examine the terms and effect of the injunction in order to discover its character.

[CA\(12\)](#) [] (12)**Injunctions § 2—Mandatory and Prohibitory Injunctions Distinguished—Effect of Incidental Requirement of Affirmative Act.**

--The purpose of mandatory injunctive relief is to compel the performance of a substantive act or a change in the relative positions of the parties while a prohibitive order seeks to restrain a party from a course of conduct or to halt a particular condition. The character of prohibitory injunctive relief, however, is not changed to mandatory in nature merely because it incidentally requires performance of an affirmative act.

Counsel: de Krassel, Tierney & Cohen and Timothy T. Tierney for Defendants and Appellants.

Edwin L. Miller, Jr., District Attorney, Peter C. Lehman, Charles R. Hayes, Robert C. Fellmeth and John R. Heisner, Deputy District Attorneys, for Plaintiff and Respondent.

Judges: Opinion by Staniforth, J., with Brown (Gerald), P. J., and Cologne, J., concurring.

Opinion by: STANIFORTH

Opinion

[*5] [*750] The People sought civil penalties and injunctive relief against defendants Mobile Magic Sales, Inc. (Mobile), Ralph Forgeon dba La Moree Mobilehome Estates (La Moree), and other mobilehome dealers in North San Diego County (North County), based upon charges of unfair competition and restraint of trade in violation of the

Cartwright Act ([Bus. & Prof. Code, §§ 16720, 16727](#) and [16754.5](#)). At the order to show cause hearing, the trial court granted a preliminary injunction which prohibited: "a. Conditioning the rental or lease of sites within Mobilhome Parks in San Diego [**751] [**2] County on the purchase or lease of mobile homes from Mobile Magic Sales, Inc., or any consenting dealer and/or their agents, employees, and servants; b. Intentionally misrepresenting the availability of mobile home park space within Mobilhome Parks in San Diego County; c. Displaying, or allowing to be displayed, any mobile home by Mobile Magic Sales, Inc., or any consenting dealer and/or their agents, employees, and servants, as a model home within Mobilhome Parks in San Diego County except as permitted by the California Vehicle Code or the Department of Motor Vehicles. Removal of any so situated mobile homes by any such dealers shall be accomplished within 45 days of the issuance of this order."

Defendants appeal, contending the trial court "improperly" granted the preliminary injunction and citing *inter alia* [Sherman v. Mertz Enterprises, 42 Cal.App.3d 769 \[117 Cal.Rptr. 188\]](#). For reasons set forth below, we conclude the order granting the preliminary injunction must be affirmed.

I

[CA\(1\)\[↑\]](#) (1) (see fn. 1.) The relevant facts, as established by the pleading, declarations made under penalty of perjury, as well as oral testimony adduced at the hearing on the motion for preliminary [**3] injunction, are as follows:¹

[*6] Mobile is one of the largest retail dealers in new mobilehomes within San Diego County and the State of California. Within the North County area, Mobile is the largest of such dealers by volume² and competes with approximately 15 other retail dealerships.

[**4] Beginning in 1976, certain other retail dealers entered into business "arrangements" with the owners of mobilehome parks (including defendant La Moree) located in the North County area. In this arrangement, retail dealers contracted to lease or rent available homesites from cooperating park owners. By this process, trailer homesites were preempted by the retail dealer -- now lessee -- and as a direct result, these homesites were not available to the individual consumer unless they purchased or leased a mobilehome from the retail dealer-lessee. The dealer-lessee also displayed their mobilehomes for sale on these homesites and used these models to conduct retail sales activity.

In 1976, North County mobilehome spaces declined from approximately 200 to 50 homesites. This reduction was attributable to two factors: (1) limited development of new homesites, and (2) restriction of remaining homesites through leaseholds by certain retail dealers.

From 1976 to April of 1978 (when the People filed this complaint) available homesites in the North County area continued to decline. By 1978, "an insignificant number" of homesites existed, and only seven or eight homesites were available [**5] for individual consumer lease or rental which were not subject to the requirement that the mobilehome be purchased from Mobile. During the period 1976-1978, Mobile had obtained leaseholds on between 50 to 100 of the 600 homesites then available.

¹ [HN1\[↑\]](#) The substantial evidence rule applies to appeal court review of preliminary injunctions. Also the familiar rule requires, when evaluating the trial court's exercise of discretion in granting a preliminary injunction, that the facts be viewed in the light most favorable to the order. ([San Diego Gas & Elec. Co. v. San Diego Congress of Racial Equality, 241 Cal.App.2d 405, 407 \[50 Cal.Rptr. 638\]](#).)

² The North County area has in recent years experienced the immigration of many new residents. This influx has resulted in an increased demand for housing. The current need, coupled with inflationary pressures, has forced many new residents to seek alternatives to conventional housing. Thus an expanding market for mobilehomes has been an outgrowth of these forces. Mobilehome housing, as consumer goods, is comprised of two components: mobilehomes, a moveable commodity, and mobilehome park space, a right of use of real property. Within a particular geographical area, these two components are necessary compliments.

By 1978, Mobile had made such lease arrangements with 14 mobilehome parks in [**752] North County. Pursuant to this "arrangement" the trailer [*7] park owner referred prospective mobilehome tenants to Mobile to secure an available space. Mobile in turn advised such prospective tenants that such park space was available only upon the purchase of a new mobilehome from Mobile.

Prospective tenants, due to their individual preference to locate in one particular mobilehome park, as opposed to any other such park, were forced to forego selective shopping for mobilehomes and were compelled either to purchase such a home, not of their own choosing, and pay the price demanded, or live elsewhere.

As of mid to late 1978, Mobile had such arrangements with respect to the majority of available space in La Moree Mobilehome Estates, and La Moree actively participated in referring prospective tenants to Mobile. A majority of the retail dealers [***6] in mobilehomes in the North County area sell brand name mobilehomes that meet the specifications for entry into La Moree. By virtue of its extensive involvement in the foregoing "arrangements," Mobile has been able to price its new homes at levels exceeding those of its North County competitors. Retail dealers in North County without such business arrangements are in imminent danger of going out of business.

II

Defendants contend the preliminary injunction issued was "mandatory" in nature and was improperly issued because it encompassed matters that must await determination on trial. Secondly, defendants argue that the trial court abused its discretion in granting the injunction in that "no California case" holds the species of "tying" agreement³ here imposed to be illegal.

[**7] The resolution of these contentions requires, first, an examination of the factual and legal prerequisites to issuance of a preliminary injunction under Code of Civil Procedure sections 526 and 527. Code of Civil Procedure section 527, so far as here pertinent, provides: HN3[¹] "An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor."

[*8] CA(2)[¹] (2) In Continental Baking Co. v. Katz, 68 Cal.2d 512, 528 [67 Cal.Rptr. 761, 439 P.2d 889], the Supreme Court summarized the basic principles governing issuance of a preliminary injunction: "HN4[¹] 'The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the right claimed by him.' [Citations.] HN5[¹] The general purpose of such an injunction is the preservation of the status quo until a final determination of [**8] the merits of the action. [Citations.] CA(3)[¹] (3) Thus, the court examines all of the material before it in order to consider 'whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it; . . .' [Citations.] In making that determination the court will consider the probability of the plaintiff's ultimately prevailing in the case and, it has been said, will deny a preliminary injunction unless there is a reasonable probability that plaintiff will be successful in the assertion of his rights. [Citations.] As was said in *Family Record Plan, Inc. v. Mitchell* 'In the last analysis the trial court must determine which party is the more likely to be injured by the exercise of its discretion [citation] and it must then be exercised in favor of that party [citation].'" (See also Weingand v. Atlantic Sav. & Loan Assn., 1 Cal.3d 806, 820 [83 Cal.Rptr. 650, 464 P.2d 106].)

[**753] CA(4)[¹] (4) Further HN6[¹] the granting or denial of a preliminary injunction, even though the evidence with respect to an absolute right therefor may be conflicting, rests in the sound discretion of the trial court and may not be disturbed on [**9] appeal except for an abuse of discretion. (People v. Black's Food Store, 16 Cal.2d 59, 61 [105 P.2d 361]; Allied Artist Pictures Corp. v. Friedman, 68 Cal.App.3d 127 [137 Cal.Rptr. 94].)

³ HN2[¹] A "tying" arrangement is defined as: ". . . an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." (Northern Pac. R. Co. v. United States, 356 U.S. 1, 5-6 [2 L.Ed.2d 545, 550, 78 S.Ct. 514].)

HN7[] Discretion is abused in the legal sense "whenever it may be fairly said that in its exercise the court in a given case exceeded the bounds of reason or contravened the uncontradicted evidence." ([Estate of Parker, 186 Cal. 668, 670 \[200 P. 619\]](#); [State Farm etc. Ins. Co. v. Superior Court, 47 Cal.2d 428, 432 \[304 P.2d 13\]](#)).)

CA(5)[] (5) Finally, **HN8**[] appellate review of the issuance of a preliminary injunction requires a determination whether substantial evidence supports the discretion exercised by the trial court. ([Fresno Canal etc. Co. v. People's Ditch Co., 174 Cal. 441, 447 \[163 P. 497\]](#); [Weingand v. Atlantic Sav. and Loan Assn., supra, 1 Cal.3d 806, 820](#); [City & County of San Francisco v. Evankovich, 69 Cal.App.3d 41, 54 \[137 Cal.Rptr. 883\]](#)).)

[*9] III

We begin our task by examining defendants' contention that the decision in [Sherman v. Mertz Enterprises, supra, 42 Cal.App.3d 769](#), precluded the granting of the preliminary injunction [***10] here. *Mertz* involves an appeal from the granting of a *summary judgment*. **HN9**[] On such motion, the function of the trial court is not "issue determination" but rather "issue finding." ([Walsh v. Walsh, 18 Cal.2d 439, 441 \[116 P.2d 62\]](#).) The appeal court reversed the judgment, holding *Sherman* was entitled to a trial upon the claim that the tying agreement (similar to that used here) was illegal. Concerning tying agreements, the *Mertz* court stated at pages 779-780: ""For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' [Citation.] They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power of leverage in another [***11] market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade.' [Citation.]" (Fns. omitted.) [Citation.] Tying arrangements are illegal per se "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product" [citations] and when "a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie. . . ." [Citation.]' [Citation.]"

The question here presented is whether defendants should be restrained pendente lite -- a totally different factual and legal issue. Defendants' reliance upon [Sherman v. Mertz Enterprises, supra](#), is misplaced.

IV

In the instant case, an examination of the three provisions of the temporary injunction in light of applicable rules of law evidences an appropriate and a sound exercise of discretion.

[*10] **CA(6)**[] (6) **HN10**[] The California antitrust law -- the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) is patterned after the federal Sherman [***12] Act. Both have their roots in the common law; federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act. ([Milton v. Hudson Sales Corp., 152 Cal.App.2d 418, 440 \[313 **754\] P.2d 936](#); [Rolley, Inc. v. Merle Norman Cosmetics, 129 Cal.App.2d 844 \[278 P.2d 63, 282 P.2d 991\]](#).) In 1961 California incorporated section 3 of the federal Clayton Act in [Business and Professions Code, section 16727](#). The Clayton Act goes beyond common law and the Sherman Act to inhibit trade restraints at their inception; federal interpretations thereof are similarly applicable. ([Chicago Title Ins. Co. v. Great Western Financial Corp., 69 Cal.2d 305, 315 \[70 Cal.Rptr. 849, 444 P.2d 481\]](#); [Corwin v. Los Angeles Newspaper Service Bureau, Inc., 4 Cal.3d 842, 852, 853 \[94 Cal.Rptr. 785, 484 P.2d 953\]](#).)

HN11[] The provisions of the Sherman Act, and therefore sections 16720 and 16726 of the Cartwright Act, codify the common law prohibition against combinations in restraint of trade. ([Sherman v. Mertz Enterprises, supra, 42 Cal.App.3d 769, 775](#); 2 Areeda & Turner, Antitrust Law (1978) § 302, pp. 2-4.)

The objective of these acts is [***13] to proscribe unlawful, "unreasonable" restraints upon trade or commerce and thus, the statutes embrace "virtually any economic act in our infinitely interconnected national economy." (1 Areeda

& Turner, **Antitrust Law** (1978) § 232a, p. 229.) **HN12**[] Both federal and state decisional law hold trade or commerce in real estate, or property rights in real estate, to be within the protections of the Sherman Act. (**Northern Pacific Railway Company v. United States, supra, 356 U.S. 1, 7-8 [2 L.Ed.2d 545, 550-551]**; **Sherman v. Mertz Enterprises, supra, 42 Cal.App.3d 769, 776-778**; **Jomicra, Inc. v. California Mobile Home Dealers Assn., 12 Cal.App.3d 396, 401 [90 Cal.Rptr. 696]**.)

By contrast **HN13**[] section 3 of the Clayton Act and its California counterpart -- **section 1672** of the Cartwright Act -- are restricted to transactions involving "commodities." (Cf. **15 U.S.C. (1973) § 14** with Cal. Bus. & Prof. Code (West 1964) **§ 1672**.) And realty or property rights in realty have been denied the status of commodity under the Clayton Act. (**Plum Tree, Inc. v. N. K. Winston Corporation (S.D.N.Y. 1972) 351 F.Supp. 80, 86-87**; **Gaylord Shops, Inc. v. Pittsburg Miracle Mile T. [***14]** & C. Shop. C. (W.D.Pa. 1963) **219 F.Supp. 400, 403**.)

CA(7)[] (7) Nevertheless, **HN14**[] tying arrangements involving rights in real property are not removed from the prohibitions of the antitrust laws, for such tying [*11] arrangements are made unlawful by **section 1** of the Sherman Act and **Business and Professions Code sections 16720** and **16726** of the Cartwright Act.

In point is **Northern Pacific Railway Company v. United States, supra, 356 U.S. 1**, where the railroad had deeded and leased land by instruments containing "preferential routing clauses" which compelled the grantees or lessees of such land to ship products of that land by the Northern Pacific railroad unless rates or services of competing lines were more favorable. The United States Supreme Court defined **HN15**[] a "tying arrangement" as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product or at least agrees that he will not purchase that product from any other supplier (**id. at p. 5 [2 L.Ed.2d at p. 550]**) and applied this definition to the sale or lease of land "tied" or conditioned upon use of the railroad's transportation facilities. This "tying arrangement" [***15] was held per se unlawful restraint of trade in violation of **sections 1** and **4** of the Sherman Act (**15 U.S.C. §§ 1, 4**). The Supreme Court reasoned: "Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed **HN16**[] 'tying agreements serve hardly any purpose beyond the suppression of competition.' [Citation.] They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of [**755] trade.' [Citation.]" (**Northern Pacific Railway Company v. United States, supra, at p. 6 [2 L.Ed.2d at p. 550]**.)

Similarly, **Sherman v. Mertz Enterprises, supra, 42 Cal.App.3d 769**, and **Jomicra, Inc. v. California Mobile Home Dealers Assn., supra, 12 Cal.App.3d 396**, factually involved tying arrangements between the rental of trailer space and a required purchase of the mobilehome [*16] from a particular dealer. The fact that land or rights in land was one of the "tied" products in no way prevented the scheme from being violative of the Cartwright Act. We find nothing in the statutes or judicial interpretations that supports defendants' contention that the species of agreement, business practice here involved is lawful or prohibits a preliminary injunction on the factual showing made to the trial court.

CA(8)[] (8) **HN17**[] While the reasonableness of the tying arrangement involved in this case is a question of fact yet to be determined on trial, nevertheless, [*12] the conditioning of mobilehome park space on the purchase of a mobilehome from a particular retail dealer "raises a serious issue of illegal conduct to restrain trade and competition." (**Jomicra, Inc. v. California Mobile Home Dealers Assn., supra, 12 Cal.App.3d 396, 401**.) The undisputed facts here support the trial court's exercise of discretion in granting the temporary injunction.

Nor does the fact that the legality or illegality of the particular business arrangement must await trial determination -- prevent the issuance of a preliminary injunction where circumstances dictate. Here the uncontradicted facts [***17] show agreements, business practices that fit the judicial definition of an illegal tying agreement. The evidence before the court was ample to show economic hardship on consumers and competitors results from this device. The evidence, viewed in the light most favorable to the order, warrants an inference that an illegal restraint of

commerce was ongoing.⁴ Moreover, the injunction does not prevent defendants from selling their mobilehomes or leasing or selling their property interests in the homesites and therefore poses only an insignificant inconvenience to their business. We conclude the injunctive provision prohibiting the conditioning of homesite availability on mobilehome lease or purchase was a reasonable exercise of the trial court's discretion.

[***18] V

CA(9)[] (9) The second provision of the preliminary injunction prohibits defendants from misrepresenting the availability of mobilehome homesites. This provision merely requires that defendants conform their conduct to the standards of honest and fair dealing under the Unfair Practices Act. ([Bus. & Prof. Code, § 17200](#).) The trial court validly exercised its statutorily granted injunctive powers in this regard. ([Bus. & Prof. Code, § 17203](#).)

VI

CA(10a)[] (10a) Finally, defendants assert that the injunction provision (c) requiring the retail dealers to remove the mobilehome models where [*13] displayed in violation of [Vehicle Code section 11709, subdivision \(c\)](#), is mandatory in character and therefore improperly granted.

This contention confuses the distinction between mandatory and prohibitive relief. **CA(11)[]** (11) **HN18[]** The designation given an injunction by the trial court does not determine whether the decree is prohibitive or mandatory. Instead, the appellate court must examine the terms and effect of the injunction in order to discover its character. ([Feinberg v. One Doe Co., 14 Cal.2d 24, 28 \[92 P.2d 640\]](#).)

[**756] **CA(12)[]** (12) **HN19[]** The purpose of mandatory relief is to compel the performance of a substantive [**19] act or a change in the relative positions of the parties. ([Mark v. Superior Court, 129 Cal. 1, 6-7 \[61 P. 436\]; Ambrose v. Alioto, 62 Cal.App.2d 680, 685 \[145 P.2d 32\]](#).) By contrast, the prohibitive order seeks to restrain a party from a course of conduct or to halt a particular condition. (See 38 Cal.Jur.3d, Injunctions, § 8 (1977) pp. 470-472.) The character of prohibitory injunctive relief, however, is not changed to mandatory in nature merely because it incidentally requires performance of an affirmative act. ([United Railroads v. Superior Court, 172 Cal. 80, 88-89 \[155 P. 463\]](#).)

CA(10b)[] (10b) **HN20[]** Under the provisions of [section 11709, subdivision \(c\) of the Vehicle Code](#), it is unlawful to display mobilehome model homes within a mobilehome park after that park has reached 70 percent occupancy. ([Veh. Code, § 11709, subd. \(c\)](#).) Provision (c) of the trial court's preliminary injunction commands defendants to remove those model mobilehomes displayed at mobilehome parks in contravention to the Vehicle Code. While the act of removal is an affirmative act, it is incidental to the injunction's prohibitive objective to restrain further violation of a valid statutory provision. [***20] Thus, the third provision of the preliminary injunction is prohibitive in character and properly issued to halt continuing violation of the Vehicle Code.

We conclude: No abuse of discretion in issuing the preliminary injunction is shown. The order granting the preliminary injunction is affirmed.

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⁴While no findings of fact were made by the trial court until after it had lost jurisdiction, findings were not required before entry of the preliminary injunction. ([Code Civ. Proc., § 632; Taliaferro v. Hoogs, 236 Cal.App.2d 521, 530 \[46 Cal.Rptr. 147\]](#)) Our search is not for findings but rather for substantial evidence to support the exercise of discretion here made. ([City & County of San Francisco v. Evankovich, supra, 69 Cal.App.3d 41, 54](#).)



Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.

Court of Appeal of California, First Appellate District, Division Two

October 23, 1979, Filed

Civ. No. 40428.

Reporter

159 Cal. Rptr. 255 *; 1979 Cal. App. LEXIS 2240 **; 97 Cal. App. 3d 932

SUBURBAN MOBILE HOMES, INC. Plaintiff and Appellant, v. AMFAC COMMUNITIES, INC., et al., Defendants and Respondents.

Notice: NOT CITABLE - SUPERSEDED BY GRANT OF REHEARING

Subsequent History: [**1] Rehg. granted Nov. 21, 1979 (see [101 C.A.3d 532](#))

Prior History: Superior Court of San Mateo County, No. 177201, Thomas M. Jenkins, Judge.

Core Terms

mobile home, tying arrangement, tied product, dealers, sales, tying product, economic power, spaces, tie-in, respondents', antitrust, damages, Sherman Act, buyers, commerce, display, nonsuit, coach, Cartwright Act, insubstantial, appreciable, cases, home site, participating, double-wide, customers, reserving, restrain, filling, seller

LexisNexis® Headnotes

Civil Procedure > ... > Pretrial Judgments > Nonsuits > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN1[] Pretrial Judgments, Nonsuits

A nonsuit or directed verdict may be granted only where, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. Neither the appellate court nor the lower court may weigh the evidence or consider the credibility of the witnesses. Plaintiff may rely on that portion of testimony which is favorable to him and disregard the unfavorable portions. Unless it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the court is not justified in taking the case from the jury.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN2 [down] **Private Actions, Remedies**

Summary proceedings are not favored in antitrust suits. Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN3 [down] **Antitrust & Trade Law, Sherman Act**

Cal. Bus. & Prof. Code §§ 16720, 16726 of the California Cartwright Act, *Cal. Bus. & Prof. Code § 16700 et seq.*, are patterned after the Sherman Act, *15 U.S.C.S. § 1 et seq.*, and both statutes have their roots in the common law.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN4 [down] **Antitrust & Trade Law, Sherman Act**

Both the Sherman Act, *15 U.S.C.S. § 1 et seq.*, and its California equivalent, the Cartwright Act, *Cal. Bus. & Prof. Code § 16700, et seq.*, prohibit every contract, combination or trust which is formed for the purpose of restraining trade or commerce. Although the statutory language prohibiting restraints on trade or commerce is couched in all-encompassing terms in both acts, each has been interpreted by the courts to ban only unreasonable restraints. However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Antitrust & Trade Law > Sherman Act > General Overview

HN5 [down] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN6 [down] **Regulated Practices, Price Fixing & Restraints of Trade**

See [Cal. Bus. & Prof. Code § 16720.](#)

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

[HN7](#) [down] Regulated Practices, Price Fixing & Restraints of Trade

See [Cal. Bus. & Prof. Code § 16726.](#)

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[HN8](#) [down] Price Fixing & Restraints of Trade, Tying Arrangements

For the purposes of antitrust violation, a tying arrangement is defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

[HN9](#) [down] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In order to prove an illegal per se tying arrangement there must be a showing that: a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; the party had sufficient economic power in the tying market to coerce the purchase of the tied product; and a substantial amount of sale was effected in the tied product. Lastly, since the antitrust violation is a species of tort, the complaining party must prove that he suffered pecuniary loss as a consequence of the unlawful act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[HN10](#) [down] Price Fixing & Restraints of Trade, Tying Arrangements

The power over the tying product can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some buyers in the market. Such crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Torts > Remedies > Damages > General Overview

[**HN11**](#) [blue document icon] **Private Actions, Remedies**

In antitrust cases the common law rules of damages are not controlling. While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that is accomplished, the jury will be permitted to act upon probable and inferential proof and to make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN12**](#) [blue document icon] **Price Fixing & Restraints of Trade, Tying Arrangements**

The requisite control of the tying product may be inferred from the seller's success in imposing a tying condition upon a substantial amount of commerce in the tied product without any further reference to the market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN13**](#) [blue document icon] **Price Fixing & Restraints of Trade, Tying Arrangements**

An illegal tying arrangement may be found if the offeror of the tying product has an economic interest in the tied product, even though the latter is manufactured or otherwise produced by another party or entity.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Real Property Law > Mobilehomes & Mobilehome Parks > Purchase & Sale

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Real Property Law > Mobilehomes & Mobilehome Parks > General Overview

[**HN14**](#) [blue document icon] **Private Actions, Remedies**

Coercion occurs when the buyer must accept the tied item and forego possibly desirable substitutes.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

[**HN15**](#) [blue document icon] **Private Actions, Remedies**

Under [Cal. Bus. & Prof. Code § 16727](#), the plaintiff must establish that the tie-in substantially lessens competition. This standard is met if either the seller enjoys sufficient economic power in the tying product to appreciably restrain competition in the tied product or if a not insubstantial volume of commerce in the tied product is restrained. Under [Cal. Bus. & Prof. Code § 16720](#), both conditions must be met.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN16 [Actual Monopolization, Anticompetitive & Predatory Practices]

See [Cal. Bus. & Prof. Code § 16727.](#)

Antitrust & Trade Law > Sherman Act > General Overview

Real Property Law > Brokers > Fiduciary Responsibilities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN17 [Antitrust & Trade Law, Sherman Act]

If the tie does not involve a commodity but concerns land, services or credit, which do not fit the Clayton Act's language, it is governed by the Sherman Act, [15 U. S.C.S. § 1 et seq.](#), and the plaintiff is required to bear the additional burden of proving that the defendant's economic power with respect to the tying product is sufficient to produce an appreciable restraint.

Counsel: Carr, Smulyan & Hartman and Yale H. Smulyan for Plaintiff and Appellant.

Gendel, Raskoff, Shapiro & Quittner and Palmer, Grundstrom & Duckworth for Defendants and Respondents.

Opinion by: CALHOUN

Opinion

[*257] CALHOUN, J. *

This is an appeal from a judgment of nonsuit rendered in favor of defendants in an action brought for violation of the California [antitrust law](#) (Cartwright Act, [Bus. & Prof. Code, 1 § 16700 et seq.](#)).

The parties to the lawsuit are plaintiff Suburban Mobile Homes, Inc. (hereafter Suburban or appellant) and four named defendants (hereafter respondents): AMFAC Communities, Inc. (AMFAC), Instant Housing Corp. (Instant), Roberts & Aguirre Mobile Home Sales, Inc. (R & A), and S & S Mobile Home Sales, Inc. (S & S). Suburban is a mobile home dealer with its principal place of business in South San Francisco. AMFAC is the owner and developer of a mobile [*2] home park known as "Franciscan Bay Mobile Country Club" (hereafter Franciscan), located in Daly City, California. The three other respondents are mobile home dealers, selling mobile homes in the San Francisco trading area and elsewhere.

The centerpiece of the present litigation is the use of mobile home sites in the Franciscan. As the relevant evidence reveals, the Franciscan was developed by AMFAC by about 1971. It had 501 mobile home sites capable of accommodating double-wide mobile homes sold by Suburban. While at the outset the Franciscan was an open park where home sites were available to all buyers irrespective of from which dealer they purchased their mobile homes,

* Assigned by the Chairperson of the Judicial Council.

¹ Unless otherwise indicated, all further references will be made to the Business and Professions Code of California.

at the end of 1971 AMFAC entered into agreement with four mobile home dealers, including the three corespondents here. In essence, these agreements and the amendments thereto, [*258] secured 288 spaces out of the 501 total for four named participating dealers who gained exclusive right to display their mobile homes in the Franciscan. In return for an exclusive right to display their merchandise and reservation of home sites in the park, the participating dealers were obligated to pay a certain sum of money [**3] to AMFAC. For instance, the park promotion agreement concluded between R & A and AMFAC provided that R & A shall contribute to the park promotion and advertising costs up to \$1,200 per month, and also that R & A shall pay AMFAC \$200 for each coach sold in the park in consideration for reserving space for the home sold. The evidence introduced at trial showed that until fall 1972, R & A in fact paid AMFAC \$500 for every coach sold in the Franciscan.

Since the sales of mobile homes are dependent upon the availability of suitable mobile home sites in the trading area, Suburban's business was seriously affected by the aforesaid restrictive agreements and the actual sales practice conducted pursuant thereto. The evidence adduced at the trial convincingly demonstrated that the older parks belonging to or surrounding the San Francisco trading area were already full prior to 1971, the opening date of the Franciscan. At the same time, it was shown that the Franciscan was an outstanding five-star park. It had large spaces and full recreational facilities, and was the only park close to San Francisco that had double-wide spaces available. The evidence as a whole leaves no doubt that the Franciscan [**4] was a unique park, both because of its location and superb facilities.

The record is replete with evidence that the exclusion of Suburban from the Franciscan resulted in considerable actual and/or potential loss of profit to appellant. Thus, it was shown that Suburban had a waiting list of customers for the Franciscan; that there were numerous prospects (half a dozen a week) who wanted mobile homes in the Franciscan; and that there were a number of concrete sales or potential sales which were lost because of the unavailability of mobile home sites in the Franciscan to the Suburban customers. In addition, it was statistically demonstrated that while Suburban filled 90 to 95 percent of the mobile home park vacancies in northern San Mateo County from 1971 to 1975, in the disputed period it could sell only six mobile homes of the total of 253 sales in the park.

Based upon the foregoing facts, appellant brought an action against respondents charging multiple violation of the Cartwright Act, including an illegal restraint of trade and an illegal tie-in arrangement ([§ § 16720, 16726, 16727](#)). Upon the conclusion of Suburban's evidence, the trial court refused to submit the case to [**5] the jury and granted respondents' motion for nonsuit. In accordance therewith, judgment was entered as to all causes of action in favor of respondents. The appeal is taken from the judgment.

Appellant contends on appeal that the trial court erred in granting respondents' motion for nonsuit, because the evidence of record supports the elements of an illegal tie-in arrangement which constitutes a per se violation of the Cartwright Act ([§ § 16720, 16726, 16727](#)). In the alternative, appellant argues that the evidence is sufficient to prove a restraint of trade under the "rule of reason" standard ([§ 16720; Standard Oil Co. v. United States \(1911\) 221 U.S. 1 \[55 L.Ed. 619, 31 S.Ct. 502\]; Marin County Bd. of Realtors, Inc. v. Palsson \(1976\) 16 Cal.3d 920, 930 \[130 Cal.Rptr. 1, 549 P.2d 833\]](#)), even if the preconditions of an unlawful tying arrangement or agreement are absent. We are persuaded that respondents' conduct, as reflected by the evidence, clearly amounts to an illegal tying arrangement which, under well established case law, constitutes a per se violation of both the federal **antitrust law** (Sherman Act, [15 U.S.C. § 1 et seq.](#)) and the California Cartwright Act ([§ § 16720, 16726](#)). Accordingly, we are compelled to reverse the judgment.

Before discussing appellant's contention on the merit, we underline a few important preliminary matters. First is the legal principle under which a nonsuit may be [*259] granted. It has become the established law of this state that **HN1** a nonsuit or directed verdict may be granted only where, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff ([O'Keefe v. South End Rowing Club \(1966\) 64 Cal.2d 729, 733 \[51 Cal.Rptr. 534, 414 P.2d 830, 16 A.L.R.3d 1\]; Morgenroth v. Pacific Medical Center, Inc. \(1976\) 54 Cal.App.3d 521, 530 \[126 Cal.Rptr. 681\]](#)). Neither the appellate court nor the lower court may weigh the evidence or consider the

credibility of the witnesses ([Lasry v. Lederman \(1957\) 147 Cal.App.2d 480 \[305 P.2d 663\]](#)). Plaintiff may rely on that portion of testimony which is favorable to him and disregard the unfavorable portions [**7] ([Anthony v. Hobbie \(1945\) 25 Cal.2d 814 \[155 P.2d 826\]](#)). Unless it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the court is not justified in taking the case from the jury ([Estate of Lances \(1932\) 216 Cal. 397, 400 \[14 P.2d 768\]](#); [Umsted v. Scofield Eng. Const. Co. \(1928\) 203 Cal. 224, 228 \[263 P. 799\]](#)).

The second point is that [HN2\[!\[\]\(6547e32491ac920ce7adbd527f1dd099_img.jpg\)\]](#) summary proceedings are not favored in antitrust suits. As the court put it in [Poller v. Columbia Broadcasting \(1962\) 368 U.S. 464, 473 \[7 L.Ed.2d 458, 464, 82 S.Ct. 468\]](#), "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." (See also [Fortner Enterprises v. U.S. Steel \(1969\) 394 U.S. 495, 500 \[22 L.Ed.2d 495, 503, 89 S.Ct. 1252\]](#); [Santa Clara Valley Distributing v. Pabst Brewing \(9th Cir. 1977\) 556 F.2d 942, 944-945](#).)

Finally, [**8] it has been widely recognized that [HN3\[!\[\]\(00817d6490b8e151505126f85268994f_img.jpg\)\]](#) [sections 16720](#) and [16726](#) of the Cartwright Act were patterned after the Sherman Act ([15 U.S.C. § 1 et seq.](#)), and both statutes have their roots in the common law ([Corwin v. Los Angeles Newspaper Service Bureau, Inc. \(1971\) 4 Cal.3d 842, 852 \[94 Cal.Rptr. 785, 484 P.2d 953\]](#)). Consequently, federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act ([Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d 920, 925](#); [Chicago Title Ins. Co. v. Great Western Financial Corp. \(1968\) 69 Cal.2d 305, 315 \[70 Cal.Rptr. 849, 444 P.2d 481\]](#); [Sherman v. Mertz Enterprises \(1974\) 42 Cal.App.3d 769, 775 \[117 Cal.Rptr. 188\]](#)). With these preliminary considerations in mind, next we set out the legal principles governing the tying agreements or arrangements and apply them to the facts of the instant case.[HN4\[!\[\]\(9eb0028ef6907fc6c1ca583a158d48a9_img.jpg\)\]](#)

Both the Sherman Act and its California equivalent, the Cartwright Act, prohibit every contract, combination or trust which is formed for the purpose of restraining trade or commerce.² Although the statutory language prohibiting restraints on trade or commerce is couched in all-encompassing terms in both [**9] acts, each has been interpreted by the courts to ban only unreasonable restraints ([Standard Oil Co. v. United States, supra, 221 U.S. 1, 60 \[55 L.Ed. 619, 645\]](#); [People v. Building Maintenance etc. Assn. \(1953\) 41 Cal.2d 719, 727 \[264 P.2d 31\]](#)). However, as the United States Supreme Court put it in [Northern Pac. R. Co. v. United States \(1958\) 356 U.S. 1, 5 \[2 L.Ed.2d 545, 549-550, 78 S.Ct. 514\]](#), "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable--an

² [HN5\[!\[\]\(5e6fd1fe236f25da9b24b62d85e16205_img.jpg\)\]](#) United States Code, [section 1](#) (Sherman Act) provides in part that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."

[HN6\[!\[\]\(2eadf3dd7d8030f86eac33eeb3631d0e_img.jpg\)\]](#) [Section 16720](#) of the Cartwright Act sets out in relevant part that "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." (Italics added.)[HN7\[!\[\]\(ae603d42235a2d8f69f76d6efc6fa417_img.jpg\)\]](#)

[Section 16726](#), in turn, reads that "Except as provided in this chapter, every trust is unlawful, against public policy and void." (Italics added.)

inquiry so often wholly fruitless when [**10] undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing [citation]; division of markets [citation]; group boycotts [citation]; and tying arrangements [citation]." (Italics added.)

HN8[[↑]] For the purposes of antitrust violation, a tying arrangement is defined [**11] as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed." (*Northern Pac. R. Co. v. United States, supra, 356 U.S. at pp. 5-6* [*2 L.Ed.2d at p. 550*]; *Corwin v. Los Angeles Newspaper Service Bureau, Inc., supra, 4 Cal.3d at p. 856*.) The evil accompanying the tying arrangement is described as follows: "[T]ying agreements serve hardly any purpose beyond the suppression of competition.' *Standard Oil Co. of California v. United States, 337 U.S. 293, 305-306*. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade.' *Times-Picayune Publishing Co. v. United States, [**12] 345 U.S. 594, 606.*" (*Northern Pac. R. Co. v. United States, supra* [*2 L.Ed.2d at p. 550*].) Tying arrangements are illegal per se "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . ." (*Northern Pac. R. Co. v. United States, supra, at p. 6* [*2 L.Ed.2d at p. 550*]), and when "a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie." (*Fortner Enterprises v. U. S. Steel, supra, 394 U.S. at p. 501* [*22 L.Ed.2d at p. 504*].)

In sum, **HN9**[[↑]] in order to prove an illegal per se tying arrangement there must be a showing that: a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; the party had sufficient economic power in the tying market to coerce the purchase of the tied product; and a substantial amount of sale was effected in the tied product. Lastly, since the antitrust violation is a species of tort, the complaining party must prove that he suffered pecuniary loss as a consequence of the unlawful act (*Beegle v. Thomson* [**13] (*7th Cir. 1943*) *138 F.2d 875, 881* [59 U.S. Pat.Q. 416]; *Alberto-Culver Company v. Andrea Dumon, Inc. (N.D. Ill. 1969)* *295 F. Supp. 1155, 1157* [160 U.S. Pat.Q. 822]; *McCormack v. Theo. Hamm Brewing Co. (D. Minn. 1968)* *284 F.Supp. 158, 164*). As will be demonstrated below, all four conditions enumerated above find abundant support in the record which is but another way of saying that appellant made out a *prima facie* case for the consideration of the jury [*261] under the doctrine of an illegal tying arrangement.

(a) Existence of Tying Arrangement: As noted earlier, the existence of a tying arrangement between AMFAC and the four participating mobile home dealers (including respondents Instant, R & A and S & S) was evidenced first by the December 29, 1971, agreement which explicitly put aside and reserved 288 out of 501 home sites in the park for those dealers who displayed their mobile homes in the Franciscan and who, under the terms of other agreements and understandings, were bound to pay monetary contribution to AMFAC after each coach that was sold in the park. In addition to the written agreements, there is a host of evidence showing that the restrictive policy agreed upon [**14] by the parties was strictly carried out in the every day practice. For example, Instant told people coming to see its mobile home display that it would be necessary to purchase the home from it or other dealers in the area (not Suburban) if they wanted a space in the Franciscan. Mr. Cole, the park manager of AMFAC, also advised people that reservations in the park were up to the management, and that anyone reserving a space for his mobile home would have to purchase the home from one of the dealers who displayed homes in the park. Mr. O'Neil, the sales representative of R & A, likewise admitted that when people came to the Franciscan they were told that they must buy through one of the displaying dealerships (most specifically through R & A) if they wanted to get a home site in the park. The above testimonies were reaffirmed by individual home buyers as well. Thus, Mr. Bishop testified that although he wanted to buy a mobile home from Suburban, he was told by Instant that only certain dealers could get their homes on the Franciscan spaces. Mrs. Varni, who had already made a deposit in order to purchase a mobile home from Suburban, rescinded the deal and bought her coach from R & A, [*261] upon learning from AMFAC that only those people could move into the park who bought their homes from one of the participating dealers. Finally, the February 27, 1972, advertisement published in the San Francisco Chronicle also made it clear that the potential buyers had to select their home from the mobile homes on display in the park.

(b) Economic Power of AMFAC: Before resorting to the record to show that AMFAC possessed sufficient economic power to impose an appreciable restraint on the free competition of the tied product (here, mobile homes), we emphasize that [HN10](#) [↑] the power over the tying product (here, home sites) can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some buyers in the market. As the cases unanimously underline, such crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes ([United States v. Loew's, Inc. \(1962\) 371 U.S. 38, 45 \[9 L.Ed.2d 11, 18, 83 S.Ct. 97\]](#); [Fortner Enterprises v. U.S. Steel, supra, 394 U.S. at p. 503 \[22 L.Ed.2d at p. 505\]](#); [Lessig v. Tidewater Oil Company \(9th Cir. 1964\) 327 F.2d 459, 470](#)).

In the case [**16] at bench, the evidence demonstrates that the Franciscan was both desirable and unique within the meaning of the aforestated rule. As mentioned earlier, the Franciscan had an excellent location attracting many potential mobile home customers in the San Francisco Bay Area. The other parks within commuting distance of San Francisco (i.e., in San Mateo, Santa Clara, Alameda, Contra Costa and Marin Counties), with a few exceptions, were filled at the time the Franciscan opened in 1972. The desirability of the Franciscan was demonstrated *inter alia* by the fact that Suburban had a backlog of customers waiting for spaces in the Franciscan, and that dozens of other customers expressed their interest in placing their mobile homes in the Franciscan. At the same time, the Franciscan was not only highly desired but also unique. As pointed out earlier, it was a first-class park with large sites and full recreational facilities, including swimming pools. Moreover, it was the only park close to and within commuting distance of San Francisco that had spaces for double-wide coaches sold by Suburban.

[*262] (c) Substantiality of Sales: The record is also revealing with respect to the third element [**17] of an illegal tie-in arrangement, that is the requisite of a substantial volume of sales in the tied product. A short summary of the pertaining evidence discloses that the sale of mobile homes was tied up as to 288 spaces out of 501. The data presented at the trial substantiate that appellant's rivals took full advantage of the illegal tying agreement. Out of the 253 sales effected in the park, 247 were made by appellant's competitors (113 by R & A, 62 by Instant, 51 by S & S, and 16 all others), and appellant was able to sell only 6 mobile homes out of the total of 253. Considering the circumstance that in the period in question the sales price of single-wide mobile homes ranged from \$7,000 to \$12,000, and the double-wides from \$10,000 to \$20,000, even taking a low average of \$10,000 per coach, the amount of sales in the tied product exceeds \$2,500,000. This volume of sales, of course, cannot be considered insubstantial or de minimis, especially in light of the case law which held that the sum of \$60,800 was regarded to be a not insubstantial amount of commerce in [United States v. Loew's, Inc., supra, 371 U.S. 38, 49 \[9 L.Ed.2d 11, 20\]](#), and likewise the sum of almost \$200,000 was [**18] not looked upon as "paltry or 'insubstantial'" in [Fortner Enterprises v. U. S. Steel, supra, 394 U.S. 495, 502 \[22 L.Ed.2d 495, 504\]](#).

(d) Proof of Damages: We are equally satisfied appellant provided sufficient proof that as a result of the illegal tying arrangement it suffered considerable loss by virtue of loss of profit. In this connection, it bears emphasis that [HN11](#) [↑] in antitrust cases the common law rules of damages are not controlling. While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue ([Flintkote Company v. Lysfjord \(9th Cir. 1957\) 246 F.2d 368, 392](#)). Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to "make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly." ([Bigelow v. RKO Radio Pictures \(1946\) 327 U.S. 251, 264 \[90 L.Ed. 652, 660, 66 S.Ct. 574\]](#)) This is in line with the California [**19] authorities which emphasize that while the plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of the defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult to ascertain with precision ([Stott v. Johnston \(1951\) 36 Cal.2d 864, 875 \[229 P.2d 348, 28 A.L.R.2d 580\]](#)). On the contrary, the law only requires that some reasonable basis of computation be used and will allow damages so computed even if the result has been reached by way of approximation ([Allen v. Gardner \(1954\) 126 Cal.App.2d 335, 340 \[272 P.2d 99\]](#)). And where, as here, the operation of an established business was prevented or interrupted by the tort of the defendants, it has been held that the loss of prospective profits may be proven by the past volume of business and other provable data relevant to the probable future sales ([Grupe v. Glick \(1945\) 26 Cal.2d 680, 692 \[160 P.2d 832\]](#); [Gainer v. Storck \(1959\) 169 Cal.App.2d 681, 687-688 \[338 P.2d 195\]](#)).

Appellant here established with reasonable certainty the required causal connection between respondents' wrongful conduct and its **[**20]** business loss suffered as a result of such conduct, and also provided sufficient relevant data upon which the extent of its lost profit may be ascertained by the jury by way of a reasonable estimate or approximation. To begin with, appellant introduced proof that as a consequence of the restrictive practices of respondents, its share in the mobile homes sales was drastically reduced in 1972. Thus, it was shown that while previously Suburban was one of the most successful mobile home dealers in the area capturing the lion's share of the market (90-95% of sales in northern San Mateo County and 50-60% of sales in the Pacific Skies Estate in Pacifica), it sold but a minimal **[*263]** 2.37 percent of mobile homes in the Franciscan in 1972. Moreover, appellant introduced concrete evidence as to individual losses suffered as a result of the oppressive sales policy of the respondents. The most notable of these instances were the loss of sale or potential sale to Bracato, Sinnard, Bishop, Ellis, Scott, Madrone, and Varni. Finally, Mr. Brayshaw, who was employed by Suburban as a salesman from 1971 to 1975, testified that as many as half a dozen prospects a week told him that they could not **[**21]** buy a mobile home from him for use in the Franciscan. If the aforesaid evidence is considered together with the testimony of Mr. Fischer, the president of Suburban, who explained that the net profit on a single-wide mobile home was about \$1,500, and about \$2,100 on a double-wide coach, it becomes clear that the jury was provided with a solid basis upon which to calculate or at least estimate the amount of damages incurred by the appellant.

Although the foregoing discussion leaves no doubt that appellant made out a *prima facie* case of an illegal per se tying arrangement which should have been submitted to the jury for proper consideration and resolution, respondents nonetheless insist that the granting of nonsuit was proper in the present case because: appellant failed to introduce evidence as to the relevant geographic market; an actionable tying arrangement requires that both the tying product and the tied product be sold or leased by the same entity; the proof of damages was inadequate; and appellant failed to introduce evidence to prove actual exercise of economic power--coercion. We find no merit in any of these contentions.

Respondents' first argument, that the delineation **[**22]** or proof of the relevant geographic market is a *conditio sine qua non* to the establishment of an actionable tying arrangement, flies directly in the face of well settled law. As pointed out earlier, the standard of illegality under the tying theory is that the seller must have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . ." (*Northern Pac. R. Co. v. United States, supra, 356 U.S. at p. 6* /2 L.Ed.2d at p. 550). Consistently therewith, it has been amplified that "The requirement that a 'not insubstantial' amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie" (*Fortner Enterprises v. U.S. Steel, supra, 394 U.S. at p. 501* /22 L.Ed.2d at pp. 503-504); and that "Since the requisite economic power may be found on the basis of either uniqueness or consumer appeal, and since market dominance in the present context does not necessitate a demonstration of market power . . . , it should seldom be necessary in a tie-in sale case to embark upon a full-scale factual inquiry into the scope of the relevant market for **[**23]** the tying product and into the corollary problem of the sellers's percentage share in that market." (*United States v. Loew's, Inc., supra, 371 U.S. at p. 45, fn. 4* /9 L.Ed.2d at p. 18, fn. 4.) (Italics added.) Indeed, **HN12**[↑] the requisite control of the tying product may be inferred from the seller's success in imposing a tying condition upon a substantial amount of commerce in the tied product without any further reference to the market (*Lessig v. Tidewater Oil Company, supra, 327 F.2d 459, 469*).

Respondents' next contention is also mistaken. It has been established that an illegal tying arrangement does not require that one party or entity offer both the tying product and the tied product. Contrary to respondents' assertion, such violation **HN13**[↑] may be found if the offeror of the tying product has an economic interest in the tied product, even though the latter is manufactured or otherwise produced by another party or entity.

The leading case dealing with that very issue is *Osborn v. Sinclair Refining Company* (4th Cir. 1960) 286 F.2d 832. In Osborn, defendant Sinclair, an oil refining company, entered into an agreement with Goodyear Tire and Rubber Company. Under the terms of the arrangement **[**24]** Sinclair agreed to sell and promote Goodyear tires, batteries and accessories through its filling station **[*264]** operators and in exchange Goodyear agreed to pay 5-10 percent commission to Sinclair on the Goodyear merchandise sold. In order to carry out the agreement, Sinclair imposed upon its filling station dealers the requirement that they purchase a certain quantity of Goodyear products and

conditioned the continued sale of gasoline to them on the purchase of Goodyear merchandise. Osborn, a filling station operator who was terminated because of failing to purchase sufficient quantities of Goodyear tires, batteries and accessories, brought an antitrust suit against Sinclair, charging that the conduct in question constituted an unlawful tying arrangement under the Sherman Act. The court found for the plaintiff and held that the tying arrangement in question was illegal per se, because it involved a not insubstantial amount of commerce. As to the contention that the tying and tied products were not produced or sold by the same entity and therefore a crucial element of an illegal tie-in was lacking, the court had the following to say: "The perniciousness of the imposed tie-in [**25] is aggravated by the fact that the defendant is not even in the business of selling the tied products, but is employing its economic power in the gasoline industry to force his dealers to do business with a supplier in another industry under an arrangement that yields the defendant an extraneous revenue. The defendant in this case goes a step further than the supplier in the usual tie-in case, for here the tied product is not even handled or sold by the defendant, but it farms out to another, for a price, its coercive economic power." (*Osborn v. Sinclair Refining Company, supra, pp. 839-840*, italics added.)

Osborn is on all fours with the case at bench. Similar to Sinclair, AMFAC, the owner of the tying product, exerted its coercive economic power to restrict the trade of mobile homes (the tied product) sold by third parties in return for extra benefit extorted from the latter parties. Consequently, what has been said in Osborn, is equally applicable to the present case.

We note in passing that *Crawford Transport Company v. Chrysler Corporation* (6th Cir. 1964) 338 F.2d 934, and *Nelligan v. Ford Motor Company* (W.D.S.C. 1958) 161 F. Supp. 738, upon which respondents primarily rely, [**26] are clearly distinguishable from Osborn. The crucial distinguishing factor is that unlike in Osborn (and the case at bench), the seller of the tying product did not receive direct benefit from the tying arrangement in either Crawford or Nelligan.

Respondents' third claim, that the evidence of loss produced by appellant was inadequate, has been fully discussed and answered in the previous chapter and requires no repeated elaboration here.

Respondents' fourth claim is that there was no evidence introduced to show that AMFAC utilized economic power to coerce an appreciable number of lessees of mobile home spaces to purchase mobile homes from the participating dealers. This contention is without merit. "[HN14](#)[] Coercion occurs when the buyer must accept the tied item and forego possibly desirable substitutes." (*Moore v. Jas. H. Matthews & Co. (9th Cir. 1977) 550 F.2d 1207, 1217*) As discussed previously in relation to the existence of a tying arrangement, the record makes it abundantly clear that many buyers had to accept the tied product and forego possibly desirable substitutes.

This brings us to two more unresolved questions. One is whether in the circumstances of the present case [**27] an unlawful tying arrangement can arise also under [section 16727](#).³ This question gains some [*265] significance because the burden of proving an illegal tying arrangement differs somewhat under [section 16720](#) and [section 16727](#). [HN15](#)[] Under [section 16727](#) the plaintiff must establish that the tie-in substantially lessens competition. This standard is met if either the seller enjoys sufficient economic power in the tying product to appreciably restrain competition in the tied product or if a not insubstantial volume of commerce in the tied product is restrained. Under [section 16720](#) standard, both conditions must be met (*MDC Data Centers, Inc. v. International Bus. Mach. Corp. (E.D. Pa. 1972) 342 F. Supp. 502, 504*).

³ [HN16](#)[] [Section 16727](#) reads that "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." (Italics added.)

[**28] In addressing the merit of the issue, we agree with respondents that [section 16727](#) is based on section 3 of the Clayton Act ([15 U.S.C. § 14](#)), hence federal decisions interpreting section 3 of that act are applicable ([Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal.2d at p. 315](#)). The federal cases, in turn, explain that the statutory word "commodities" in section 3 of the act obtains only to goods, wares, merchandise, machinery, supplies and other similar movable items which do not include land ([Baum v. Investors Diversified Services, Inc. \(7th Cir. 1969\) 409 F.2d 872, 875](#); [United States v. Investors Diversified Services \(D. Minn. 1951\) 102 F. Supp. 645, 648](#)). It is well to remember that in the case at bench the tying product is not a movable item but rather is land, more specifically, lease of land. It thus falls squarely within [N.W. Controls, Inc. v. Outboard Marine Corporation \(D. Del. 1971\) 333 F. Supp. 493, 500](#), where the court held that "[HN17](#) [↑] If the tie does not involve a commodity but concerns land, services or credit, which do not fit the Clayton Act's language, it is governed by the Sherman Act and the plaintiff is required to bear the additional burden [**29] of proving that the defendant's economic power with respect to the tying product is sufficient to produce an appreciable restraint." (Italics added.) [Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d 920](#), cited by appellant, does not control the situation here. In Palsson, the word "commodity" was interpreted under [section 16720](#), the equivalent of [section 1](#) of the Sherman Act, and as a consequence it did not cover [section 16727](#) which is governed by the Clayton Act and the case interpretation thereunder.

Turning to the last issue, we note appellant's contention that it is entitled to recover also under the "rule of reason" theory has been raised only as an alternative if we would find that the elements of an unlawful tie-in have not been established. Since we have concluded that appellant has made out a *prima facie* case of an actionable tying arrangement under [section 16720](#), the complex issues raised in appellant's alternative argument need not be reached.

That portion of the judgment granting a nonsuit as to the tie-in cause of action is reversed; in all other respects the judgment is affirmed.

Taylor, P. J., and Miller, J., concurred.

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Guild Wineries & Distilleries v. J. Sosnick & Sons

Court of Appeal of California, First Appellate District, Division Four

November 30, 1979, Filed

Civ. No. 42953

Reporter

160 Cal. Rptr. 201 *; 1979 Cal. App. LEXIS 2498 **; 99 Cal. App. 3d 205

GUILD WINERIES AND DISTILLERIES, Plaintiff, Cross-defendant and Respondent, v. J. SOSNICK & SONS, Defendant, Cross-complainant and Appellant.

Notice: NOT CITABLE - SUPERSEDED BY GRANT OF REHEARING

Subsequent History: [**1] Rehg. granted Dec. 27, 1979 (See [102 C.A.3d 627](#))

Prior History: Superior Court of San Mateo County, No. 199071, Lyle R. Edson, Judge.

Core Terms

distributor, manufacturer, restrictions, retailers, products, territory, terminated, horizontal, nonprice, wine, rule of reason, customers, Antitrust, sales, per se rule, wholesale, retail outlet, vertical, presale, anti trust law, effects, instructions, interbrand, wholesale distributor, anticompetitive, intrabrand, marketing, consumer, dealers, selling

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1 **Antitrust & Trade Law, Sherman Act**

The Cartwright Act, [Cal. Bus & Prof. Code § 16700 et seq.](#), is patterned upon the federal Sherman Act and both have their roots in common law; hence federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > Sherman Act > General Overview

HN2 **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A refusal of a manufacturer to deal with a distributor can constitute a combination in restraint of trade within the purview of the Sherman Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN3 Per Se Rule & Rule of Reason, Per Se Violations

Distributors cannot lawfully agree to divide territories or customers. Such conduct is sometimes called a "horizontal restraint," and is a per se violation of the Sherman Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Per se principles are formulated where the conduct involved is manifestly anticompetitive and has no clearly discernible benefits to competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN5 Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

If market or customer arrangement or combinations are put together through the coercive tactics of the seller alone, this is sufficient as a per se violation of antitrust laws.

Counsel: Frederick P. Furth, Thomas R. Fahrner, Richard S. E. Johns, Michael P. Lehmann, Furth, Fahrner & Wong, for defendant, Cross-complainant and Appellant.

Godfrey L. Munter, Jr., Robert W. Martin, Martin, Munter & Keegin, for Plaintiff, Cross-defendant and Respondent.

Opinion by: BRUNN

Opinion

[*202] BRUNN, J. *

This is a Cartwright Act private antitrust case. We hold that it is unlawful for a manufacturer who also distributes its own products in one geographic area to terminate an independent distributor when a substantial factor in bringing about the termination is the distributor's refusal to accept the manufacturer's attempt to enforce or impose territorial or customer restrictions among distributors. We reverse a judgment in favor of the manufacturer because of instructions to the jury inconsistent with this principle.

[*203] I

Guild Wineries and Distilleries (hereinafter Guild) sued J. Sosnick & Sons (Sosnick) seeking monies due for liquor which Guild had sold Sosnick. Sosnick [*2] filed a cross-complaint alleging violations of the Cartwright Act ([Bus. & Prof. Code, § 16700 et seq.](#)) and seeking treble damages. Before trial the parties stipulated to the amount Sosnick owed Guild. The trial proceeded on the issues joined on the cross-complaint. The jury decided in favor of Guild. Sosnick appeals from the resulting judgment.

Guild is a wine marketing cooperative controlled by its member grape growers. Guild's share of the Northern California wine market was about 2 percent at pertinent times. Guild was not a wholesale distributor of its products before 1975, but marketed them through several independent wholesalers who also handled wines of Guild's competitors.

Sosnick is a wholesaler of food and beverages based in South San Francisco. During the period which this litigation concerns, Sosnick handled hundreds of items of food and wine.

Fourteen wholesalers distributed Guild wines in Northern California. Guild assigned to each of them an area of primary responsibility adjacent to the wholesaler's headquarters. Sosnick concentrated its Guild wine marketing in San Mateo County. The territories were not entirely exclusive in practice; distributors [*3] would sell Guild products outside their territory because of overlapping customer accounts. A distributor who represented Guild in one county might wholesale another company's products in a second county and not infrequently would sell Guild wines to retailers in the latter area. Not surprisingly, this led to complaints by distributors to Guild. The evidence is in conflict as to whether Guild tried to dissuade distributors from poaching on each other's territory.

In 1975, the Guild wholesale distributorship in Fresno terminated. Guild wanted to increase its sales in the Fresno area where most of its growers were concentrated. Guild therefore took over the Fresno wholesaling itself under the name "Valley Distributors." Valley Distributors was not a separate entity, but merely a name under which Guild acted as a distributor.

The previous Fresno distributor had also been selling Guild wines to the Lucky Stores chain, whose central purchasing operations were in San Leandro and not in the Fresno area. When that distributor stopped handling Guild products, Sosnick (who was already selling Kosher foods to Lucky) began selling Guild wines to the chain at Lucky's request. A Guild [*4] executive then called Sosnick at least twice and asked Sosnick to cease selling to Lucky because Guild wanted to handle the Lucky account itself through its new Valley Distributors operation. Martin Sosnick testified that the last request was angry and threatening. The Guild executive denied making threats. About two weeks later, Guild terminated Sosnick's contract as a distributor. Several Guild executives testified that the decision to cancel Sosnick preceded the Lucky Stores incident and was not related to it.

It is undisputed that the evidence would support, although not compel, a finding that Sosnick's insistence on selling to Lucky was a substantial factor in Guild's decision to terminate Sosnick's distributorship. The evidence would also support the opposite finding.

* Assigned by the Chairperson of the Judicial Council.

The basic disagreement between the parties is whether liability can be predicated upon the former finding. The disagreement arose in a conflict over instructions to the jury. Guild requested and the trial court gave instructions under which Guild would be liable only if, in terminating Sosnick, it joined in and acted in furtherance of an agreement or conspiracy among the competing independent wholesalers [**5] to divide the territory and customers between themselves.¹ The jury was precluded from [*204] imposing liability if Guild had acted alone, even if it had cancelled Sosnick for his refusal to yield the Lucky account to Guild.² Sosnick's proposed instructions, which the trial court declined to give, were based on the theory that such conduct would violate the antitrust laws if it were carried out to enforce an illegal customer allocation agreement.³

[**6] II

In discussing whether the court's instructions were prejudicially erroneous, we note preliminarily that [HN1](#)[] the Cartwright Act "is patterned upon the federal Sherman Act and both have their roots in common law; hence federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act." ([Chicago Title Ins. Co. v. Great Western Financial Corp.](#) (1968) 69 Cal.2d 305, 315 [[70 Cal.Rptr. 849, 444 P.2d 481](#)].)

We observe next that [HN2](#)[] "a refusal of a manufacturer to deal with a distributor can constitute a 'combination' in restraint of trade within the purview" of the Sherman Act. ([Bushie v. Stenocord Corporation](#) (9th Cir. 1972) 460 F.2d 116, 119; [United States v. Parke, Davis & Co.](#) (1960) 362 U.S. 29 [[4 L.Ed.2d 505, 80 S.Ct. 503](#)]; [Albrecht v. Herald Co.](#) (1968) 390 U.S. 145 [[19 L.Ed.2d 998, 88 S.Ct. 869](#)].)

The question is whether this is one of the situations where a manufacturer's refusal to deal runs afoul of the antitrust laws. The answer hinges on whether Guild's alleged conduct is unlawful per se or whether it is to be judged under the "rule of reason." Sosnick does not contend that the evidence would support antitrust [**7] liability under the "rule of reason" approach; were that approach to be taken, the trial court's instructions would either be correct or harmless error.

¹ The trial court gave Guild's instruction 37: "Under the facts of this case any restrictions and limitations on territories or on customers imposed by Guild on its distributors would not constitute a violation of the antitrust laws entitling Mr. Sosnick to recover unless the acts were taken by Guild not as a producer or manufacturer interested in the distribution of its product, but rather were taken to enforce an agreement or conspiracy among the competing independent wholesalers of its product to divide the territories and customers between themselves."

"If you find that such an agreement existed, that is an agreement between the independent wholesalers to divide the market and to allocate the customers and that Guild, in terminating Sosnick, knowingly joined and acted as a party or acted in furtherance of that agreement, then you must find in favor of Sosnick and against Guild on this issue."

² The court also gave Guild's instruction 36: "I instruct you that if Guild, provided it was acting alone and not pursuant to an unlawful conspiracy asked Sosnick to cease dealing with Lucky Stores because it wanted to service Lucky Stores and then terminated Sosnick because he refused, an antitrust violation could not be established for that termination."

³ Sosnick's proposed instructions 17 and 19 stated: "A seller of goods has a legal right to announce to his customers that he has established a policy prohibiting such customers from reselling the goods to a specified person or persons, and to refuse to deal with any customer who does not follow the policy. But it is illegal for the seller to take affirmative action, such as threatening to stop selling to his customer, to enforce his policy. Furthermore, the law imposes two important limitations on this right:

"First, if a seller announces to his customer a policy which -- if accepted by the customer -- would result in an illegal horizontal customer allocation agreement, it is illegal for the seller to go beyond a mere announcement of the policy and use other means - - such as threats of termination if the customer refuses to comply -- which effect adherence to the policy.

"Second, it is illegal for the seller to refuse to deal with a customer, if the refusal is made pursuant to an illegal combination or conspiracy." (Instruction 17.)

"If a supplier (such as Guild) having an ongoing business relationship with a distributor (such as Sosnick) requests the distributor to enter into an agreement which would violate the Cartwright Act; if the distributor refuses to enter into the proposed illegal agreement; if the supplier exerts pressure upon the distributor to accept the illegal agreement; and if the supplier terminates the distributor because of the distributor's refusal to accept, then the termination itself is in violation of the Cartwright Act." (Instruction 19.)

We conclude that this case -- assuming, of course, that Sosnick's refusal to agree to turn the Lucky account over to Valley was a substantial factor in Guild's decision to terminate Sosnick -- is governed by a per se principle.

[*205] It is settled that [HN3](#) distributors cannot lawfully agree to divide territories or customers. Such conduct is sometimes called a "horizontal restraint," and is a per se violation of the Sherman Act. ([United States v. Topco Associates \(1972\) 405 U.S. 596 \[31 L.Ed.2d 515, 92 S.Ct. 1126\]](#).) The principle has deep roots, going back to [Addyston Pipe & Steel Co. v. United States \(1899\) 175 U.S. 211 \[44 L.Ed. 136, 20 S.Ct. 96\]](#).

When Guild became a distributor the same rule became applicable to it. Guild could not lawfully coerce a fellow distributor into allocating customers any more than Sosnick and other distributors could lawfully agree to such an allocation. ([American Motor Inns, Inc. v. Holiday Inn, Inc. \(3d Cir. 1975\) 521 F.2d 1230, 1253-1254](#) [territorial restrictions [\[**8\]](#) imposed by motel chain on its franchisees are horizontal restraints and illegal per se where the chain also operates motels]; [Hobart Brothers Co. v. Malcolm T. Gilliland, Inc. \(5th Cir. 1973\) 471 F.2d 894, 899](#) [illegal horizontal restraint for manufacturer who also distributes to some accounts to limit territories of its distributors so as to eliminate competition between the manufacturer and its distributors].) *Hobart Brothers* and *American Motor Inns* cover the situation before us. (For a recent application of the same principle, see [Krehl v. Baskin-Robbins Ice Cream Co. \(C.D.Cal. 1978\) 78 F.R.D. 108, 123](#).)

[HN4](#) Per se principles are formulated where the conduct involved is manifestly anticompetitive and has no clearly discernible benefits to competition. ([Continental T.V., Inc. v. GTE Sylvania Inc. \(1977\) 433 U.S. 36, 50 \[53 L.Ed.2d 568, 580, 97 S.Ct. 2549\]](#); [Marin County Bd. of Realtors v. Palsson \(1976\) 16 Cal.3d 920, 934 \[130 Cal.Rptr. 1, 549 P.2d 833\]](#)) The undesirable effects of a manufacturer restraining a distributor from selling to particular customers are that "they serve to suppress all competition between manufacturer and [\[**9\]](#) distributor for the custom of the most desirable accounts... [without]... countervailing tendencies to foster competition between brands." ([White Motor Co. v. United States \(1963\) 372 U.S. 253, 272 \[9 L.Ed.2d 738, 752, 83 S.Ct. 696\]](#) [Brenna, J., con.]) The anticompetitive consequences were also lucidly noted in [Industrial Bldg. Materials, Inc. v. Interchemical Corp. \(9th Cir. 1970\) 437 F.2d 1336, 1342](#), as follows: "The appellee cites many cases for the proposition that a manufacturer is free to agree with others to replace a distributor. In each of those cases, however, the manufacturer did not enter into competition with a distributor, and there was no removal of a competitor of the manufacturer from the market. In none of those cases did the agreement have an anticompetitive purpose or effect. [Citation.] When a distributor is replaced by another, the public is given a substitute with no diminution in the number of distributors offering services, but when a manufacturer enters the field and then removes a distributor, the public is left with only the manufacturer instead of the manufacturer and the independent distributor." (Fn. omitted.)

Guild urges [\[**10\]](#) that [Continental T.V., Inc. v. GTE Sylvania Inc., supra](#), changes the law. That case held that vertical, non-price restraints by a manufacturer on distributors -- e.g., manufacturer allocation of distributor territories -- are not automatically unlawful but are to be tested under the rule of reason, i.e., by looking at the economic effects on competition. In that case, the restrictions required franchisees to sell the products from assigned locations. The manufacturer did not compete with its distributors. Not only is the case factually inapposite, but the court took pains to note that its decision did not alter the rule as to horizontal restraints:

"There may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers. There is no doubt that restrictions in the latter category would be illegal per se, see, e.g., [United States v. General Motors Corp., 384 U.S. 127 \(1966\)](#); [United States v. Topco Associates, Inc., supra, \[405 U.S. 596\]](#)...." (9433 U.S. 36 at p. 58, fn. 28 [53 L.Ed.2d at p. 585].)

[*206] Thus, the per se rule of *Topco* (with which we started [\[**11\]](#) this discussion) remains unimpaired. Post-*Continental T.V., Inc.* cases have repeatedly so held, and have held further that horizontal restraints continue to be illegal per se. (See, e.g., [Gough v. Rossmoor Corp. \(9th Cir. 1978\) 585 F.2d 381, 386](#); [Oreck Corp. v. Whirlpool Corp. \(2d Cir. 1978\) 579 F.2d 126, 131](#) [cert. den., 439 U.S. 946 (58 L.Ed.2d 338)] [Eiberger v. Sony Corp. of America \(S.D.N.Y. 1978\) 459 F.Supp. 1276, 1284](#); [Krehl v. Baskin-Robbins Ice Cream Co., supra, 78 F.R.D. 108 at p. 123](#); [Du Pont Glore Forgan, Inc. v. Am. Tel. & Tel. Co. \(S.D.N.Y. 1977\) 437 F.Supp. 1104, 1113](#); [Pitchford](#)

Scientific etc. v. PEPI, Inc. (W.D.Pa. 1977) 435 F.Supp. 685, 688.) Krehl is a post-Continental T.V., Inc. decision which continues to apply the principles of American Motor Inns and Hobart Brothers, supra. We follow these cases to conclude that Continental T.V. did not sub silentio overrule Topco, American Motor Inns or Hobart Brothers.

At bottom, an antitrust decision of this kind is not an exercise in labeling a particular restraint "vertical" or "horizontal." That can deteriorate into "formalistic line drawing." [**12] (Continental T.V., Inc. v. GTE Sylvania Inc., supra, 433 U.S. 36 at pp. 58-59 [53 L.Ed.2d at p. 585].) What matters is that the conduct produces only anticompetitive effects without "countervailing benefits," as we have noted above.

The dissent focuses on conceivably valid reasons of Guild's termination of Sosnick, particularly Guild's claim that he "refused to deliver promotional presale services to retail outlets, and thereby hampered Guild's efforts to increase its market share." Nothing we have said prevents Guild from offering evidence in support of this contention on retrial. Should the jury conclude that Guild terminated Sosnick because of his inadequate promotion, Guild would prevail. On the other hand, if the termination was caused by his competition for the Lucky account, and not by his alleged failure to promote Guild's products, he would prevail on the liability issue. The concern expressed by the dissent, to the effect that Guild may take reasonable steps to enhance interbrand competition, is thus served.

The dissent would deny recovery to Sosnick, even if he proves that his termination was caused by his refusal to give up the Lucky account, on the [**13] ground that he did not also prove that Guild's conduct was "lacking in any redeeming virtue." Such a burden of proof is not necessary for the purpose of enabling the jury to deal with the economic realities of the situation. Moreover, for the reasons we stated earlier, the rule urged by the dissent is contrary to the controlling decisions and would frustrate rather than advance the purposes of the antitrust laws.

III

To sum up, Guild's liability depended on the causes of Sosnick's termination or the factors substantially affecting it. If one of these causes or factors was Sosnick's refusal to enter into an arrangement effecting a territorial or customer allocation among distributors, an antitrust violation is established. (See Interphoto Corporation v. Minolta Corporation (S.D.N.Y. 1969) 295 F.Supp. 711, 719-723 [affd. per curiam (2d Cir. 1969) 417 F.2d 621; Cornwell Quality Tools Co. v. C.T.S. Company (9th Cir. 1971) 446 F.2d 825, 832.) Guild's proposed instructions 36 and 37, which were given by the trial court, were prejudicial because they informed the jury that liability could not be established unless they first found an "existing" agreement between [**14] Guild distributors to "divide the market and allocate customers" and further found that Guild "knowingly joined and acted as a party" to the agreement. In fact, there need not have been a concert of action among distributors, or an overt conspiracy between Guild and the several distributors, in order to establish a per se violation of the antitrust laws. HN5 [↑] "If the arrangement or combination... is put together through the coercive tactics of the seller alone, this is sufficient." (Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., supra, 471 F.2d 894 at p. 900 [quoting from Osborn v. Sinclair Refining Company (4th Cir. 1963) 324 F.2d 566, 573-574, fn. 13]. See also United States v. Parke, Davis & Co., supra, 362 U.S. 29 at pp. 46-47 [4 L.Ed.2d 516-517].) Such an agreement, combination or conspiracy may also be inferred from Guild's conduct. (See United States v. Parke, Davis & Co., supra, at p. 40 [4 L.Ed.2d at p. 513].)

Guild's instructions 36 and 37 should therefore not have been given with respect to the Lucky Stores matter, and Sosnick's instructions 17 and 19 (or a modification embodying the basic principle of [**15] liability which we have outlined) should have been given.

Finally, Sosnick contends that the court should not have instructed on the duty to mitigate damages. Under the circumstances, the giving of that instruction was not prejudicial, but a broad mitigation rule finds no support in appellate antitrust decisions. In the event of a retrial, the court may instruct instead that as an element of damage Sosnick must show the lack of an alternative comparable substitute for the products formerly obtained from Guild. (Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc. (6th Cir. 1972) 459 F.2d 138, 148.)

The judgment is reversed. The purported appeal from the order denying a new trial is dismissed.

Rattigan, Acting P.J., concurred.

Dissent by: CHRISTIAN

Dissent

CHRISTIAN, J. -- I respectfully dissent.

The majority opinion sets out a clear and well ordered review of the pertinent authorities; but I cannot concur in the decision because, in my view, the opinion inappropriately applies "per se" antitrust doctrine in such a way as to punish as anticompetitive an act which according to the evidence had predominantly procompetitive purposes and effects.

At the times relevant [**16] to this appeal, there was no price competition between wholesale distributors of Guild products. Guild set the prices at which Guild sold to the wholesale distributors, the distributors sold to retail outlets, and retailers sold to consumers. (See *Bus. & Prof. Code, §§ 24850- 24881*. See also *Rice v. Alcoholic Bev. etc. Appeals Bd. (1978) 21 Cal.3d 431 [146 Cal.Rptr. 585, 579 P.2d 476]* [statutory liquor price-fixing scheme violates Sherman Antitrust Act].)

Guild executives testified that the commercial success of a producer's wine line depends heavily on the promotional presale services offered by wholesale distributors to retail outlets. The executives testified that to build consumer preference or demand for a particular wine brand, distributors had to engage in promotional activities with retail outlets to, e.g., set up floor displays for the brand, stock the brand at eye level rather than on bottom shelves, maintain well stocked refrigeration units of the chilled brand, promote white wines at Thanksgiving and red wines in winter, and so on. The spread between the price at which Guild sold its products to the distributors, and the higher price at which the distributors [**17] sold the products to the retailers, included an allowance to reimburse the distributors for performing these presale activities.

Each distributor had an area of primary responsibility. This was a geographical area adjacent to the distributor's office and warehouse in which the distributor was expected to develop demand for Guild products by delivering presale services to retailers. Guild did not prohibit distributors from making sales outside of their own territories, although sales goals, promotional requirements, and practical geographical constraints generally ensured that each distributor concentrated its sales efforts in its own area. There was some problem with "high-spotting" or "free-riders": Typically, each distributor's territory included some retail outlets that purchased a high volume of Guild products, and some outlets that purchased a low volume. A distributor in one territory would expend resources to promote Guild products to both large and low volume retailers. A second distributor from another territory then would "raid" the first territory, and sell the Guild products [*208] to the large-volume retailers without having incurred any promotional costs [**18] in connection with those retailers. The remaining low volume sales would be insufficient to compensate the first distributor for the costs that it had incurred in delivering the presale services to all retailers in the territory. Even though the revenue from the sales to the low-volume outlets was not sufficient to cover distribution costs to those outlets, Guild considered it necessary to keep the outlets stocked: If Guild products were not readily available to the ultimate consumer even in small retail outlets, consumers would lose or not develop a preference for the Guild brand. There was conflicting testimony as to whether Guild ever intervened to prevent this free-riding.

In January of 1975, Guild hired Jack Dadum as senior vice-president in charge of marketing and sales. Dadum found Guild's low market share and promotional practices "horrible." In consultation with other Guild executives, he took several steps to increase Guild's market share, including three that are relevant here. First, Guild was dissatisfied with the promotional efforts and sales of DiNubilo and Company, the independent distributor in the San Joaquin Valley where most of the grower-members of the [**19] Guild cooperative were concentrated. Second, Guild management decided to integrate vertically by establishing Guild's own unincorporated wholesale distribution division, Valley Distributors, to replace DiNubilo. On March 1, 1975, Guild established Valley Distributors and terminated DiNubilo. The San Joaquin Valley became Valley Distributor's area of primary responsibility. Valley handled Guild products exclusively.

DiNubilo's major customer for Guild products had been Lucky Stores. Lucky was also one of the major retail outlet purchasers of Guild products in Northern California. When Valley Distributors took over DiNubilo's territory, Guild management expected the Lucky account to go to Valley. The revenue from the large volume sales to Lucky was necessary to offset the expenses of operating Valley Distributors. However, while DiNubilo had been supplying Guild products to Lucky, Sosnick had been supplying a line of Kosher foods to Lucky. When Guild terminated DiNubilo, Lucky began purchasing Guild products (in addition to Kosher foods) from Sosnick instead of from Valley.

On April 3, Guild took the third marketing step relevant here. Guild terminated Sosnick as an independent [**20] distributor. Guild contends that it terminated Sosnick because Sosnick had consistently refused to deliver promotional presale services to retail outlets, and thereby hampered Guild's efforts to increase its market share by developing consumer preference for Guild wines. Guild claims that it decided to terminate Sosnick before Sosnick started selling to Lucky. Sosnick contends that it was terminated because it captured the Lucky Stores account, which Guild sought to reserve for Valley Distributors.

The crucial issue is whether Guild's conduct is to be examined under the rule of reason, or whether the conduct was illegal per se. Sosnick concedes that if Guild's conduct is examined under the rule of reason, then Guild's conduct was not illegal and the judgment must be affirmed. In my view the rule of reason is applicable and the judgment should be affirmed.

The legality of nonprice distribution restraints ¹ was at issue in [U.S. v. Arnold, Schwinn & Co. \(1967\) 388 U.S. 365 \[18 L.Ed.2d 1249, 87 S.Ct. 1856\]](#). Bicycle manufacturer Schwinn marketed its products through three principal methods: (1) sales to wholesale distributors; (2) sales to retailers by means of consignment [**21] or agency arrangements with distributors; and (3) sales to retailers under the so-called Schwinn Plan, [*209] which involved direct shipment by Schwinn to the retailer with Schwinn invoicing the dealers, extending credit, and paying a commission to the distributor taking the order. Schwinn assigned specific territories to each distributor, and each distributor could sell only to franchised retail outlets within its assigned territory. Each franchised retailer could purchase Schwinn products only from or through the distributor authorized to serve the retailer's area, and the retailer could sell only to consumers, not to unfranchised retailers. The Supreme Court held that section one of the Sherman Act required differentiation between the situation where the manufacturer parts with title, dominion, or risk with respect to its products, and where the manufacturer completely retains ownership and risk of loss. The court held nonprice distribution restrictions to be illegal per se if the manufacturer sold its products to distributors or retailers. The court found that such restrictions violated "the ancient rule against restraints on alienation." ([388 U.S. at p. 380 \[18 \[**22\] L.Ed.2d at p. 1261\]](#).) However, nonprice restrictions were to be examined under the rule of reason if the manufacturer retained title, dominion, and risk with respect to the product, and the position and function of the distributor or retailer were indistinguishable from those of an agent or salesman of the manufacturer. The great weight of scholarly opinion was critical of the *Schwinn* decision. (See, e.g., [Continental T.V., Inc. v. GTE Sylvania Inc. \(1977\) 433 U.S. 36, 48 fn. 13 \[53 L.Ed.2d 568, 579, 97 S.Ct. 2549\]](#), and authorities cited.)

The legality of nonprice distribution restraints and the continuing vitality [**23] of the *Schwinn* rule were at issue in [Continental T.V., Inc. v. GTE Sylvania Inc., supra, 433 U.S. 36](#). GTE Sylvania Inc. manufactured television sets. It originally marketed its product through independent or company-owned wholesalers, who in turn resold to a large and diverse group of retailers for sale to the ultimate consumer. Prompted by a decline in its market share to a relatively insignificant 1 to 2 percent of national television sales in an industry with more than 100 manufacturers, Sylvania in 1962 phased out its wholesale distributors and began to sell to a smaller and more select group of franchised retailers. An acknowledged purpose of the new franchise plan was to decrease the number of competing Sylvania retailers in the hope of attracting the more aggressive and competent retailers thought necessary to improve the manufacturer's market position. Sylvania imposed location restrictions ² on its retailers. By 1965

¹A nonprice distribution restraint restricts competition among wholesale or retail distributors by, e.g., forbidding distributors from selling from any but a designated location, assigning exclusive territories to distributors, reserving certain customers to the manufacturer, forbidding wholesale distributors from selling to other than authorized retail outlets, or forbidding distributors from selling to other distributors. (See Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision* (1977) 45 U.Chi.L.Rev. 1.)

Sylvania ranked eighth in national television sales with 5 percent of the market. In 1965 Sylvania, dissatisfied with its sales in San Francisco, added another retail outlet in the city. The existing San Francisco retailer, Continental T.V., [**24] protested the addition. Continental also requested a franchise in Sacramento. Sylvania refused the request because it felt that the existing Sacramento retailers adequately serviced the Sacramento area. Relations between Continental and Sylvania deteriorated. Sylvania terminated the Continental franchise, and Continental brought suit for antitrust violations. The district court, applying the *Schwinn* rule, instructed the jury that if Sylvania imposed postsale territorial restrictions on its retailers, the conduct was illegal per se. The district court entered judgment on the jury verdict finding Sylvania liable for treble damages for violating section one of the Sherman Act. The United States Supreme Court disapproved the per se rule stated in [*Schwinn* \(433 U.S. 36, 58 \[53 L.Ed.2d 568, 585\]\)](#), and affirmed the decision of the Ninth Circuit reversing the district court judgment ([*id.*, at p. 59 \[53 L.Ed.2d at p. 586\]](#)).

[**25] The "rule of reason" is the prevailing standard of analysis to be used in evaluating combinations in restraint of trade or commerce. Under this rule, the fact-finder [**210] weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.³ ([*Continental T.V., Inc. v. GTE Sylvania Inc., supra*, \(433 U.S. 36, 49 \[53 L.Ed.2d 568, 579-580\].\)](#)

[**26] Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive. ([*Continental T.V., Inc. v. GTE Sylvania Inc., supra*, 433 U.S. 36, 49-50. \[53 L.Ed.2d 568, 579-580\].\) "\[There\] are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." \(\[*Northern Pac. R. Co. v. United States* \\(1958\\) 356 U.S. 1, 5. \\[2 L.Ed.2d 545, 549, 78 S.Ct. 514\\].\\)\]\(#\) Per se rules require a court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice, and the severity of those consequences, must be balanced against its procompetitive consequences. A per se rule reflects the judgment that exceptions to the generalization may arise, but such exceptions are not sufficiently common or important to justify the time and expense necessary to identify them. \(\[*Continental T.V., Inc. v. GTE Sylvania Inc.,* \\[**27\\] *supra*, 433 U.S. 36, 50 fn. 16 \\[53 L.Ed.2d 568, 580\\].\\)\]\(#\) Per se rules must be based on demonstrable economic effects \(\[*id.*, at pp. 58-59 \\[53 L.Ed.2d at p. 585\\]\]\(#\)\). \(See also Sullivan, Antitrust \(1977\) 165-194.\)](#)

The *Sylvania* court recognized that nonprice distribution restrictions reduce intrabrand competition but promote interbrand competition. Nonprice restraints reduce intrabrand competition, the competition between wholesale or retail distributors of the product of a particular manufacturer, by limiting the number of sellers of the product competing for the business of a given group of buyers. However, the *Sylvania* court held that nonprice restrictions do not have such a pernicious effect on competition and are not so lacking of any redeeming virtue as to be illegal per se. ([*433 U.S. 36, 52 fn. 19, 54, 58-59 \[53 L.Ed.2d 568, 581, 585\].*](#))

² A location restriction limits a distributor's sales of a manufacturer's product to certain authorized outlets. The manufacturer does not assign specific territories, but as a practical matter the size of each distributor's market will be controlled and limited by the number of authorized outlets. (Note, *Antitrust Treatment of Intrabrand Territorial Restraints Within a Dual Distribution System* (1978) 56 Tex.L.Rev. 1486, 1487, fn. 8.)

³ The classic statement of the rule of reason is that of Mr. Justice Brandeis in [*Chicago Board of Trade v. United States* \(1918\) 246 U.S. 231, 238 \[62 L.Ed. 683, 687, 38 S.Ct. 242\]](#): "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

The *Sylvania* court identified the "redeeming virtues" of nonprice distribution restrictions. ([433 U.S. 36, 54 \[53 L.Ed.2d 568, 582-583\].](#)) Interbrand competition, the competition among the manufacturers of the same generic product, "is the primary concern of antitrust law." (*Id.*, at p. 52 fn. 19 [[53 L.Ed.2d at p. 1**28\] 581.](#)) Nonprice restrictions may allow a manufacturer to achieve certain efficiencies in the distribution of its products, and thus to compete more effectively against other manufacturers. For example, manufacturers can use nonprice distribution restrictions, such as the territorial restrictions at issue in the present case, to induce distributors to engage in the promotional presale services thought necessary to the efficient marketing of their product. The availability and quality of such services affect a manufacturer's goodwill and the interbrand competitiveness of its product. In the absence of the distribution restriction, the "free rider" problem could arise: If one distributor offered promotional presale services, other unrestricted distributors could capture the first dealer's customers without having provided any presale services to those customers, [*211] and thus take a "free ride" on the first distributor's services. This could deter delivery of the optimal amount of presale services. (*Id.*, at pp. 54-55 [[53 L.Ed.2d at pp. 582-583\]](#), citing Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and* [\[**29\] Potential Competition Decisions](#) (1975) 75 Colum.L.Rev. 282; Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards* (1965) 30 Law & Contemp. Prob. 506, 511; Samuelson, *Economics* (19th ed. 1976) pp. 506-507. See generally Posner, [Antitrust Law: An Economic Perspective](#) (1976) pp. 147-167; Posner, [The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, supra](#), 45 U.Chi.L.Rev. 1; Telser, *Why Should Manufacturers Want Fair Trade?* (1960) 3 J. Law & Econ. 86. But see Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath* (1968) 81 Harv.L.Rev. 1419. See also Sullivan, *Antitrust, supra*, 399-421.)

The *Sylvania* court held that the adverse effects of nonprice distribution restrictions on intrabrand competition are outweighed by the potential for beneficial effects on interbrand competition. The restrictions therefore must be reviewed under the rule of reason, rather than under the per se doctrine. ([433 U.S. 36, 57-59 \[53 L.Ed.2d 568, 584\].](#) See generally ABA Antitrust Section, Monograph No. 2, *Vertical Restrictions Limiting Intrabrand Competition* (1977) 55-71, Bork, [\[**30\] The Rule of Reason and the Per Se Concept: Price Fixing and Market Division](#) (1965) 74 Yale L.J. 775, (1966) 75 Yale L.J. 373; Posner, [The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, supra](#), 45 U.Chi.L.Rev. 1, 13-20.)

The majority opinion holds that the reasoning of the *Sylvania* decision does not apply to the present case. Guild was both a producer and a distributor of wine. As a producer, Guild was a supplier of and stood in a vertical relation to Sosnick. As a distributor, Guild was a competitor and stood in a horizontal relation to Sosnick. The question is whether the territorial and customer restrictions imposed by Guild must be treated as horizontal restrictions that are illegal per se under [United States v. Topco Associates \(1972\) 402 U.S. 596 \[31 L.Ed.2d 515, 92 S.Ct. 1126\].](#)

The language of the *Sylvania* decision is limited to vertical nonprice distribution restrictions. In a footnote the court stated that horizontal nonprice distribution restrictions originating in agreement among retailers would be illegal per se. ([433 U.S. 36, 58 fn. 28 \[53 L.Ed.2d 568, 585\].](#) citing [United States v. Topco Associates, \[\\[**31\\] supra, 405 U.S. 596\]\(#\), and \[United States v. General Motors Corp. \\(1966\\) 384 U.S. 127 \\[16 L.Ed.2d 415, 86 S.Ct. 1321\\].\]\(#\)\) The meaning of this dictum is unclear. Whether distribution restrictions are to be examined under the rule of reason or under the per se doctrine should not turn on whether the restrictions were imposed by the manufacturer or by downstream distributors. The *Sylvania* court acknowledged that the location restrictions at issue there "involved understandings or agreements with the retailers." \(\[433 U.S. 36, 40 fn. 8 \\(53 L.Ed.2d 568, 574\\).\]\(#\)\) As Professor Posner points out: "Dealers as well as the manufacturer are hurt by free-riding; it is a detail whether the initiative in seeking to prevent free-riding was taken by the dealers or the manufacturer. This point was missed in Justice Fortas's opinion for the Court in \[\[United States v. General Motors Corp., supra, 384 U.S. 127\]\(#\). The court\] ruled that because competing dealers had collaborated to enlist General Motors' assistance in enforcing the location clause, the case involved an illegal per se horizontal conspiracy, regardless of the reasonableness of the clause. But if the clause was reasonable, \[\\[**32\\]\]\(#\) the dealers should have been entitled to band together for the innocent purpose of persuading General Motors to carry out mutually beneficial contractual obligations." \(Posner, \[The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, supra\]\(#\), 45 U.Chi.L.Rev. 1, 19-20. See also Posner, \[Antitrust Law: An Economic\]\(#\) \[\\[*212\\] Perspective, supra\]\(#\), pp. 165-166; Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court term-1977* \(1977\) 77 Colum.L.Rev. 979, 986-989.\)](#)

Moreover, the *Sylvania* court recognized that problem would arise in differentiating vertical from horizontal distribution restrictions. ([433 U.S. 36, 58 fn. 28 \[53 L.Ed.2d 568, 585\]](#).) In the instant case, Guild was both a producer and a distributor of wine, and also used independent wholesale distributors. Whether nonprice distribution restrictions in such a dual distribution system⁴ are to be examined under the rule of reason or under the per se doctrine should not turn on whether the restrictions are pigeon-holed as horizontal or vertical. This is the type of "formalistic line drawing" condemned in *Sylvania*. ([433 U.S. 36, 59 \[53 L.Ed.2d 568, 585\]](#)). **[**33]** See also Note, *Antitrust Treatment of Intrabrand Territorial Restraints Within a Dual Distribution System*, *supra*, 56 Tex.L.Rev. 1486 and cases cited.)

The Supreme Court in *Topco* stated that the courts should use per se rules as a substitute for examining "difficult economic problems" ([405 U.S. 596, 609 \[31 L.Ed.2d 515, 526\]](#)) because courts are "of limited utility" (*id.* [[31 L.Ed.2d at p. 526](#)]) in balancing **[**34]** the effects of distribution restrictions on intrabrand versus interbrand competition. (*Id.*, pp. 609-612 [[31 L.Ed.2d at pp. 526-528](#)].) This cannot be reconciled with the position taken by the Supreme Court in *Sylvania*. The *Sylvania* court, influenced by the economic literature (see, e.g., [433 U.S. 36, 54-57 \[53 L.Ed.2d 568, 582-584\]](#) and authorities cited), concluded that courts must assess the intent, competitive impact, and demonstrable economic effect of a non-price distribution restriction before declaring the restraint to be prohibited by the antitrust laws. (*Id.*, at pp. 46, 59 [[53 L.Ed.2d at pp. 578, 585](#)].) The *Topco* court felt that without per se rules, the business community would be left with little guidance as to what courts will find to be legal and illegal under the *Sherman Act* ([405 U.S. 596, 609 fn. 10 \[31 L.Ed.2d 515, 526-527\]](#)). The *Sylvania* court acknowledged that per se rules provide guidance to the business community and minimized the burdens on the courts and litigants as compared to rule of reason trials. However, the *Sylvania* court held that those advantages are not sufficient in themselves to justify the creation of per se rules. **[**35]** The *Topco* court referred to the antitrust laws as "the Magna Carta of free enterprise" ([405 U.S. 596, 610 \[31 L.Ed. 515, 527\]](#)) which guaranteed every business the freedom to compete in every section of the economy, whether intrabrand or interbrand (*Id.*, at pp. 610-612 [[31 L.Ed.2d 527-528](#)]). This is contrary to the *Sylvania* court's explicit sanctioning of limits on wholesale and retail dealer autonomy.

It appears that the per se rule of *Topco* should be limited to situations where "it is clear that the restraint... is a horizontal one" (*United States v. Topco Associates*, *supra*, [405 U.S. 596, 608 \[31 L.Ed.2d 515, 526\]](#)) "originating in agreements among... retailers" (*Continental T.V., Inc. v. GTE Sylvania Inc.*, *supra*, [433 U.S. 36, 58 fn. 28 \[53 L.Ed. 2d 568, 585\]](#); see also *id.*, at p. 48 fn. 14 [[53 L.Ed.2d at p. 579](#)]; cf. *Fuchs Sugars and Syrups, Inc. v. Amstar Corp.* (2d Cir. 1979) [602 F.2d 1025, 1030](#) cert. den. (Oct. 16, 1979)⁵ U.S. [[L.Ed.2d](#) , [S.Ct.](#)]; *Magnus Petroleum Co., Inc. v. Skelly Oil Co.* (7th Cir. 1979) [599 F.2d 196, 204](#), cert. den. (Oct. 16, 1979)⁶ U.S. **[**36]**

[[L.Ed.2d](#) , [S.Ct.](#)]). The challenged restrictions in the present case are not exclusively horizontal, **[*213]** and there is no evidence that the restrictions originated in agreements among retailers. There was substantial evidence that Guild adopted the restrictions to order to promote interbrand competition and to guard against free-riders. Sosnick did not establish that Guild's conduct had such a pernicious effect on competition and was so lacking in any redeeming virtue as to be illegal per se. I would hold that the restrictions should be reviewed under the *Sylvania* rule of reason approach. Sosnick does not argue that the Guild restrictions are illegal under the rule of reason.

I would affirm the judgment.

⁴ "A manufacturer employing a dual distribution system markets a product through two separate and competitive channels. The manufacturer supplies independent retailers either directly or through its wholly-owned branch distributors. It also supplies the product to independent distributors who resell to retailers. Consequently, the manufacturer, whether or not vertically integrated, faces competition on two market levels. On the production level, it competes interbrand with other manufacturers of the same generic product; on the distribution level, it competes intrabrand with the independent distributors of its own brand."

(Note, *Antitrust Treatment of Intrabrand Territorial Restraints Within a Dual Distribution System*, *supra*, 56 Tex.L.Rev. 1486, 1489.)

⁵ Advance Report Citation: 48 U.S.L. Week 3258.

⁶ Advance Report Citation: 48 U.S.L. Week 3258.

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Guild Wineries & Distilleries v. J. Sosnick & Son

Court of Appeal of California, First Appellate District, Division Four

January 29, 1980

Civ. No. 42953

Reporter

102 Cal. App. 3d 627 *; 162 Cal. Rptr. 87 **; 1980 Cal. App. LEXIS 1515 ***; 1980-1 Trade Cas. (CCH) P63,258

GUILD WINERIES AND DISTILLERIES, Plaintiff, Cross-defendant and Respondent, v. J. SOSNICK & SON, Defendant, Cross-complainant and Appellant

Subsequent History: [***1] A petition for a rehearing was denied February 25, 1980. Christian, J., was of the opinion that the petition should be granted. Respondent's petition for a hearing by the Supreme Court was denied March 27, 1980. Clark, J., was of the opinion that the petition should be granted.

Prior History: Superior Court of San Mateo County, No. 199071, Lyle R. Edson, Judge.

Disposition: The judgment is reversed. The purported appeal from the order denying a new trial is dismissed.

Core Terms

distributor, manufacturer, restrictions, retailers, products, territory, terminated, rule of reason, wine, horizontal, nonprice, Antitrust, customers, sales, per se rule, wholesale, retail outlet, vertical, presale, anti trust law, effects, instructions, interbrand, wholesale distributor, anticompetitive, intrabrand, marketing, consumer, dealers, selling

LexisNexis® Headnotes

Contracts Law > Breach > Breach of Contract Actions > General Overview

Governments > Courts > Judicial Precedent

HN1 [blue icon] Breach, Breach of Contract Actions

Cal. Bus. & Prof. Code §§ 16700 et seq., the Cartwright Act, is patterned upon the federal Sherman Act and both have their roots in common law; hence federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > Sherman Act > General Overview

[HN2](#)[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

A refusal of a manufacturer to deal with a distributor can constitute a "combination" in restraint of trade within the purview of the Sherman Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

[HN3](#)[] Per Se Rule & Rule of Reason, Per Se Violations

Distributors cannot lawfully agree to divide territories or customers. Such conduct is sometimes called a "horizontal restraint" and is a per se violation of the Sherman Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

[HN4](#)[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Per se principles are formulated where the conduct involved is manifestly anticompetitive and has no clearly discernible benefits to competition.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

In an action by a wine marketing cooperative against a wholesale distributor of plaintiff's products for money due for liquor which plaintiff had sold to defendant, the trial court entered a judgment on a jury verdict in favor of plaintiff, and against defendant on its cross-complaint for damages for alleged violations of the Cartwright Act, [Bus. & Prof. Code, § 16700 et seq.](#), prohibiting certain restraints of trade. The record indicated plaintiff originally was not a wholesale distributor of its products, but distributed them through various wholesalers, including defendant. Plaintiff assigned to each of them an area of primary responsibility, but the territories were not entirely exclusive in practice. Eventually plaintiff began to distribute its products itself, and demanded that defendant turn over a large account to it. Defendant refused to turn over the account, and shortly thereafter, plaintiff terminated defendant's contract as a distributor. The trial court gave instructions under which plaintiff would be liable only if, in terminating defendant, it joined in and acted in furtherance of an agreement or a conspiracy among the competing independent wholesalers to divide the territory and customers between them. The jury was precluded from imposing liability if plaintiff had

acted alone, even if it had cancelled defendant for his refusal to yield the account to plaintiff. Defendant's proposed instructions, which the trial court declined to give, were based on the theory that such conduct would violate the antitrust laws if it were carried out to enforce an illegal allocation agreement. (Superior Court of San Mateo County, No. 199071, Lyle R. Edson, Judge.)

The Court of Appeal reversed. The court held that it is unlawful for a manufacturer who also distributes its own products in one geographic area to terminate an independent distributor when a substantial factor in bringing about the termination is the distributor's refusal to accept the manufacturer's attempt to enforce or impose territorial or customer restrictions among distributors. Thus, the court held that plaintiff's proposed instructions, which were given by the trial court, were prejudicial, since the coercive tactics of plaintiff were per se illegal. (Opinion by Brunn, J., * with Rattigan, Acting P. J., concurring. Separate dissenting opinion by Christian, J.)

Headnotes

CA(1a) [] (1a) CA(1b) [] (1b) CA(1c) [] (1c)

Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—Manufacturer's Imposition of Territorial Restrictions Among Distributors.

--In an action by a wine marketing cooperative controlled by its member grape growers against a wholesale distributor of its products seeking money due for liquor which plaintiff had sold to defendant, the trial court committed reversible error in adopting plaintiff's proposed instructions, declining to give defendant's proposed instructions and entering judgment for plaintiff and against defendant on its cross-complaint for alleged violations of the Cartwright Act, Bus. & Prof. Code, § 16700 et seq., prohibiting various restraints of trade. The record indicated plaintiff terminated defendant's distributorship after defendant refused to give plaintiff, which also acted as a distributor of its own products, a lucrative account. The trial court gave instructions under which plaintiff would be liable only if, in terminating defendant, it acted in furtherance of an agreement or conspiracy among the competing independent wholesalers to divide the territory and customers between themselves. The jury was precluded from imposing liability if it had acted alone, even if it had cancelled defendant for his refusal to yield the account. Defendant's proposed instructions were based on the theory that such conduct would violate the antitrust laws if it were carried out to enforce an illegal customer allocation agreement.

CA(2) [] (2)

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Application of Federal Cases.

--The Cartwright Act, Bus. & Prof. Code, § 16700 et seq., prohibiting certain restraints of trade, is patterned upon the federal Sherman Antitrust Act, and both have their roots in common law. Thus, federal cases interpreting the Sherman Antitrust Act are applicable with respect to the Cartwright Act.

CA(3) [] (3)

Monopolies and Restraints of Trade § 4—Sherman Act—Refusal of Manufacturer to Deal With Distributor.

--A refusal of a manufacturer to deal with a distributor can constitute a combination in restraint of trade within the purview of the federal Sherman Antitrust Act.

* Assigned by the Chairperson of the Judicial Council.

CA(4) [] (4)**Monopolies and Restraints of Trade § 4—Sherman Act—Division of Territories or Customers by Distributors.**

--Distributors cannot lawfully agree to divide territories or customers. Such conduct is sometimes called a "horizontal restraint" and is a per se violation of the federal Sherman Antitrust Act.

CA(5) [] (5)**Monopolies and Restraints of Trade § 1—Per Se Principles.**

--Per se principles are formulated in antitrust cases where the conduct involved is manifestly anticompetitive and has no clearly discernible benefits to competition. When a manufacturer restrains a distributor from selling to particular customers, such restraint serves to suppress all competition between manufacturer and distributor for the obtaining of the most desirable accounts without countervailing tendencies to foster competition between brands.

CA(6) [] (6)**Monopolies and Restraints of Trade § 10—Under Cartwright Act—Remedies of Individuals—Damages—Mitigation.**

--Defendant liquor wholesaler, who cross-complained for antitrust violations under the Cartwright Act, Bus. & Prof. Code, § 16700 et seq., against plaintiff wine manufacturer in its action for money due for liquor sold by it to defendant, was required to show the lack of an alternative comparable substitute for the products formerly obtained from plaintiff. The record indicated that plaintiff terminated defendant's liquor distributorship after it refused to turn over a lucrative account to plaintiff which also wholesaled its own products.

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Judges: Opinion by Brunn, J., * with Rattigan, Acting P. J., concurring. Separate dissenting opinion by Christian, J.

Opinion by: BRUNN

Opinion

[*630] [**88] **CA(1a)** [] (1a) This is a Cartwright Act private antitrust case. We hold that it is unlawful for a manufacturer who also distributes its own [**89] products in one geographic area to [***2] terminate an independent distributor when a substantial factor in bringing about the termination is the distributor's refusal to accept the manufacturer's attempt to enforce or impose territorial or customer restrictions among distributors. We reverse a judgment in favor of the manufacturer because of instructions to the jury inconsistent with this principle.

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* Assigned by the Chairperson of the Judicial Council.

Guild Wineries and Distillers (hereinafter Guild) sued J. Sosnick & Son (Sosnick) seeking monies due for liquor which Guild had sold Sosnick. Sosnick filed a cross-complaint alleging violations of the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.) and seeking treble damages. Before trial the parties stipulated to the amount Sosnick owed Guild. The trial proceeded on the issues joined on the cross-complaint. The jury decided in favor of Guild. Sosnick appeals from the resulting judgment.

Guild is a wine marketing cooperative controlled by its member grape growers. Guild's share of the Northern California wine market was about 2 percent at pertinent times. Guild was not a wholesale distributor of its products before 1975, but marketed them through several independent wholesalers who also handled wines of Guild's [***3] competitors.

[*631] Sosnick is a wholesaler of food and beverages based in South San Francisco. During the period which this litigation concerns, Sosnick handled hundreds of items of food and wine.

Fourteen wholesalers distributed Guild wines in Northern California. Guild assigned to each of them an area of primary responsibility adjacent to the wholesaler's headquarters. Sosnick concentrated its Guild wine marketing in San Mateo County. The territories were not entirely exclusive in practice; distributors would sell Guild products outside their territory because of overlapping customer accounts. A distributor who represented Guild in one county might wholesale another company's products in a second county and not infrequently would sell Guild wines to retailers in the latter area. Not surprisingly, this led to complaints by distributors to Guild. The evidence is in conflict as to whether Guild tried to dissuade distributors from poaching on each other's territory.

In 1975, the Guild wholesale distributorship in Fresno terminated. Guild wanted to increase its sales in the Fresno area where most of its growers were concentrated. Guild therefore took over the Fresno [***4] wholesaling itself under the name "Valley Distributors." Valley Distributors was not a separate entity, but merely a name under which Guild acted as a distributor.

The previous Fresno distributor had also been selling Guild wines to the Lucky Stores chain, whose central purchasing operations were in San Leandro and not in the Fresno area. When that distributor stopped handling Guild products, Sosnick (who was already selling Kosher foods to Lucky) began selling Guild wines to the chain at Lucky's request. A Guild executive then called Sosnick at least twice and asked Sosnick to cease selling to Lucky because Guild wanted to handle the Lucky account itself through its new Valley Distributors operation. Martin Sosnick testified that the last request was angry and threatening. The Guild executive denied making threats. About two weeks later, Guild terminated Sosnick's contract as a distributor. Several Guild executives testified that the decision to cancel Sosnick preceded the Lucky Stores incident and was not related to it.

It is undisputed that the evidence would support, although not compel, a finding that Sosnick's insistence on selling to Lucky was a substantial factor in [***5] Guild's decision to terminate Sosnick's distributorship. The evidence would also support the opposite finding.

[*632] The basic disagreement between the parties is whether liability can be predicated upon the former finding. The disagreement arose in a conflict over instructions to the jury. Guild requested and the trial court gave instructions under which Guild would be liable only if, in terminating Sosnick, [**90] it joined in and acted in furtherance of an agreement or conspiracy among the competing independent wholesalers to divide the territory and customers between themselves.¹ [***6] The jury was precluded from imposing liability if Guild had acted

¹ The trial court gave Guild's instruction No. 37: "Under the facts of this case any restrictions and limitations on territories or on customers imposed by Guild on its distributors would not constitute a violation of the antitrust laws entitling Mr. Sosnick to recover unless the acts were taken by Guild not as a producer or manufacturer interested in the distribution of its product, but rather were taken to enforce an agreement or conspiracy among the competing independent wholesalers of its product to divide the territories and customers between themselves."

"If you find that such an agreement existed, that is an agreement between the independent wholesalers to divide the market and to allocate the customers and that Guild, in terminating Sosnick, knowingly joined and acted as a party or acted in furtherance of that agreement, then you must find in favor of Sosnick and against Guild on this issue."

alone, even if it had cancelled Sosnick for his refusal to yield the Lucky account to Guild.² Sosnick's proposed instructions, which the trial court declined to give, were based on the theory that such conduct would violate the antitrust laws if it were carried out to enforce an illegal customer allocation agreement.³

[***7] [*633] //

CA(2)[↑] (2) In discussing whether the court's instructions were prejudicially erroneous, we note preliminarily that **HN1**[↑] the Cartwright Act "is patterned upon the federal Sherman Act and both have their roots in common law; hence federal cases interpreting the Sherman Act are applicable with respect to the Cartwright Act." (*Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 315 [70 Cal.Rptr. 849, 444 P.2d 481].)

CA(3)[↑] (3) We observe next that "**HN2**[↑] a refusal of a manufacturer to deal with a distributor can constitute a 'combination' in restraint of trade within the purview" of the Sherman Act. (*Bushie v. Stenocord Corporation* (9th Cir. 1972) 460 F.2d 116, 119; *United States v. Parke, Davis & Co.* (1960) 362 U.S. 29 [4 L.Ed.2d 505, 80 S.Ct. 503]; *Albrecht v. Herald Co.* (1968) 390 U.S. 145 [19 L.Ed.2d 998, 88 S.Ct. 869].)

The question is whether this is one of the situations where a manufacturer's refusal to deal runs afoul of the antitrust laws. The answer hinges on whether Guild's alleged conduct is unlawful per se or whether it is to be judged under the "rule of reason." Sosnick does not contend that the evidence would support [***8] antitrust liability under the "rule of reason" approach; were that approach to be taken, the trial court's [**91] instructions would either be correct or harmless error.

We conclude that this case -- assuming, of course, that Sosnick's refusal to agree to turn the Lucky account over to Valley was a substantial factor in Guild's decision to terminate Sosnick -- is governed by a per se principle.

CA(4)[↑] (4) It is settled that **HN3**[↑] distributors cannot lawfully agree to divide territories or customers. Such conduct is sometimes called a "horizontal restraint," and is a per se violation of the Sherman Act. (*United States v. Topco Associates* (1972) 405 U.S. 596 [31 L.Ed.2d 575, 92 S.Ct. 1126].) The principle has deep roots, going back to *Addyston Pipe & Steel Co. v. United States* (1899) 175 U.S. 211 [44 L.Ed. 136, 20 S.Ct. 96]. **CA(1b)**[↑] (1b) When Guild became a distributor the same rule became applicable to it. Guild could not lawfully coerce a fellow distributor into allocating customers any more than Sosnick and other distributors could lawfully agree to such an allocation. (*American Motor Inns, Inc. v. Holiday Inns, Inc.* (3d Cir. 1975) 521 F.2d 1230, 1253-1254 [territorial [***9] [*634] restrictions imposed by motel chain on its franchisees are horizontal restraints and illegal

²The court also gave Guild's instruction No. 36: "I instruct you that if Guild, provided it was acting alone and not pursuant to an unlawful conspiracy asked Sosnick to cease dealing with Lucky Stores because it wanted to service Lucky Stores and then terminated Sosnick because he refused, an antitrust violation could not be established for that termination."

³Sosnick's proposed instructions Nos. 17 and 19 stated: "A seller of goods has a legal right to announce to his customers that he has established a policy prohibiting such customers from reselling the goods to a specified person or persons, and to refuse to deal with any customer who does not follow the policy. But it is illegal for the seller to take affirmative action, such as threatening to stop selling to his customer, to enforce his policy. Furthermore, the law imposes two important limitations on this right:

"First, if a seller announces to his customer a policy which -- if accepted by the customer -- would result in an illegal horizontal customer allocation agreement, it is illegal for the seller to go beyond a mere announcement of the policy and use other means - - such as threats of termination if the customer refuses to comply -- which effect adherence to the policy.

"Second, it is illegal for the seller to refuse to deal with a customer, if the refusal is made pursuant to an illegal combination or conspiracy." (Inst. No. 17.)

"If a supplier (such as Guild) having an ongoing business relationship with a distributor (such as Sosnick) requests the distributor to enter into an agreement which would violate the Cartwright Act; if the distributor refuses to enter into the proposed illegal agreement; if the supplier exerts pressure upon the distributor to accept the illegal agreement; and if the supplier terminates the distributor because of the distributor's refusal to accept, then the termination itself is in violation of the Cartwright Act." (Inst. No. 19.)

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per se where the chain also operates motels]; *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.* (5th Cir. 1973) 471 F.2d 894, 899 [illegal horizontal restraint for manufacturer who also distributes to some accounts to limit territories of its distributors so as to eliminate competition between the manufacturer and its distributors.) *Hobart Brothers* and *American Motor Inns* cover the situation before us. (For a recent application of the same principle, see *Krehl v. Baskin-Robbins Ice Cream Co.* (C.D.Cal. 1978) 78 F.R.D. 108, 123.)

CA(5)[[↑]] (5) HN4[[↑]] Per se principles are formulated where the conduct involved is manifestly anticompetitive and has no clearly discernible benefits to competition. (*Continental T. V., Inc. v. GTE Sylvania Inc.* (1977) 433 U.S. 36, 50 [53 L.Ed.2d 568, 580, 97 S.Ct. 2549]; *Marin County Bd. of Realtors v. Palsson* (1976) 16 Cal.3d 920, 934 [130 Cal.Rptr. 1, 549 P.2d 833].) The undesirable effects of a manufacturer restraining a distributor from selling to particular customers are that "they serve to suppress all competition between [***10] manufacturer and distributor for the custom of the most desirable accounts [without] . . . countervailing tendencies to foster competition between brands." (*White Motor Co. v. United States* (1963) 372 U.S. 253, 272 [9 L.Ed.2d 738, 752, 83 S.Ct. 696] [Brennan, J., conc.].) The anticompetitive consequences were also lucidly noted in *Industrial Bldg. Materials, Inc. v. Interchemical Corp.* (9th Cir. 1970) 437 F.2d 1336, 1342, as follows: "The appellee cites many cases for the proposition that a manufacturer is free to agree with others to replace a distributor. In each of those cases, however, the manufacturer did not enter into competition with a distributor, and there was no removal of a competitor of the manufacturer from the market. In none of those cases did the agreement have an anticompetitive purpose or effect. [Citation.] When a distributor is replaced by another, the public is given a substitute with no diminution in the number of distributors offering services, but when a manufacturer enters the field and then removes a distributor, the public is left with only the manufacturer instead of the manufacturer and the independent distributor." (Fn. [***11] omitted.)

Guild urges that *Continental T. V., Inc. v. GTE Sylvania Inc.*, *supra*, 433 U.S. 36, changes the law. That case held that vertical, nonprice restraints by a manufacturer on distributors -- e.g., manufacturer allocation of distributor territories -- are not automatically unlawful but are to be tested under the rule of reason, i.e., by looking at the economic effects [*635] on competition. In that case, the restrictions required franchisees to sell the products from assigned locations. The manufacturer did not compete with its distributors. Not only is the case factually inapposite, but the court took pains to note that its decision did not alter the rule as to horizontal restraints: "There may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers. There is no [*92] doubt that restrictions in the latter category would be illegal per se, see, e.g., *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *United States v. Topco Associates, Inc.*, *supra* [405 U.S. 596]" (433 U.S. 36 at p. 58, fn. 28 [53 L.Ed.2d at p. 585].)

Thus, the [***12] per se rule of *Topco* (with which we started this discussion) remains unimpaired. Post-*Continental T. V., Inc.* cases have repeatedly so held, and have held further that horizontal restraints continue to be illegal per se. (See, e.g., *Gough v. Rossmoor Corp.* (9th Cir. 1978) 585 F.2d 381, 386; *Oreck Corp. v. Whirlpool Corp.* (2d Cir. 1978) 579 F.2d 126, 131 [cert. den. 439 U.S. 946 (58 L.Ed.2d 338, 99 S.Ct. 340)]; *Eiberger v. Sony Corp. of America* (S.D.N.Y. 1978) 459 F.Supp. 1276, 1284; *Krehl v. Baskin-Robbins Ice Cream Co.*, *supra*, 78 F.R.D. 108 at p. 123; *Du Pont Glore Forgan, Inc. v. Am. Tel. & Tel. Co.* (S.D.N.Y. 1977) 437 F.Supp. 1104, 1113; *Pitchford Scientific etc. v. PEPI, Inc.* (W.D.Pa. 1977) 435 F.Supp. 685, 688.) *Krehl* is a post-*Continental T. V., Inc.* decision which continues to apply the principles of *American Motor Inns* and *Hobart Brothers*, *supra*. We follow these cases to conclude that *Continental T. V.* did not sub silentio overrule *Topco*, *American Motor Inns* or *Hobart Brothers*.

At bottom, an antitrust decision of this kind is not an exercise in labeling a particular restraint "vertical" [***13] or "horizontal." That can deteriorate into "formalistic line drawing." (*Continental T. V., Inc. v. GTE Sylvania Inc.*, *supra*, 433 U.S. 36 at pp. 58-59 [53 L.Ed.2d at p. 585].) What matters is that the conduct produces only anticompetitive effects without "countervailing benefits," as we have noted above.

The dissent focuses on conceivably valid reasons of Guild's termination of Sosnick, particularly Guild's claim that he "refused to deliver promotional presale services to retail outlets, and thereby hampered Guild's efforts to increase its market share." Nothing we have said prevents Guild from offering evidence in support of this contention on

retrial. Should the jury conclude that Guild terminated Sosnick because [*636] of his inadequate promotion, Guild would prevail. On the other hand, if the termination was caused by his competition for the Lucky account, and not by his alleged failure to promote Guild's products, he would prevail on the liability issue. The concern expressed by the dissent, to the effect that Guild may take reasonable steps to enhance interbrand competition, is thus served.

The dissent would deny recovery to Sosnick, even if he proves that ***14 his termination was caused by his refusal to give up the Lucky account, on the ground that he did not also prove that Guild's conduct was "lacking in any redeeming virtue." Such a burden of proof is not necessary for the purpose of enabling the jury to deal with the economic realities of the situation. Moreover, for the reasons we stated earlier, the rule urged by the dissent is contrary to the controlling decisions and would frustrate rather than advance the purposes of the antitrust laws.

III

CA(1c)[] (1c) To sum up, Guild's liability depended on the causes of Sosnick's termination or the factors substantially affecting it. If one of these causes or factors was Sosnick's refusal to enter into an arrangement effecting a territorial or customer allocation among distributors, an antitrust violation is established. (See *Interphoto Corporation v. Minolta Corporation* (S.D.N.Y. 1969) 295 F.Supp. 711, 719-723 [affd. per curiam (2d Cir. 1969) 417 F.2d 621]; *Cornwell Quality Tools Co. v. C. T. S. Company* (9th Cir. 1971) 446 F.2d 825, 832.) Guild's proposed instructions Nos. 36 and 37, which were given by the trial court, were prejudicial because they informed the jury that liability ***15 could not be established unless they first found an "existing" agreement between Guild distributors to "divide the market and allocate customers" and further found that Guild "knowingly joined and acted as a party" to the agreement. In fact, there need not have been a concert of action among distributors, or an overt conspiracy between **93 Guild and the several distributors, in order to establish a per se violation of the antitrust laws. "If the arrangement or combination . . . is put together through the coercive tactics of the seller alone, this is sufficient." (*Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., supra*, 471 F.2d 894 at p. 900 [quoting from *Osborn v. Sinclair Refining Company* (4th Cir. 1963) 324 F.2d 566, 573-574, fn. 13]. See also *United States v. Parke, Davis & Co., supra*, 362 U.S. 29 at pp. 46-47 [4 L.Ed.2d 505 at pp. 516-517].) Such an agreement, combination or conspiracy may also be inferred [*637] from Guild's conduct. (See *United States v. Parke, Davis & Co., supra*, at p. 40 [4 L.Ed.2d at p. 513].)

Guild's instructions Nos. 36 and 37 should therefore not have been given with respect to the Lucky Stores ***16 matter, and Sosnick's instructions Nos. 17 and 19 (or a modification embodying the basic principle of liability which we have outlined) should have been given.

CA(6)[] (6) Finally, Sosnick contends that the court should not have instructed on the duty to mitigate damages. Under the circumstances, the giving of that instruction was not prejudicial, but a broad mitigation rule finds no support in appellate antitrust decisions. In the event of a retrial, the court may instruct instead that as an element of damage Sosnick must show the lack of an alternative comparable substitute for the products formerly obtained from Guild. (*Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc. (6th Cir. 1972) 459 F.2d 138, 148.*)

The judgment is reversed. The purported appeal from the order denying a new trial is dismissed.

Dissent by: CHRISTIAN

Dissent

CHRISTIAN, J. I respectfully dissent.

The majority opinion sets out a clear and well ordered review of the pertinent authorities; but I cannot concur in the decision because, in my view, the opinion inappropriately applies "per se" antitrust doctrine in such a way as to punish as anticompetitive an act which according to the evidence had predominantly ***17 procompetitive purposes and effects.

At the times relevant to this appeal, there was no price competition between wholesale distributors of Guild products. Guild set the prices at which Guild sold to the wholesale distributors, the distributors sold to retail outlets, and retailers sold to consumers. (See [Bus. & Prof. Code, §§ 24850- 24881](#). Of later effect are [Rice v. Alcoholic Bev. etc. Appeals Bd. \(1978\) 21 Cal.3d 431 \[146 Cal.Rptr. 585, 579 P.2d 476\]](#) [statutory liquor price-fixing scheme violates Sherman Antitrust Act] and [Midcal Aluminum, Inc. v. Rice \(1979\) 90 Cal.App.3d 979 \[153 Cal.Rptr. 757\]](#), cert. granted *sub. nom.* [Calif. Retail Liquor Assn. v. Midcal Aluminum \[*638\]](#) (1979) 444 U.S. 824 [62 L.Ed.2d 31, 100 S.Ct. 45] [statutory wine price-fixing scheme violates Sherman Antitrust Act].)

Guild executives testified that the commercial success of a producer's wine line depends heavily on the promotional presale services offered by wholesale distributors to retail outlets. The executives testified that to build consumer preference or demand for a particular wine brand, distributors had to engage in promotional activities with retail outlets **[***18]** to, e.g., set up floor displays for the brand, stock the brand at eye level rather than on bottom shelves, maintain well stocked refrigeration units of the chilled brand, promote white wines at Thanksgiving and red wines in winter, and so on. The spread between the price at which Guild sold its products to the distributors, and the higher price at which the distributors sold the products to the retailers, included an allowance to reimburse the distributors for performing these presale activities.

Each distributor had an area of primary responsibility. This was a geographical area adjacent to the distributor's office and warehouse in which the distributor was expected to develop demand for Guild products by delivering presale services to retailers. **[**94]** Guild did not prohibit distributors from making sales outside of their own territories, although sales goals, promotional requirements, and practical geographical constraints generally ensured that each distributor concentrated its sales efforts in its own area. There was some problem with "highspotting" or "freeriders": Typically, each distributor's territory included some retail outlets that purchased a high volume of Guild **[***19]** products, and some outlets that purchased a low volume. A distributor in one territory would expend resources to promote Guild products to both large and low volume retailers. A second distributor from another territory then would "raid" the first territory, and sell the Guild products to the large-volume retailers without having incurred any promotional costs in connection with those retailers. The remaining low volume sales would be insufficient to compensate the first distributor for the costs that it had incurred in delivering the presale services to all retailers in the territory. Even though the revenue from the sales to the low-volume outlets was not sufficient to cover distribution costs to those outlets, Guild considered it necessary to keep the outlets stocked: If Guild products were not readily available to the ultimate consumer even in small retail outlets, **[*639]** consumers would lose or not develop a preference for the Guild brand. There was conflicting testimony as to whether Guild ever intervened to prevent this freeriding.

In January of 1975, Guild hired Jack Dadum as senior vice-president in charge of marketing and sales. Dadum found Guild's low market **[***20]** share and promotional practices "horrible." In consultation with other Guild executives, he took several steps to increase Guild's market share, including three that are relevant here. First, Guild was dissatisfied with the promotional efforts and sales of DiNubilo and Company, the independent distributor in the San Joaquin Valley where most of the growermembers of the Guild cooperative were concentrated. Second, Guild management decided to integrate vertically by establishing Guild's own unincorporated wholesale distribution division, Valley Distributors, to replace DiNubilo. On March 1, 1975, Guild established Valley Distributors and terminated DiNubilo. The San Joaquin Valley became Valley Distributor's area of primary responsibility. Valley handled Guild products exclusively.

DiNubilo's major customer for Guild products had been Lucky Stores. Lucky was also one of the major retail outlet purchasers of Guild products in Northern California. When Valley Distributors took over DiNubilo's territory, Guild management expected the Lucky account to go to Valley. The revenue from the large volume sales to Lucky was necessary to offset the expenses of operating Valley Distributors. **[***21]** However, while DiNubilo had been supplying Guild products to Lucky, Sosnick had been supplying a line of Kosher foods to Lucky. When Guild terminated DiNubilo, Lucky began purchasing Guild products (in addition to Kosher foods) from Sosnick instead of from Valley.

On April 3, Guild took the third marketing step relevant here. Guild terminated Sosnick as an independent distributor. Guild contends that it terminated Sosnick because Sosnick had consistently refused to deliver

promotional presale services to retail outlets, and thereby hampered Guild's efforts to increase its market share by developing consumer preference for Guild wines. Guild claims that it decided to terminate Sosnick before Sosnick started selling to Lucky. Sosnick contends that it was terminated because it captured the Lucky Stores account, which Guild sought to reserve for Valley Distributors.

The crucial issue is whether Guild's conduct is to be examined under the rule of reason, or whether the conduct was illegal per se. Sosnick [*640] concedes that if Guild's conduct is examined under the rule of reason, then Guild's conduct was not illegal and the judgment must be affirmed. In my view the rule [***22] of reason is applicable and the judgment should be affirmed.

[**95] The legality of nonprice distribution restraints¹ was at issue in *U. S. v. Arnold, Schwinn & Co. (1967) 388 U.S. 365 [18 L.Ed.2d 1249, 87 S.Ct. 1856]*. Bicycle manufacturer Schwinn marketed its products through three principal methods: (1) sales to wholesale distributors; (2) sales to retailers by means of consignment or agency arrangements with distributors; and (3) sales to retailers under the so-called Schwinn Plan, which involved direct shipment by Schwinn to the retailer with Schwinn invoicing the dealers, extending credit, and paying a commission to the distributor taking the order. Schwinn assigned specific territories to each distributor, and each distributor could sell only to franchised retail outlets within its assigned territory. Each franchised retailer could purchase Schwinn products only from or through the distributor authorized to serve the retailer's area, and the retailer could sell only to consumers, not to unfranchised retailers. The Supreme Court held that section 1 of the Sherman Act required differentiation between the situation where the manufacturer parts with title, dominion, [***23] or risk with respect to its products, and where the manufacturer completely retains ownership and risk of loss. The court held nonprice distribution restrictions to be illegal per se if the manufacturer sold its products to distributors or retailers. The court found that such restrictions violated "the ancient rule against restraints on alienation." (*388 U.S. at p. 380 [18 L.Ed.2d at p. 1261]*.) However, nonprice restrictions were to be examined under the rule of reason if the manufacturer retained title, dominion, and risk with respect to the product, and the position and function of the distributor or retailer were indistinguishable from those of an agent or salesman of the manufacturer. The great weight of scholarly opinion was critical of the *Schwinn* decision. (See, e.g., *Continental T. V., Inc. v. GTE Sylvania Inc. (1977) 433 U.S. 36, 48 fn. 13 [53 L.Ed.2d 568, 579, 97 S.Ct. 2549]*, and authorities cited.)

[***24] [*641] The legality of nonprice distribution restraints and the continuing vitality of the *Schwinn* rule were at issue in *Continental T. V., Inc. v. GTE Sylvania Inc., supra, 433 U.S. 36*. GTE Sylvania Inc. manufactured television sets. It originally marketed its product through independent or company-owned wholesalers, who in turn resold to a large and diverse group of retailers for sale to the ultimate consumer. Prompted by a decline in its market share to a relatively insignificant 1 to 2 percent of national television sales in an industry with more than 100 manufacturers, Sylvania in 1962 phased out its wholesale distributors and began to sell to a smaller and more select group of franchised retailers. An acknowledged purpose of the new franchise plan was to decrease the number of competing Sylvania retailers in the hope of attracting the more aggressive and competent retailers thought necessary to improve the manufacturer's market position. Sylvania imposed location restrictions² on its retailers. By 1965 Sylvania ranked eighth in national television sales with 5 percent of the market. In 1965 Sylvania, dissatisfied with its sales in San Francisco, added [***25] another retail outlet in the city. The existing San Francisco retailer, Continental T. V., protested the addition. Continental also requested a franchise in Sacramento. Sylvania refused the request because it felt that the existing Sacramento retailers adequately serviced the Sacramento [**96] area.

¹ A nonprice distribution restraint restricts competition among wholesale or retail distributors by, e.g., forbidding distributors from selling from any but a designated location, assigning exclusive territories to distributors, reserving certain customers to the manufacturer, forbidding wholesale distributors from selling to other than authorized retail outlets, or forbidding distributors from selling to other distributors. (See Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision* (1977) 45 U.Chi.L.Rev. 1.)

² A location restriction limits a distributor's sales of a manufacturer's product to certain authorized outlets. The manufacturer does not assign specific territories, but as a practical matter the size of each distributor's market will be controlled and limited by the number of authorized outlets. (Note, *Antitrust Treatment of Intrabrand Territorial Restraints Within a Dual Distribution System* (1978) 56 Texas L.Rev. 1486, 1487 fn. 8.)

Relations between Continental and Sylvania deteriorated. Sylvania terminated the Continental franchise, and Continental brought suit for antitrust violations. The district court, applying the *Schwinn* rule, instructed the jury that if Sylvania imposed postsale territorial restrictions on its retailers, the conduct was illegal per se. The district court entered judgment on the jury verdict finding Sylvania liable for treble damages for violating section 1 of the Sherman Act. The United States Supreme Court disapproved the per se rule stated in [*Schwinn* \(433 U.S. 36, 58 \[53 L.Ed.2d 568, 585\]\)](#), and affirmed the decision of the Ninth Circuit reversing the district court judgment ([*id.* at p. 59 \[53 L.Ed.2d at pp. 585-586\]](#)).

[***26] The "rule of reason" is the prevailing standard of analysis to be used in evaluating combinations in restraint of trade or commerce. Under this rule, the factfinder weighs all of the circumstances of a case in deciding [*642] whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.³ ([*Continental T. V., Inc. v. GTE Sylvania Inc., supra, 433 U.S. 36, 49 \[53 L.Ed.2d 568, 580\]*](#))

[***27] Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive. ([*Continental T. V., Inc. v. GTE Sylvania Inc., supra, 433 U.S. 36, 49-50 \[53 L.Ed.2d 568, 580\]*](#)) "[There] are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." ([*Northern Pac. R. Co. v. United States \(1958\) 356 U.S. 1, 5 \[2 L.Ed.2d 545, 549, 78 S.Ct. 514\]*](#)) Per se rules require a court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice, and the severity of those consequences, must be balanced against its procompetitive consequences. A per se rule reflects the judgment that exceptions to the generalization may arise, but such exceptions are not sufficiently common or important to justify the time and expense necessary to identify them. ([*Continental T. V., Inc. v. GTE Sylvania Inc., supra*](#) [***28] , [*433 U.S. 36, 50 fn. 16 \[53 L.Ed.2d 568, 580\]*](#).) Per se rules must be based on demonstrable economic effects ([*id.* at pp. 58-59 \[53 L.Ed.2d at p. 585\]](#)). (See also Sullivan, Antitrust (1977) pp. 165-194.)

The *Sylvania* court recognized that nonprice distribution restrictions reduce intrabrand competition but promote interbrand competition. Nonprice restraints reduce intrabrand competition, the competition between wholesale or retail distributors of the product of a particular manufacturer, by limiting the number of sellers of the product competing for the business of a given group of buyers. However, the *Sylvania* [*643] court held that nonprice restrictions do not have such a pernicious effect on competition and are not so lacking of any redeeming virtue as to be illegal per se. ([*433 U.S. 36, 52 fn. 19, 54, 58-59 \[53 L.Ed.2d 568, 581, 583, 585\]*](#).)

The *Sylvania* court identified the "redeeming virtues" of nonprice distribution restrictions. ([*433 U.S. 36, 54 \[53 L.Ed.2d 568, 583\]*](#)) Interbrand competition, the competition among the manufacturers [**97] of the same generic product, "is the primary concern of antitrust law." ([*Id.* at p. 52 fn. 19](#) [***29] [[*53 L.Ed.2d at p. 581*](#)].) Nonprice restrictions may allow a manufacturer to achieve certain efficiencies in the distribution of its products, and thus to compete more effectively against other manufacturers. For example, manufacturers can use nonprice distribution restrictions, such as the territorial restrictions at issue in the present case, to induce distributors to engage in the promotional presale services thought necessary to the efficient marketing of their product. The availability and quality of such services affect a manufacturer's goodwill and the interbrand competitiveness of its product. In the absence of the distribution restriction, the "free rider" problem could arise: If one distributor offered promotional presale services, other unrestricted distributors could capture the first dealer's customers without having provided

³The classic statement of the rule of reason is that of Mr. Justice Brandeis in [*Chicago Board of Trade v. United States \(1918\) 246 U.S. 231, 238 \[62 L.Ed. 683, 687, 38 S.Ct. 242\]*](#): "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

any presale services to those customers, and thus take a "free ride" on the first distributor's services. This could deter delivery of the optimal amount of presale services. (*Id., at pp. 54-55 [53 L.Ed.2d at p. 583]*, citing Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and [***30] Potential Competition Decisions* (1975) 75 Colum.L.Rev. 282; Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards* (1965) 30 Law & Contemp. Prob. 506, 511; Samuelson, *Economics* (10th ed. 1976) pp. 506-507. See generally Posner, *Antitrust Law: An Economic Perspective* (1976) pp. 147-167; Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, supra*, 45 U.Chi.L.Rev. 1; Telser, *Why Should Manufacturers Want Fair Trade?* (1960) 3 J. Law & Econ. 86. But see Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath* (1968) 81 Harv.L.Rev. 1419. See also Sullivan, *Antitrust, supra*, pp. 399-421.)

The *Sylvania* court held that the adverse effects of nonprice distribution restrictions on intrabrand competition are outweighed by the potential for beneficial effects on interbrand competition. The restrictions therefore must be reviewed under the rule of reason, rather than [*644] under the per se doctrine. (*433 U.S. 36, 57-59 [53 L.Ed.2d 568, 584-585]*). See generally ABA Antitrust Section, Monograph No. 2, *Vertical Restrictions Limiting Intrabrand Competition* [***31] (1977) pp. 55-71; Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (1965) 74 Yale L.J. 775, (1966) 75 Yale L.J. 373; Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, supra*, 45 U.Chi.L.Rev. 1, 13-20.)

The majority opinion holds that the reasoning of the *Sylvania* decision does not apply to the present case. Guild was both a producer and a distributor of wine. As a producer, Guild was a supplier of and stood in a vertical relation to Sosnick. As a distributor, Guild was a competitor and stood in a horizontal relation to Sosnick. The question is whether the territorial and customer restrictions imposed by Guild must be treated as horizontal restrictions that are illegal per se under *United States v. Topco Associates (1972) 405 U.S. 596 [31 L.Ed.2d 515, 92 S.Ct. 1126]*.

The language of the *Sylvania* decision is limited to vertical nonprice distribution restrictions. In a footnote the court stated that horizontal nonprice distribution restrictions originating in agreements among retailers would be illegal per se. (*433 U.S. 36, 58, fn. 28 [53 L.Ed.2d 568, 585]*, citing *United [***32] States v. Topco Associates, supra, 405 U.S. 596*, and *United States v. General Motors Corp. (1966) 384 U.S. 127 [16 L.Ed.2d 415, 86 S.Ct. 1321]*.) The meaning of this dictum is unclear. Whether distribution restrictions are to be examined under the rule of reason or under the per se doctrine should not turn on whether the restrictions were imposed by the manufacturer or by downstream distributors. The *Sylvania* court acknowledged that the location restrictions at issue there "involved understandings or agreements with the retailers." (*433 U.S. 36, 40 fn. 8 [53 L.Ed.2d 568, 574]*.) As Professor Posner points out: "Dealers as well as the manufacturer [**98] are hurt by free-riding; it is a detail whether the initiative in seeking to prevent free-riding was taken by the dealers or the manufacturer. This point was missed in Justice Fortas's opinion for the Court in [*United States v. General Motors Corp., supra, 384 U.S. 127*] The Court . . . ruled that because competing dealers had collaborated to enlist General Motors' assistance in enforcing the location clause, the case involved an illegal per se horizontal conspiracy, regardless of the reasonableness [***33] of the clause. But if the clause was reasonable, the dealers should have been entitled to band together for the innocent purpose of persuading General Motors to carry out mutually beneficial contractual obligations." [*645] (Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, supra*, 45 U.Chi.L.Rev. 1, 19-20. See also Posner, *Antitrust Law: An Economic Perspective, supra*, pp. 165-166; Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term-1977* (1977) 77 Colum.L.Rev. 979, 986-989.)

Moreover, the *Sylvania* court recognized that problems would arise in differentiating vertical from horizontal distribution restrictions. (*433 U.S. 36, 58, fn. 28 [53 L.Ed.2d 568, 585]*.) In the instant case, Guild was both a producer and a distributor of wine, and also used independent wholesale distributors. Whether nonprice distribution restrictions in such a dual distribution system ⁴ are to be examined under the rule of reason or under the per se

⁴ A manufacturer employing a dual distribution system markets a product through two separate and competitive channels. The manufacturer supplies independent retailers either directly or through its wholly-owned branch distributors. It also supplies the product to independent distributors who resell to retailers. Consequently, the manufacturer, whether or not vertically integrated,

doctrine should not turn on whether the restrictions are pigeonholed as horizontal or vertical. This is the type of "formalistic line drawing" condemned in [***34] *Sylvania*. ([433 U.S. 36, 59 \[53 L.Ed.2d 568, 585\]](#). See also Note, *Antitrust Treatment of Intrabrand Territorial Restraints Within a Dual Distribution System*, *supra*, 56 Texas L.Rev. 1486 and cases cited.)

The Supreme Court in *Topco* stated [***35] that the courts should use per se rules as a substitute for examining "difficult economic problems" ([405 U.S. 596, 609 \[31 L.Ed.2d 515, 526\]](#)) because courts are "of limited utility" (*ibid.*) in balancing the effects of distribution restrictions on intrabrand versus interbrand competition. (*Id.*, pp. 609-612 [31 L.Ed.2d 526-528].) This cannot be reconciled with the position taken by the Supreme Court in *Sylvania*. The *Sylvania* court, influenced by the economic literature (see, e.g., [433 U.S. 36, 54-57 \[53 L.Ed.2d 568, 582-585\]](#) and authorities cited), concluded that courts must assess the intent, competitive impact, and demonstrable economic effect of a nonprice distribution restriction before declaring the restraint to be prohibited by the antitrust laws. (*Id.*, at pp. 46, 59 [53 L.Ed.2d at pp. 577, 585].) The *Topco* court felt that without per se rules, the business community would be left with little guidance as to what courts will [*646] find to be legal and illegal under the *Sherman Act* ([405 U.S. 596, 609, fn. 10 \[31 L.Ed.2d 515, 527\]](#)). The *Sylvania* court acknowledged that per se rules provide guidance to the business community and minimized [***36] the burdens on the courts and litigants as compared to rule of reason trials. However, the *Sylvania* court held that those advantages are not sufficient in themselves to justify the creation of per se rules. The *Topco* court referred to the antitrust laws as "the Magna Carta of free enterprise" ([405 U.S. 596, 610 \[31 L.Ed.2d 515, 527\]](#)) which guaranteed every business the freedom to compete in every section of the economy, whether intrabrand or interbrand (*id.*, at pp. 610-612 [31 L.Ed.2d at pp. 527-528]). This is contrary to the *Sylvania* [**99] court's explicit sanctioning of limits on wholesale and retail dealer autonomy.

It appears that the per se rule of *Topco* should be limited to situations where "it is clear that the restraint . . . is a horizontal one" (*United States v. Topco Associates, supra*, [405 U.S. 596, 608 \[31 L.Ed.2d 515, 526\]](#)) "originating in agreements among . . . retailers" (*Continental T. V., Inc. v. GTE Sylvania Inc., supra*, [433 U.S. 36, 58, fn. 28 \[53 L.Ed.2d 568, 585\]](#); see also *id.*, at p. 48, fn. 14 [53 L.Ed.2d at p. 579]; cf. *Fuchs Sugars and Syrups, Inc. v. Amstar Corp.* (2d Cir. 1979) [602 F.2d 1025, \[***37\] 1030](#), cert. den. (Oct. 16, 1979) [444 U.S. 917 \[62 L.Ed.2d 172, 100 S.Ct. 232\]](#); *Magnus Petroleum Co., Inc. v. Skelly Oil Co. (7th Cir. 1979) 599 F.2d 196, 204*, cert. den. (Oct. 16, 1979) [444 U.S. 916 \[62 L.Ed.2d 171, 100 S.Ct. 231\]](#)). The challenged restrictions in the present case are not exclusively horizontal, and there is no evidence that the restrictions originated in agreements among retailers. There was substantial evidence that Guild adopted the restrictions in order to promote interbrand competition and to guard against freeriders. Sosnick did not establish that Guild's conduct had such a pernicious effect on competition and was so lacking in any redeeming virtue as to be illegal per se. I would hold that the restrictions should be reviewed under the *Sylvania* rule of reason approach. Sosnick does not argue that the Guild restrictions are illegal under the rule of reason.

I would affirm the judgment.

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faces competition on two market levels. On the production level, it competes interbrand with other manufacturers of the same generic product; on the distribution level, it competes intrabrand with the independent distributors of its own brand." (Note, *Antitrust Treatment of Intrabrand Territorial Restraints Within a Dual Distribution System*, *supra*, 56 Texas L.Rev. 1486, 1489.)



Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.

Court of Appeal of California, First Appellate District, Division Two

January 30, 1980

Civ. No. 40428

Reporter

101 Cal. App. 3d 532 *; 161 Cal. Rptr. 811 **; 1980 Cal. App. LEXIS 1420 ***; 1980-1 Trade Cas. (CCH) P63,040

SUBURBAN MOBILE HOMES, INC., Plaintiff and Appellant, v. AMFAC COMMUNITIES, INC., et al., Defendants and Respondents

Subsequent History: [***1] Respondents' petitions for a hearing by the Supreme Court were denied April 17, 1980.

Prior History: Superior Court of San Mateo County, No. 177201, Thomas M. Jenkins, Judge.

Disposition: That portion of the judgment granting a nonsuit as to the tie-in cause of action is reversed; in all other respects the judgment is affirmed.

Core Terms

mobilehome, tying arrangement, tied product, dealers, sales, economic power, tying product, spaces, tie-in, respondents', antitrust, damages, Sherman Act, buyers, mobile home, commerce, display, nonsuit, coach, Cartwright Act, insubstantial, appreciable, cases, tying agreement, home site, participating, double-wide, customers, reserving, restrain

LexisNexis® Headnotes

Civil Procedure > ... > Pretrial Judgments > Nonsuits > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN1[] Pretrial Judgments, Nonsuits

A nonsuit or directed verdict may be granted only where, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. Neither the appellate court nor the lower court may weigh the evidence or consider the credibility of the witnesses. A plaintiff may rely on that portion of testimony which is favorable to him and disregard the unfavorable portions. Unless it can be said as a matter of law that no other reasonable conclusion

is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the court is not justified in taking the case from the jury.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2 [down] **Regulated Practices, Private Actions**

Summary proceedings are not favored in antitrust suits.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

HN3 [down] **Antitrust & Trade Law, Sherman Act**

Federal cases interpreting the Sherman Antitrust Act are applicable to problems arising under the Cartwright Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN4 [down] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

See [Cal. Bus. & Prof. Code § 16720](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN5 [down] **Price Fixing & Restraints of Trade, Tying Arrangements**

For the purposes of antitrust violation, a tying arrangement is defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Tying arrangements are illegal per se whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, and when a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN6 [down] **Tying Arrangements, Per Se Rule**

In order to prove an illegal per se tying arrangement there must be a showing that a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; that the party had sufficient economic power in the tying market to coerce the purchase of the tied product; and that a substantial amount of sale was effected in the tied product. Lastly, since the antitrust violation is a species of tort, the complaining party must prove that he suffered pecuniary loss as a consequence of the unlawful act.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Torts > Remedies > Damages > General Overview

HN7 Private Actions, Remedies

While damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, a plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN8 Price Fixing & Restraints of Trade, Tying Arrangements

For purposes of **antitrust law**, the standard of illegality under the tying theory is that the seller must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. The requirement that a "not insubstantial" amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

In an antitrust action by a mobilehome dealer against the owner and developer of a mobilehome park and three other mobilehome dealers, the trial court granted defendants' motion for nonsuit as to all causes of action at the conclusion of plaintiff's evidence. The complaint charged multiple violations of the Cartwright Act, including an illegal restraint of trade and an illegal tie-in arrangement. Plaintiff alleged that it had suffered economic loss by reason of an illegal tying arrangement between defendants whereby plaintiff was prevented from making sales of coaches to persons leasing space in the park. The evidence showed that, under a written agreement, defendant park owner had reserved over half of its spaces for four dealers, including defendant dealers, who had the exclusive right to show their homes in the park and who were bound to pay defendant owner a monetary contribution after the sale of each coach. It was further shown that such restrictive policy was strictly carried out and that the park was desirable and unique in every respect and was the only one in the area that had spaces for the double-wide coaches sold by plaintiff. Plaintiff also established that it had been able to make only 6 of 253 sales effected in the park in the period in question and that its share of total mobilehome sales was drastically reduced in the year following the institution of the restrictive practices. Plaintiff also introduced evidence of losses of sales or potential sales to particular individual customers. (Superior Court of San Mateo County, No. 177201, Thomas M. Jenkins, Judge.)

The Court of Appeal reversed that portion of the judgment granting a nonsuit as to the tie-in cause of action, and in all other respects affirmed the judgment. The court held that plaintiff had made out a *prima facie* case of an illegal per se tying arrangement under both the Sherman Antitrust Act ([15 U.S.C. § 1, et seq.](#)) and the Cartwright Act ([Bus. & Prof. Code, §§ 16720, 16726](#)) and that the trial court therefore erred in granting defendants' motion as to that cause of action. The court held that in order to prove an illegal per se tying arrangement there must be a showing that a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; that the party had sufficient economic power in the tying market to coerce the purchase of the tied product; that a substantial amount of sale was effected in the tied product; and that the complaining party suffered pecuniary loss as a consequence of the unlawful act. The court further held that the existence of all those conditions in the case before it was abundantly supported by the record. (Opinion by Calhoun, J., * with Taylor, P. J., and Miller, J., concurring.)

Headnotes

CA(1) [down] (1)

Dismissal and Nonsuit § 43—Nonsuit and Motion for Entry of Judgment ([Code Civ. Proc., §§ 581c](#) and [631.8](#))—When Motion May Be Granted.

--A nonsuit or directed verdict may be granted only where, disregarding conflicting evidence and giving to the plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. Neither the appellate court nor the lower court may weigh the evidence or consider the credibility of the witnesses. The plaintiff may rely on that portion of testimony which is favorable to him and disregard the unfavorable portions. Unless it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it on appeal, or the trial court to set it aside as a matter of law, the court is not justified in taking the case from the jury.

CA(2) [down] (2)

Monopolies and Restraints of Trade § 5—Actions—Propriety of Summary Procedures.

--Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

CA(3) [down] (3)

Monopolies and Restraints of Trade § 6—Under Cartwright Act—Applicability of Decisions Under Sherman Act.

--[Bus. & Prof. Code, §§ 16720, 16726](#) (Cartwright Act) were patterned after the Sherman Act ([15 U.S.C. § 1 et seq.](#)), and both statutes have their roots in the common law. Consequently, federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act.

CA(4) [down] (4)

Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations.

* Assigned by the Chairperson of the Judicial Council.

--Both the Sherman Act and the Cartwright Act prohibit every contract, combination or trust which is formed for the purpose of restraining trade or commerce ([15 U.S.C. § 1; Bus. & Prof. Code, §§ 16720, 16726](#)). Although the statutory language prohibiting restraints on trade or commerce is couched in all-encompassing terms in both acts, each is interpreted to ban only unreasonable restraints. However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Among practices deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.

[CA\(5\)](#) [] (5)

Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—Tying Arrangements.

--For the purpose of antitrust violation, a tying arrangement is defined as an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agree that he will not purchase that product from any other supplier. Tying arrangements are illegal per se whenever a party has sufficient economic power with respect to the tying market to appreciably restrain free competition in the market for the tied product, and when a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie.

[CA\(6a\)](#) [] (6a) [CA\(6b\)](#) [] (6b)

Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—Tying Arrangements.

--In order to prove an illegal per se tying arrangement in antitrust litigation there must be a showing that a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; that the party had sufficient economic power in the tying market to coerce the purchase of the tied product; that a substantial amount of sale was effected in the tied product; and that the complaining party suffered pecuniary loss as a consequence of the unlawful act. The power over the tying product can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some buyers in the market. Such crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.

[CA\(7a\)](#) [] (7a) [CA\(7b\)](#) [] (7b) [CA\(7c\)](#) [] (7c)

Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—Tying Arrangements—Evidence—Sufficiency.

--In an antitrust action by a mobile home dealer against the owner and developer of a mobile home park and three other mobile home dealers, plaintiff made out a prima facie case of an illegal per se tying arrangement under both the Sherman Antitrust Act ([15 U.S.C. § 1 et seq.](#)) and the Cartwright Act ([Bus. & Prof. Code, §§ 16720, 16726](#)), and the trial court therefore erred in granting defendants' motion for nonsuit at the conclusion of plaintiff's evidence. Under a written agreement, defendant park owner had reserved over half of its spaces for four dealers, including defendant dealers, who had the exclusive right to show their homes in the park and who were bound to pay defendant owner a monetary contribution after the sale of each coach, and the evidence showed that the restrictive policy was strictly carried out. The park was desirable and unique in every respect and it was the only one in the area that had spaces for the double-wide coaches sold by plaintiff. During the period in question plaintiff was able to make only 6 of 253 sales effected in the park. Furthermore, plaintiff introduced proof that its share of sales was

drastically reduced in the year following the institution of the restrictive practice and also introduced evidence of losses of sales or potential sales to particular individual customers.

CA(8) [] (8)

Monopolies and Restraints of Trade § 5—Actions—Damages.

--In antitrust cases, the common law rules of damages are not controlling. While damages cannot be awarded in antitrust cases on sheer guesswork or speculation, a plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between the defendant's wrongful act and some loss of anticipated revenue. Once that has been accomplished, the jury will be permitted to act on probable and inferential proof and to make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.

CA(9) [] (9)

Damages § 31—Evidence—Weight and Sufficiency.

--While a plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of the defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult to ascertain with precision. The law only requires that some reasonable basis of computation be used and will allow damages so computed even if the result has been reached by way of approximation.

CA(10) [] (10)

Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—Tying Arrangements—Evidence—Market Area.

--An actionable tying agreement under antitrust law may be established without the introduction of evidence as to relevant geographic market. The requisite control of the tying product may be inferred from the seller's success in imposing a tying condition upon a substantial amount of commerce in the tied product without any further reference to the market.

CA(11) [] (11)

Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—Tying Arrangements—Evidence—Parties Involved in Arrangement.

--The illegality of a tying agreement under antitrust law does not depend on a showing that one party or entity offered both the tying product and the tied product. A violation may be found if the offeror of the tying product has an economic interest in the tied product, even though the tied product is manufactured or otherwise produced by another party or entity.

CA(12) [] (12)

Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—Tying Arrangements—Evidence—Coercion of Buyers.

--"Coercion," for purposes of establishing a violation of antitrust laws by virtue of a tying arrangement occurs when a buyer must accept the tied item and forego possible desirable substitutes.

CA(13) [] (13)

Monopolies and Restraints of Trade § 7—Under Cartwright Act—Prohibited Agreements and Combinations—Tying Arrangements—Applicable Statutes.

--Bus. & Prof. Code, § 16727, a part of the Cartwright Act, was not applicable in an action by a mobilehome dealer against the owner and developer of a mobilehome park and three other mobilehome dealers based on allegations of an illegal tying arrangement with respect to mobilehome sales and leases of space in the park. The statute refers only to goods, merchandise, machinery, supplies and commodities, whereas the tying product at issue was land.

Counsel: Carr, Smulyan & Hartman and Yale H. Smulyan for Plaintiff and Appellant.

Gendel, Raskoff, Shapiro & Quittner, Richard I. Berger, Frank C. Christl, Palmer, Grundstrom & Duckworth and Bruce M. Palmer for Defendants and Respondents.

Judges: Opinion by Calhoun, J., * with Taylor, P. J., and Miller, J., concurring.

Opinion by: CALHOUN

Opinion

[*537] [*813] This is an appeal from a judgment of nonsuit rendered in favor of defendants in an action brought for violation of the California antitrust law (Cartwright Act, Bus. & Prof. Code, 1. § 16700 et seq.).

[***2] The parties to the lawsuit are plaintiff Suburban Mobile Homes, Inc. (hereafter Suburban or appellant) and four named defendants (hereafter respondents): AMFAC Communities, Inc. (AMFAC), Instant [*538] Housing Corp. (Instant), Roberts & Aguirre Mobile Home Sales, Inc. (R & A), and S & S Mobile Home Sales, Inc. (S & S). Suburban is a mobile home dealer with its principal place of business in South San Francisco. AMFAC is the owner and developer of a mobilehome park known as "Franciscan Bay Mobile Country Club" (hereafter Franciscan), located in Daly City, California. The three other respondents are mobilehome dealers, selling mobilehomes in the San Francisco trading area and elsewhere.

The centerpiece of the present litigation is the use of mobilehome sites in the Franciscan. As the relevant evidence reveals, the Franciscan was developed by AMFAC by about 1971. It had 501 mobilehome sites capable of accommodating double-wide mobile homes sold by Suburban. While at the outset the Franciscan was an open park where home sites were available to all buyers irrespective of from which dealer they purchased their mobilehomes, at the end of 1971 AMFAC entered into agreement with [***3] four mobilehome dealers, including the three correspondents here. In essence, these agreements and the amendments thereto, secured 288 spaces out of the 501 total for 4 named participating dealers who gained exclusive right to display their mobilehomes in the Franciscan. In return for an exclusive right to display their merchandise and reservation of home sites in the park, the participating dealers were obligated to pay a certain sum of money to AMFAC. For instance, the park promotion agreement concluded between R & A and [*814] AMFAC provided that R & A shall contribute to the park promotion and advertising costs up to \$ 1,200 per month, and also that R & A shall pay AMFAC \$ 200 for each

* Assigned by the Chairperson of the Judicial Council.

¹ Unless otherwise indicated, all further references will be made to the Business and Professions Code of California.

coach sold in the park in consideration for reserving space for the home sold. The evidence introduced at trial showed that until fall 1972, R & A in fact paid AMFAC \$ 500 for every coach sold in the Franciscan.

Since the sales of mobilehomes are dependent upon the availability of suitable mobilehome sites in the trading area, Suburban's business was seriously affected by the aforesaid restrictive agreements and the actual sales practice conducted pursuant thereto. The evidence adduced [***4] at the trial convincingly demonstrated that the older parks belonging to or surrounding the San Francisco trading area were already full prior to 1971, the opening date of the Franciscan. At the same time, it was shown that the Franciscan was an outstanding five-star park. It had large spaces and full recreational facilities, and was the only park close to San Francisco that had double-wide spaces available. The evidence [*539] as a whole leaves no doubt that the Franciscan was a unique park, both because of its location and superb facilities.

The record is replete with evidence that the exclusion of Suburban from the Franciscan resulted in considerable actual and/or potential loss of profit to appellant. Thus, it was shown that Suburban had a waiting list of customers for the Franciscan; that there were numerous prospects (half a dozen a week) who wanted mobilehomes in the Franciscan; and that there were a number of concrete sales or potential sales which were lost because of the unavailability of mobilehome sites in the Franciscan to the Suburban customers. In addition, it was statistically demonstrated that while Suburban filled 90 to 95 percent of the mobilehome park [***5] vacancies in northern San Mateo County from 1971 to 1975, in the disputed period it could sell only 6 mobilehomes of the total of 253 sales in the park.

Based upon the foregoing facts, appellant brought an action against respondents charging multiple violation of the Cartwright Act, including an illegal restraint of trade and an illegal tie-in arrangement ([§§ 16720, 16726, 16727](#)). Upon the conclusion of Suburban's evidence, the trial court refused to submit the case to the jury and granted respondents' motion for nonsuit. In accordance therewith, judgment was entered as to all causes of action in favor of respondents. The appeal is taken from the judgment.

Appellant contends on appeal that the trial court erred in granting respondents' motion for nonsuit, because the evidence of record supports the elements of an illegal tie-in arrangement which constitutes a per se violation of the Cartwright Act ([§§ 16720, 16726, 16727](#)). In the alternative, appellant argues that the evidence is sufficient to prove a restraint of trade under the "rule of reason" standard ([§ 16720; Standard Oil Co. v. United States \(1911\) 221 U. S. 1 \[55 L.Ed. 619, 31 S.Ct. 502\]; Marin County Bd. \[***6\] of Realtors, Inc. v. Palsson \(1976\) 16 Cal.3d 920, 930 \[130 Cal.Rptr. 1, 549 P.2d 833\]](#)), even if the preconditions of an unlawful tying arrangement or agreement are absent. We are persuaded that respondents' conduct, as reflected by the evidence, clearly amounts to an illegal tying arrangement which, under well established case law, constitutes a per se violation of both the federal **antitrust law** (Sherman Act, [15 U.S.C. § 1 et seq.](#)) and the California Cartwright Act ([§§ 16720, 16726](#)). Accordingly, we are compelled to reverse the judgment.

[*540] [CA\(1\)](#) [↑] (1) Before discussing appellant's contention on the merits, we underline a few important preliminary matters. First is the legal principle under which a nonsuit may be granted. It has become the established law of this state that [HN1](#) [↑] a nonsuit or directed verdict may be granted only where, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, therein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict [**815] in favor of the plaintiff [***7] ([O'Keefe v. South End Rowing Club \(1966\) 64 Cal.2d 729, 733 \[51 Cal.Rptr. 534, 414 P.2d 830, 16 A.L.R.3d 1\]; Morgenroth v. Pacific Medical Center, Inc. \(1976\) 54 Cal.App.3d 521, 530 \[126 Cal.Rptr. 681\]](#)). Neither the appellate court nor the lower court may weigh the evidence or consider the credibility of the witnesses ([Lasry v. Lederman \(1957\) 147 Cal.App.2d 480 \[305 P.2d 663\]](#)). Plaintiff may rely on that portion of testimony which is favorable to him and disregard the unfavorable portions ([Anthony v. Hobbie \(1945\) 25 Cal.2d 814 \[155 P.2d 826\]](#)). Unless it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the court is not justified in taking the case from the jury (

Estate of Lances (1932) 216 Cal. 397, 400 [14 P.2d 768]; Umsted v. Scofield Eng. Const. Co. (1928) 203 Cal. 224, 228 [263 P. 799].

The second point is that HN2[] summary proceedings are not favored in antitrust suits. CA(2)[] (2) As the [***8] court put it in Poller v. Columbia Broadcasting (1962) 368 U.S. 464, 473 [7 L.Ed.2d 458, 464, 82 S.Ct. 468], "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." (See also Fortner Enterprises v. U.S. Steel (1969) 394 U.S. 495, 500 [22 L.Ed.2d 495, 503, 89 S.Ct. 1252]; Santa Clara Valley Distributing v. Pabst Brewing (9th Cir. 1977) 556 F.2d 942, 944-945.)

CA(3)[] (3) Finally, it has been widely recognized that sections 16720 and 16726 of the Cartwright Act were patterned after the Sherman Act (15 U.S.C. § 1 et seq.), and both statutes have their roots in the common law (Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal.3d 842, 852 [94 Cal.Rptr. 785, 484 P.2d 953]). Consequently, HN3[] federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act (Marin County Bd. of Realtors, Inc. [*541] v. Palsson, supra, 16 Cal.3d 920, 925; Chicago Title Ins. Co. v. Great Western Financial Corp. (1968) 69 Cal.2d 305, 315 [70 Cal.Rptr. ***9] 849, 444 P.2d 481; Sherman v. Mertz Enterprises (1974) 42 Cal.App.3d 769, 775 [117 Cal.Rptr. 188]). With these preliminary considerations in mind, next we set out the legal principles governing the tying agreements or arrangements and apply them to the facts of the instant case.

CA(4)[] (4) Both the Sherman Act and its California equivalent, the Cartwright Act, prohibit every contract, combination or trust which is formed for the purpose of restraining trade or commerce.² Although the statutory language prohibiting restraints on trade or commerce is couched in all-encompassing terms in both acts, each has been interpreted by the courts to ban only unreasonable restraints (Standard Oil Co. v. United States, supra, 221 U.S. 1, 60 [55 L.Ed. 619, 645]; People v. Building Maintenance etc. Assn. (1953) 41 Cal.2d 719, 727 [264 P.2d 31]). However, as the United States Supreme Court put it in Northern Pac. R. Co. v. United States (1958) 356 U.S. 1, 5 [2 L.Ed.2d 545, 549-550, 78 S.Ct. 514], "there are certain agreements or practices which because of their pernicious effect on competition [**816] and lack of any redeeming virtue are conclusively presumed [***10] to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken. Among the practices [*542] which the courts have heretofore deemed to be unlawful in and of themselves are price fixing [citation]; division of markets [citation]; group boycotts [citation]; and tying arrangements [citation]." (Italics added.)

[***11] CA(5)[] (5)

² 15 United States Code section 1 (Sherman Act) provides in part that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."

Section 16720 of the Cartwright Act sets out in relevant part that HN4[] "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." (Italics added.)

Section 16726, in turn, reads that "Except as provided in this chapter, every trust is unlawful, against public policy and void." (Italics added.)

HN5 [↑] For the purposes of antitrust violation, a tying arrangement is defined as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed." (*Northern Pac. R. Co. v. United States, supra, 356 U.S. at pp. 5-6 [2 L.Ed.2d at p. 550]*; *Corwin v. Los Angeles Newspaper Service Bureau, Inc., supra, 4 Cal.3d at p. 856*.) The evil accompanying the tying arrangement is described as follows: "[Tying] agreements serve hardly any purpose beyond the suppression of competition.' *Standard Oil Co. of California v. United States, 337 U.S. 293, 305-306*. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare [***12] harshly under the laws forbidding restraints of trade.' *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 606*" (*Northern Pac. R. Co. v. United States, supra*.) Tying arrangements are illegal per se "whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . ." (*Northern Pac. R. Co. v. United States, supra at p. 6 [2 L.Ed.2d at p. 550]*), and when "a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie." (*Fortner Enterprises v. U.S. Steel, supra, 394 U.S. at p. 501 [22 L.Ed.2d at p. 504]*.)

CA(6a) [↑] (6a) In sum, **HN6** [↑] in order to prove an illegal per se tying arrangement there must be a showing that: (1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; and (3) a substantial amount of sale was effected in the tied product. Lastly, since the antitrust violation is a species [***13] of tort, (4) the complaining party must prove that he suffered pecuniary loss as a consequence of the unlawful act (*Beegle v. Thomson (7th Cir. 1943) [*543] 138 F.2d 875, 881; Alberto-Culver Company v. Andrea Dumon, Inc. (N.D. Ill. 1969) 295 F.Supp. 1155, 1157; McCormack v. Theo. Hamm Brewing Co. (D.Minn. 1968) 284 F.Supp. 158, 164*).

CA(7a) [↑] (7a) As will be demonstrated below, all four conditions enumerated above find abundant support in the record which is but another way of saying that appellant made out a *prima facie* case for the consideration of the jury under the doctrine of an illegal tying arrangement.

(a) *Existence of Tying Arrangement:* As noted earlier, the existence of a tying arrangement between AMFAC and the four participating mobilehome dealers (including respondents Instant, R & A and S & S) was evidenced first by the December 29, [**817] 1971, agreement which explicitly put aside and reserved 288 out of 501 home sites in the park for those dealers who displayed their mobilehomes in the Franciscan and who, under the terms of other agreements and understandings, were bound to pay monetary contribution to AMFAC after each coach that was sold in [***14] the park. In addition to the written agreements, there is a host of evidence showing that the restrictive policy agreed upon by the parties was strictly carried out in the every day practice. For example, Instant told people coming to see its mobilehome display that it would be necessary to purchase the home from it or other dealers in the area (not Suburban) if they wanted a space in the Franciscan. Mr. Cole, the park manager of AMFAC, also advised people that reservations in the park were up to the management, and that anyone reserving a space for his mobilehome would have to purchase the home from one of the dealers who displayed homes in the park. Mr. O'Neil, the sales representative of R & A, likewise admitted that when people came to the Franciscan they were told that they must buy through one of the displaying dealerships (most specifically through R & A) if they wanted to get a home site in the park. The above testimonies were reaffirmed by individual home buyers as well. Thus, Mr. Bishop testified that although he wanted to buy a mobilehome from Suburban, he was told by Instant that only certain dealers could get their homes on the Franciscan spaces. Mrs. Varni, who [***15] had already made a deposit in order to purchase a mobilehome from Suburban, rescinded the deal and bought her coach from R & A, upon learning from AMFAC that only those people could move into the park who bought their homes from one of the participating dealers. Finally, the February 27, 1972, advertisement published in the San Francisco Chronicle also made it clear that the potential buyers had to select their home from the mobilehomes on display in the park.

[*544] (b) *Economic Power of AMFAC:* **CA(6b)** [↑] (6b) Before resorting to the record to show that AMFAC possessed sufficient economic power to impose an appreciable restraint on the free competition of the tied product (here, mobilehomes), we emphasize that the power over the tying product (here, home sites) can be sufficient even

though the power falls short of dominance and even though the power exists only with respect to some buyers in the market. As the cases unanimously underline, such crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes ([United States v. Loew's, Inc. \(1962\) 371 U.S. 38, 45 \[9 L.Ed.2d 11, 18, 83 S.Ct. 97\]](#); [Fortner Enterprises \[***16\] v. U. S. Steel, supra, 394 U.S. at p. 503 \[22 L.Ed.2d at p. 505\]](#); [Lessig v. Tidewater Oil Company \(9th Cir. 1964\) 327 F.2d 459, 470](#)).

CA(7b)[] (7b) In the case at bench, the evidence demonstrates that the Franciscan was both desirable and unique within the meaning of the aforestated rule. As mentioned earlier, the Franciscan had an excellent location attracting many potential mobilehome customers in the San Francisco Bay Area. The other parks within commuting distance of San Francisco (i.e., in San Mateo, Santa Clara, Alameda, Contra Costa and Marin Counties), with a few exceptions, were filled at the time the Franciscan opened in 1972. The desirability of the Franciscan was demonstrated *inter alia* by the fact that Suburban had a backlog of customers waiting for spaces in the Franciscan, and that dozens of other customers expressed their interest in placing their mobilehomes in the Franciscan. At the same time, the Franciscan was not only highly desired but also unique. As pointed out earlier, it was a first-class park with large sites and full recreational facilities, including swimming pools. Moreover, it was the only park close to and within commuting distance of San Francisco [***17] that had spaces for double-wide coaches sold by Suburban.

(c) *Substantiality of Sales:* The record is also revealing with respect to the third element of an illegal tie-in arrangement, that is the requisite of a substantial volume of sales in the tied product. A short summary of the pertaining evidence discloses that the sale of mobile homes was tied up as to 288 spaces out of 501. The data presented at [**818] the trial substantiate that appellant's rivals took full advantage of the illegal tying agreement. Out of the 253 sales effected in the park, 247 were made by appellant's competitors (113 by R & A, 62 by Instant, 51 by S & S, and 16 all others), and appellant was able to sell only 6 mobilehomes out of the total of 253. Considering the circumstance that [*545] in the period in question the sales price of single-wide mobilehomes ranged from \$ 7,000 to \$ 12,000 and the double-wides from \$ 10,000 to \$ 20,000, even taking a low average of \$ 10,000 per coach, the amount of sales in the tied product exceeds \$ 2.5 million. This volume of sales, of course, cannot be considered insubstantial or de minimis, especially in light of the case law which held that the sum of [***18] \$ 60,800 was regarded to be a not insubstantial amount of commerce in [United States v. Loew's, Inc., supra, 371 U.S. 38, 49 \[9 L.Ed.2d 11, 20-21\]](#), and likewise the sum of almost \$ 200,000 was not looked upon as "paltry or 'insubstantial'" in [Fortner Enterprises v. U.S. Steel, supra, 394 U.S. 495, 502 \[22 L.Ed.2d 495, 504\]](#).

(d) *Proof of Damages:* We are equally satisfied appellant provided sufficient proof that as a result of the illegal tying arrangement it suffered considerable loss by virtue of loss of profit. **CA(8)[]** (8) In this connection, it bears emphasis that in antitrust cases the common law rules of damages are not controlling. **HNT[]** While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue ([Flintkote Company v. Lysfjord \(9th Cir. 1957\) 246 F.2d 368, 392](#)). Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to "make a just and reasonable [***19] estimate of the damage based on relevant data, and render its verdict accordingly." ([Bigelow v. RKO Radio Pictures \(1946\) 327 U.S. 251, 264 \[90 L.Ed. 652, 660, 66 S.Ct. 574\]](#).) **CA(9)[]** (9) This is in line with the California authorities which emphasize that while the plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of the defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult to ascertain with precision ([Stott v. Johnston \(1951\) 36 Cal.2d 864, 875 \[229 P.2d 348, 28 A.L.R.2d 580\]](#)). On the contrary, the law only requires that some reasonable basis of computation be used and will allow damages so computed even if the result has been reached by way of approximation ([Allen v. Gardner \(1954\) 126 Cal.App.2d 335, 340 \[272 P.2d 99\]](#)). And where, as here, the operation of an established business was prevented or interrupted by the tort of the defendants, it has been held that the loss of prospective profits may be proven by the past volume of business and other provable data relevant to the probable future sales ([Grupe v. \[*546\] \[***20\] Glick \(1945\) 26 Cal.2d 680, 692 \[160 P.2d 832\]](#); [Gainer v. Storck \(1959\) 169 Cal.App.2d 681, 687-688 \[338 P.2d 195\]](#)).

CA(7c)[[↑]] (7c) Appellant here established with reasonable certainty the required causal connection between respondents' wrongful conduct and its business loss suffered as a result of such conduct, and also provided sufficient relevant data upon which the extent of its lost profit may be ascertained by the jury by way of a reasonable estimate or approximation. To begin with, appellant introduced proof that as a consequence of the restrictive practices of respondents, its share in the mobilehomes sales was drastically reduced in 1972. Thus, it was shown that while previously Suburban was one of the most successful mobilehome dealers in the area capturing the lion's share of the market (90-95 percent of sales in northern San Mateo County and 50-60 percent of sales in the Pacific Skies Estate in Pacifica), it sold but a minimal 2.37 percent of mobilehomes in the Franciscan in 1972. Moreover, appellant introduced concrete evidence as to individual losses suffered as a result of the oppressive sales policy of the respondents. The most notable of these instances were the [***21] loss of sale or potential sale to Bracato, Sinnard, Bishop, Ellis, Scott, Madrone, and [*819] Varni. Finally, Mr. Brayshaw, who was employed by Suburban as a salesman from 1971 to 1975, testified that as many as half a dozen prospects a week told him that they could not buy a mobilehome from him for use in the Franciscan. If the aforesaid evidence is considered together with the testimony of Mr. Fischer, the president of Suburban, who explained that the net profit on a single-wide mobilehome was about \$ 1,500, and about \$ 2,100 on a double-wide coach, it becomes clear that the jury was provided with a solid basis upon which to calculate or at least estimate the amount of damages incurred by the appellant.

Although the foregoing discussion leaves no doubt that appellant made out a *prima facie* case of an illegal per se tying arrangement which should have been submitted to the jury for proper consideration and resolution, respondents nonetheless insist that the granting of nonsuit was proper in the present case because: (1) appellant failed to introduce evidence as to the relevant geographic market; (2) an actionable tying arrangement requires that both the tying product and the [***22] tied product be sold or leased by the same entity; (3) the proof of damages was inadequate; and (4) appellant failed to introduce evidence to prove actual exercise of economic power -- coercion. We find no merit in any of these contentions.

[*547] **CA(10)[[↑]]** (10) Respondents' first argument, that the delineation or proof of the relevant geographic market is a *conditio sine qua non* to the establishment of an actionable tying arrangement, flies directly in the face of well settled law. As pointed out earlier, **HN8[[↑]]** the standard of illegality under the tying theory is that the seller must have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . ." ([Northern Pac. R. Co. v. United States, supra, 356 U.S. at p. 6 \[2 L.Ed.2d at p. 550\]](#)). Consistently therewith, it has been amplified that "*The requirement that a 'not insubstantial' amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie*" ([Fortner Enterprises v. U. S. Steel, supra, 394 U.S. at p. 501 \[22 L.Ed.2d at pp. 503-504\]](#)); and that "Since the requisite [***23] economic power may be found on the basis of either uniqueness or consumer appeal, and since market dominance in the present context does not necessitate a demonstration of market power . . . it should seldom be necessary in a tie-in sale case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the seller's percentage share in that market." ([United States v. Loew's, Inc., supra, 371 U.S. at p. 45, fn. 4 \[9 L.Ed.2d at p. 18\]](#).) (Italics added.) Indeed, the requisite control of the tying product may be inferred from the seller's success in imposing a tying condition upon a substantial amount of commerce in the tied product without any further reference to the market ([Lessig v. Tidewater Oil Company, supra, 327 F.2d 459, 469](#)).

CA(11)[[↑]] (11) Respondents' next contention is also mistaken. It has been established that an illegal tying arrangement does not require that one party or entity offer both the tying product and the tied product. Contrary to respondents' assertion, such violation may be found if the offeror of the tying product has an economic interest in the tied product, even though [***24] the latter is manufactured or otherwise produced by another party or entity.

The leading case dealing with that very issue is [Osborn v. Sinclair Refining Company \(4th Cir. 1960\) 286 F.2d 832](#). In *Osborn*, defendant Sinclair, an oil refining company, entered into an agreement with Goodyear Tire and Rubber Company. Under the terms of the arrangement Sinclair agreed to sell and promote Goodyear tires, batteries and accessories through its filling station operators and in exchange Goodyear agreed to pay 5-10 percent commission to Sinclair on the Goodyear merchandise sold. In order to carry out the agreement, Sinclair imposed [*548] upon its filling station dealers the requirement that they purchase a certain quantity of Goodyear products and

conditioned the continued sale of gasoline to them on the purchase of Goodyear merchandise. [**820] Osborn, a filling station operator who was terminated because of failing to purchase sufficient quantities of Goodyear tires, batteries and accessories, brought an antitrust suit against Sinclair, charging that the conduct in question constituted an unlawful tying arrangement under the Sherman Act. The court found for the plaintiff [***25] and held that the tying arrangement in question was illegal per se, because it involved a not insubstantial amount of commerce. As to the contention that the tying and tied products were not produced or sold by the same entity and therefore a crucial element of an illegal tie-in was lacking, the court had the following to say: "The perniciousness of the imposed tie-in is aggravated by the fact that the defendant is not even in the business of selling the tied products, but is employing its economic power in the gasoline industry to force his dealers to do business with a supplier in another industry under *an arrangement that yields the defendant an extraneous revenue*. The defendant in this case goes a step further than the supplier in the usual tie-in case, for here the tied product is not even handled or sold by the defendant, but it farms out to another, for a price, its coercive economic power." ([Osborn v. Sinclair Refining Company, supra, pp. 839-840](#), italics added.)

Osborn is on all fours with the case at bench. Similar to Sinclair, AMFAC, the owner of the tying product, exerted its coercive economic power to restrict the trade of mobile homes (the tied product) [***26] sold by third parties in return for extra benefit extorted from the latter parties. Consequently, what has been said in *Osborn*, is equally applicable to the present case.

We note in passing that [Crawford Transport Company v. Chrysler Corporation \(6th Cir. 1964\) 338 F.2d 934](#), and [Nelligan v. Ford Motor Company \(W.D.S.C. 1958\) 161 F.Supp. 738](#), upon which respondents primarily rely, are clearly distinguishable from *Osborn*. The crucial distinguishing factor is that unlike in *Osborn* (and the case at bench), the seller of the tying product did not receive direct benefit from the tying arrangement in either *Crawford* or *Nelligan*.

Respondents' third claim, that the evidence of loss produced by appellant was inadequate, has been fully discussed and answered in the previous chapter and requires no repeated elaboration here.

[*549] [CA\(12\)](#) [↑] (12) Respondents' fourth claim is that there was no evidence introduced to show that AMFAC utilized economic power to coerce an appreciable number of lessees of mobilehome spaces to purchase mobilehomes from the participating dealers. This contention is without merit. "Coercion occurs when the buyer must accept the tied item [***27] and forego possibly desirable substitutes." ([Moore v. Jas. H. Matthews & Co. \(9th Cir. 1977\) 550 F.2d 1207, 1217](#).) As discussed previously in relation to the existence of a tying arrangement, the record makes it abundantly clear that many buyers had to accept the tied product and forego possibly desirable substitutes.

[CA\(13\)](#) [↑] (13) This brings us to two more unresolved questions. One is whether in the circumstances of the present case an unlawful tying arrangement can arise also under [section 1672Z](#).³ This question gains some significance because the burden of proving an illegal tying arrangement differs somewhat under [section 16720](#) and [section 16727](#). Under [section 16727](#) the plaintiff must establish that the tie-in substantially lessens competition. This standard is met if *either* the seller enjoys sufficient economic power [**821] in the tying product to appreciably restrain competition in the tied product *or* if a not insubstantial volume of commerce in the tied product is restrained. Under [section 16720](#) standard, both conditions must be met ([MDC Data Centers, Inc. v. International Bus. Mach. Corp. \(E.D. Pa. 1972\) 342 F.Supp. 502, 504](#)).

³ [Section 16727](#) reads that "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." (Italics added.)

[***28] In addressing the merit of the issue, we agree with respondents that [section 16727](#) is based on section 3 of the Clayton Act ([15 U.S.C. § 14](#)), hence federal decisions interpreting section 3 of that act are applicable ([Chicago Title Ins. Co. v. Great Western Financial Corp., supra, 69 Cal.2d at p. 315](#)). The federal cases, in turn, explain that the statutory word "commodities" in section 3 of the act pertains only to goods, wares, merchandise, machinery, supplies and other similar movable items which do not include land ([Baum v. Investors Diversified Services, Inc. \(7th Cir. 1969\) 409 F.2d 872, 875; United States v. Investors Diversified Services \(D.Minn. 1951\) 102 F.Supp. 645, 648](#)). It [*550] is well to remember that in the case at bench the tying product is not a movable item but rather is land, more specifically, lease of land. It thus falls squarely within [N.W. Controls, Inc. v. Outboard Marine Corporation \(D.Del. 1971\) 333 F.Supp. 493, 500](#), where the court held that "*If the tie does not involve a commodity but concerns land, services or credit, which do not fit the Clayton Act's language, it is governed by the Sherman Act and the plaintiff* [***29] *is required to bear the additional burden of proving that the defendant's economic power with respect to the tying product is sufficient to produce an appreciable restraint.*" (Italics added.) [Marin County Bd. of Realtors, Inc. v. Palsson, supra, 16 Cal.3d 920](#), cited by appellant, does not control the situation here. In *Palsson*, the word "commodity" was interpreted under [section 16720](#), the equivalent of [section 1](#) of the Sherman Act, and as a consequence it did not cover [section 16727](#) which is governed by the Clayton Act and the case interpretation thereunder.

Turning to the last issue, we note appellant's contention that it is entitled to recover also under the "rule of reason" theory has been raised only as an alternative if we would find that the elements of an unlawful tie-in have not been established. Since we have concluded that appellant has made out a *prima facie* case of an actionable tying arrangement under [section 16720](#), the complex issues raised in appellant's alternative argument need not be reached.

That portion of the judgment granting a nonsuit as to the tie-in cause of action is reversed; in all other respects the judgment is affirmed.

End of Document



Coldwell Banker & Co. v. Department of Insurance

Court of Appeal of California, Second Appellate District, Division Four

February 21, 1980

Civ. No. 55067

Reporter

102 Cal. App. 3d 381 *; 162 Cal. Rptr. 487 **; 1980 Cal. App. LEXIS 1496 ***

COLDWELL BANKER & COMPANY et al., Plaintiffs and Respondents, v. DEPARTMENT OF INSURANCE et al., Defendants and Appellants

Subsequent History: [***1] A petition for a rehearing was denied March 13, 1980, and respondents' petition for a hearing by the Supreme Court was denied May 14, 1980.

Prior History: Superior Court of Los Angeles County, No. C 159518, Campbell M. Lucas, Judge.

Disposition: The judgment is reversed.

Core Terms

license, trial court, title company, underwritten, percent, administrative hearing, antitrust, judicial review, title insurance, issuance, terms, substantial evidence, administrative decision, real estate broker, vested, administrative agency, stock permit, conditions, vertical, insurance company, organizational, stock, vested right, do business, Clayton Act, subsidiary, insurers, factors, escrow, lessen

LexisNexis® Headnotes

Insurance Law > Industry Practices > Insurance Company Operations > General Overview

HN1 **Industry Practices, Insurance Company Operations**

See [Cal. Ins. Code § 12924.](#)

Insurance Law > Industry Practices > Insurance Company Operations > General Overview

HN2 **Industry Practices, Insurance Company Operations**

See [Cal. Ins. Code § 839.](#)

Insurance Law > Industry Practices > Insurance Company Operations > General Overview

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HN3 Industry Practices, Insurance Company Operations

See [Cal. Ins. Code § 839.1.](#)

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Civil Procedure > Remedies > Writs > General Overview

HN4 Common Law Writs, Mandamus

See [Cal. Code Civ. Proc. § 1085.](#)

Bankruptcy Law > Administrative Powers > Automatic Stay > General Overview

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > Automatic Stays

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN5 Administrative Powers, Automatic Stay

See [Cal. Code Civ. Proc. § 1110b.](#)

Civil Procedure > Remedies > Writs > General Overview

HN6 Remedies, Writs

It is crystal clear that nothing contained in [Cal. Code Civ. Proc. § 1110b](#) empowers the trial court to insulate its previous judgment from judicial review by issuing an order after judgment that purports to render appeal from the judgment meaningless. Such "bootstrapping" is not cognizable under any recognized principle of statutory or decisional law pertaining to appellate review.

Governments > Courts > Judicial Precedent

HN7 Courts, Judicial Precedent

It may readily be seen that a reversal of a trial court's judgment requires that the parties be returned as close as is possible to that position they occupied prior to the rendering of the erroneous judgment. [Cal. Code Civ. Proc. § 908.](#) If the judgment is affirmed, it is enforceable according to its terms.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

Criminal Law & Procedure > ... > Reviewability > Waiver > Exceptions & Validity of Waivers

102 Cal. App. 3d 381, *381 162 Cal. Rptr. 487, **487 1980 Cal. App. LEXIS 1496, ***1

HN8[] Reviewability of Lower Court Decisions, Adverse Determinations

The general rule is that a party waives the right to appeal if he voluntarily complies with the terms of the lower court's judgment. A waiver is implied only if the satisfaction or compliance is by way of compromise, or is coupled with an agreement not to appeal. Where it is compelled or coerced, e.g., by the threat of forfeiture or seizure of property under execution, there is no waiver.

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Reviewability > Questions of Law

HN9[] Judicial Review, Standards of Review

It is the settled general rule of law in California that where the legislature has by statute clothed an administrative officer with power to ascertain the facts with reference to the fitness of an applicant for a permit to engage in a business subject to regulation under the police power and has vested in such officer the discretion, based on the facts ascertained, to grant or deny a permit to engage in such business the courts will not interfere with the exercise of such discretion except in the case of an abuse thereof.

Administrative Law > Judicial Review > Remedies > Mandamus

Civil Procedure > Remedies > Writs > General Overview

HN10[] Remedies, Mandamus

The distinction between vested and non-vested rights continues to be of controlling significance not only in cases governed by administrative-mandamus principles but those which are not.

Administrative Law > Judicial Review > Standards of Review > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN11[] Judicial Review, Standards of Review

The Bixby-Strumsky rule of judicial review provides that if the subject order or decision substantially affects a fundamental vested right, the court, in determining under [Cal. Code Civ. Proc. § 1094.5](#) whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. If, on the other hand, the order or decision does not substantially affect a fundamental vested right, the trial court's inquiry will be limited to a determination of whether or not the findings are supported by substantial evidence in light of the whole record. It is manifest that the difference between the two standards of judicial review is of substantial significance.

Administrative Law > Judicial Review > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN12[] Judicial Review, Standards of Review

In determining whether a right is fundamental, the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation. A "vested" fundamental right is viewed in terms of a contrast between a right possessed and one that is merely sought. Since an administrative agency must engage in the delicate task of determining whether an individual qualifies for the sought right, the courts have deferred to the administrative expertise of the agency. If, however, the right has been acquired by the individual, and if the right is fundamental, the courts have held the loss of it is sufficiently vital to the individual to compel a full and independent review.

Antitrust & Trade Law > Clayton Act > General Overview

HN13 [L] **Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 18](#).

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court granted a petition for writ of mandate sought by a real estate brokerage corporation and a title insurance company to compel the Department of Insurance and the Insurance Commissioner to issue the title insurance company a permit to sell stock and a license to do business. The record indicated that the real estate brokerage firm caused the formation and incorporation of the title insurance company to conduct the business of an underwritten title company and the real estate brokerage firm was to be the sole owner of the stock. The commissioner, after a hearing, concluded that the issuance of a stock permit would be in violation of [Ins. Code, § 839.1, subd. \(a\)\(5\)](#), providing the commissioner with the discretion to deny a stock permit where transactions under it would substantially lessen competition in the insurance business, and thus the title insurance company was not entitled to a stock permit. The commissioner found that the proliferation of broker-owned underwritten title companies would result eventually in diminishing competition and lack of incentive to lower prices. The trial court found that it was unnecessary to determine whether or not the administrative findings of fact were supported by substantial evidence or the weight of the evidence, and determined that, as a matter of law, the title insurance company's share of the relevant market, 1 percent, was too small to substantially lessen competition. The court also found that vertical integration arrangements such as that of petitioners were not illegal per se under [§ 839.1, subd. \(a\)\(5\)](#). The court placed great emphasis on the purported impropriety of the administrative hearings, specifically that part of the process which involved consideration of the pending applications of 10 other similarly situated broker-owned underwritten title company applicants. (Superior Court of Los Angeles County, No. C 159518, Campbell M. Lucas, Judge.)

The Court of Appeal reversed, holding that the record demonstrated the permit was properly denied under the provisions of [Ins. Code, § 839.1](#). The court also held that the appeal from the judgment granting a peremptory writ of mandate was not rendered moot by after-judgment events, nor was the only viable issue on appeal the question of whether the Department of Insurance and the Insurance Commissioner exceeded their powers by imposing conditions on the permit and license issued to the title insurance company. The court further held that the case did not involve a fundamental vested right, and thus the substantial evidence standard applied on review of the administrative decision rather than the independent judgment standard as applied by the trial court. (Opinion by Jefferson (Bernard), J., with Files, P. J., and Kingsley, J., concurring.)

Headnotes

CA(1a) [] (1a) **CA(1b)** [] (1b) **CA(1c)** [] (1c)**Courts § 13—Jurisdiction—Moot Questions—After-judgment Events.**

--An appeal from a superior court judgment granting a peremptory writ of mandate to a real estate brokerage corporation and a title insurance company ordering the Department of Insurance and Insurance Commissioner to issue the title insurance company a permit to sell stock and a license to do business was not rendered moot by the fact that pending appeal the commissioner, pursuant to the superior court's order, issued a conditional stock permit and a license to transact business after the court vacated an automatic stay of the judgment. Under such conditions, the department and the commissioner were compelled to follow the order or face citation for contempt, and thus the decision to comply was not a voluntary act which constituted waiver of appeal rights. Furthermore, the real estate brokerage company and the title insurance company did not comply with their burden of showing that the department and the commissioner had entered into some type of compromise agreement with them which was intended to terminate the litigation pending appeal.

CA(2) [] (2)**Appellate Review § 72—Supersedeas and Stay—Obtaining Stay—Stay by Order of Trial Court—Vacating Stay—Effect.**

--Nothing contained in Code Civ. Proc., § 1110b, providing that if an appeal be taken from an order or judgment granting a writ of mandate the court granting the writ may direct that the appeal shall not operate as a stay of execution, empowers the trial court to insulate its previous judgment from judicial review by issuing an order after judgment that purports to render appeal from the judgment meaningless. Such "bootstrapping" is not cognizable under any recognized principle of statutory or decisional law pertaining to appellate review.

CA(3) [] (3)**Appellate Review § 6—Who May Appeal—Loss or Waiver of Right—Voluntary Compliance With Judgment.**

--A party waives the right to appeal if he voluntarily complies with the terms of the lower court's judgment. The waiver is implied only if the satisfaction or compliance is by way of compromise, or is coupled with an agreement not to appeal. Where it is compelled or coerced, for example, by the threat or forfeiture or seizure of property under execution, there is no waiver.

CA(4) [] (4)**Administrative Law § 131—Judicial Review—Scope and Extent—Evidence—Substantial Evidence Rule—Administrative Mandamus.**

--If the subject before an administrative agency or its decision substantially affects a fundamental vested right, the court, in determining under Code Civ. Proc., § 1094.5, administrative mandamus, whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. If, on the other hand, the order or decision does not substantially affect a fundamental vested right, the trial court's inquiry will be limited to a determination of whether or not the findings are supported by substantial evidence in light of the whole record. It is manifest that the difference between the two standards of judicial review is of substantial significance.

CA(5) [] (5)**Administrative Law § 131—Judicial Review—Scope and Extent—Evidence—Substantial Evidence Rule—Fundamental Vested Right.**

--The right or interest of a real estate brokerage company and a title insurance company to have the title insurance company obtain a permit to sell stock and a license to do business was not a fundamental or vested right, and thus the trial court, on review under traditional mandamus, of a determination by the Insurance Commissioner denying the permit to sell stock and a license to do business, erred in applying the independent judgment test, rather than the substantial evidence standard.

CA(6) [] (6)**Administrative Law § 131—Judicial Review—Scope and Extent—Evidence—Substantial Evidence Rule—Other Errors.**

--Even when the substantial evidence standard is applicable on review of a decision of an administrative agency, the trial court must look to the entire administrative record not only to determine whether the findings are supported by substantial evidence, but also to determine whether the agency committed any errors of law.

CA(7) [] (7)**Insurance Companies § 2—Organization and Regulation—Authority of Insurance Commissioner—Issuance of Securities.**

--Under Ins. Code, art. 8, § 820 et seq., governing the issuance of securities by insurers, the Department of Insurance and the Insurance Commissioner have been charged with the duty and responsibility of monitoring the issuance of such securities in broad terms, rather than in terms of limitation. The legislative objective appears to be not only to safeguard the rights of shareholders but also the rights of consumers.

CA(8) [] (8)**Insurance Companies § 2—Organization and Regulation—Authority of Insurance Commissioner—Regulation of Potential Danger to Competition.**

--The Legislature, as it is entitled to do, has delegated broad powers to the Department of Insurance and the Insurance Commissioner, powers which include the power to determine not only the presence of danger but potential danger to competition in the insurance industry presented by various business combinations and arrangements. The language of [Ins. Code, § 839.1](#), granting such authority to the department and the commissioner, does not suggest that it was intended to deal only with mergers but rather with any business combination likely to have damaging economic consequences. There is no language in the statute which supports the view that only horizontal arrangements are subject to administrative scrutiny. Under the statute, it is appropriate and necessary for the department and the commissioner to make the scope of their inquiry include the factor of similar pending applications. To limit the administrative decision-making power under the statute to consideration of each application in a vacuum, requiring the administrative agency to ignore that application's significance as part of a trend toward an unhealthy concentration of economic power, would rob the statute of much of its effectiveness.

CA(9) [] (9)

Insurance Companies § 2—Organization and Regulation—Authority of Insurance Commissioner—Statutory Authority to Permit Anticompetitive Practices.

--Ins. Code, § 839.1, giving the Department of Insurance and the Insurance Commissioner the authority to control practices which would substantially lessen competition in the insurance business, is unlike the federal antitrust legislation, that is, the Sherman Act (15 U.S.C. § 1 et seq.) and the Clayton Act (15 U.S.C. § 12 et seq.), since it operates in the context of permit issuance. The burden of compliance with the terms of § 839.1 is on the applicant, rather than on the government or a complaining party to establish antitrust violation pursuant to federal law. Under § 839.1, the department and the commissioner have the power and duty to consider potential threats to competition in addition to current danger.

[CA\(10a\)](#) [] (10a) [CA\(10b\)](#) [] (10b)

Insurance Companies § 2—Organization and Regulation—Authority of Insurance Commissioner—Issuance of Permit to Sell Stock and License to Do Business—Substantial Evidence.

--On review of the superior court's order granting a writ of mandate sought by a real estate brokerage company and a title insurance company to compel the Department of Insurance and the Insurance Commissioner to issue a permit to sell stock and a license to do business to the title insurance company, there was substantial evidence to support the finding of the commissioner that an arrangement between the real estate brokerage company and the title insurance company would eventually foreclose a substantial portion of the market to competition from other title insurers, and the superior court erred in ruling, as a matter of law, that only 1 percent of the title insurance market was involved and that this portion was too small to substantially lessen competition in violation of Ins. Code, § 839.1. The record indicated that the title insurance company was to be wholly owned by the real estate firm. Furthermore the only testimony as to the percentage of the market involved was that of the president of the title insurance company, and it was based upon a survey done by some unnamed party eight years prior to the present litigation. Also, the president's testimony was limited to the number of sales, rather than to all facets of real estate transactions such as the dollar volume and size and character of the real estate involved in each transaction. The commissioner held an administrative hearing and the evidence produced at the hearing was uncontroverted.

[CA\(11\)](#) [] (11)

Insurance Companies § 2—Organization and Regulation—Vertical Business Arrangements—Ill legality.

--A vertical business arrangement per se connotes nothing unlawful under Ins. Code, § 839.1, granting the Department of Insurance and the Insurance Commissioner the authority to regulate arrangements between insurance companies which would substantially lessen competition, but the contrary may be true when the arrangement is assessed in relation to a particular set of facts in the particular industry.

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Tuohey, Barton & McDermott, Conrad G. Tuohey, Gibson, Dunn & Crutcher, John J. Hanson, Robert H. Fairbank and Stanley M. Gordon for Plaintiffs and Respondents.

Judges: Opinion by Jefferson (Bernard), J., with Files, P. J., and Kingsley, J., concurring.

Opinion by: JEFFERSON

Opinion

[*386] [**489] Petitioners Coldwell Banker & Company, a California corporation, and Guardian Title Company, [***2] a California [*387] corporation, sought a writ of mandate and declaratory relief to compel the respondents, the Department of Insurance of the State of California and Wesley J. Kinder, Insurance Commissioner, to issue to Guardian Title an organizational permit (a permit to sell stock) and a license to do business. The permit and the license would enable Guardian Title to conduct business as an underwritten title company.¹

|

The Factual Background and Procedural History

We set forth the facts and procedural history relevant to this dispute. On May 16, 1975, Coldwell Banker, a real estate broker, caused the formation and incorporation of Guardian Title to conduct the business of an underwritten title company as defined in [***3] [section 12340.5 of the Insurance Code](#).²

On June 4, 1975, Guardian Title submitted to the Department of Insurance applications for an organizational permit³ [***4] and for a license.⁴ Specifically, Guardian Title sought authorization to sell and issue 4,000 shares of its \$50 par value common stock at a price of \$50 per share to Coldwell Banker; it was contemplated that Coldwell Banker would be the sole shareholder. The license application, as it was originally submitted, proposed that Guardian Title engage in the underwritten title business in 19 California counties.

On January 12, 1976, petitioner Guardian Title filed formal amendments to both applications, requesting authorization to do business in [*388] only the four counties of Los Angeles, Ventura, Orange and San Diego; in addition, Guardian Title then proposed to issue 7,000 shares of common stock to Coldwell Banker alone. The Department of Insurance was also informed of Guardian Title's intention to enter into an underwriting title agreement with Security Title Insurance Company, a California corporation and a wholly owned subsidiary of Safeco Insurance Company, engaged in the business of issuing title insurance policies.

Despite numerous requests, both telephonic [***5] and written, the department failed to act upon the application for the stock permit; it also failed to issue the license, taking the position that the authorization to sell stock was a condition precedent to the department's consideration of the license application. On January 30, 1976, Guardian Title made formal demand on the department for the approval of both applications.

On March 3, 1976, Coldwell Banker and Guardian Title filed a petition for a writ of [**490] mandate and declaratory relief in the Superior Court of Orange County. The department and the commissioner appeared and

¹ In our discussion, petitioners will sometimes be referred to as Coldwell Banker and Guardian Title; respondents will sometimes be referred to as the department and the commissioner. All references to code sections will refer to the Insurance Code, unless otherwise indicated.

² "Underwritten title company" is defined therein as "any corporation engaged in the business of preparing title searches, title examinations, title reports, certificates or abstracts of title upon the basis of which a title insurer writes title policies."

³ [Insurance Code section 827](#) requires the issuance of a permit by providing: "An insurer shall not sell in this state, . . . or offer for sale, negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do."

⁴ The license requirement is set forth in [Insurance Code section 12389, subdivision \(a\)\(3\)](#), which provides, in part pertinent to the issue before us: "Such an underwritten title company shall obtain from the commissioner a license to transact its business. Such license shall not be granted until the applicant conforms to the requirements of this section and all other provisions of this code specifically applicable to applicant."

made a motion for change of venue to the Superior Court of Los Angeles County; the motion was granted. At this point the department and the commissioner advised Coldwell Banker and Guardian Title of the fact that an administrative hearing would be conducted concerning the applications. It was stated that the hearing would be held pursuant to Insurance Code section 12924⁵ [***6] and that the principal issues for determination were to be the proper interpretation and application of Insurance Code sections 839 and 839.1 to the applications of Guardian Title.⁶

[***7] [*389] From May 12, 1976, through May 24, 1976, the department conducted hearings periodically on this matter.⁷ As constituted, the hearings were concerned with the economic effect of permitting real estate brokers, through wholly owned subsidiary title companies (this being the relationship between Coldwell Banker and Guardian Title), to enter the title underwriting business, with particular emphasis on the impact such entries into the title underwriting business would have upon competition. The Department of Insurance hearing officer noted that, in addition to the Coldwell Banker-Guardian Title applications, there were 10 other similar applications under review by the department.

Seventeen witnesses testified. Two expert economists, familiar with the title insurance business, were presented; they were [***8] Dr. Irving H. Plotkin, senior economist for Arthur D. Little, Inc., appearing on behalf of California Land Title Association, and Dr. Alfred E. Hofflander, professor of finance and insurance, U.C.L.A. graduate school of management, appearing on behalf of Transamerica Title Insurance Company. Guardian Title and Coldwell Banker attended these hearings and were represented by counsel, who had the opportunity to present such evidence as they wished, and the opportunity to cross-examine all witnesses who testified. They did present the testimony of Guardian Title president Charles R. Hilton; the 1974 annual report of Coldwell Banker was received in evidence.

Plotkin testified that he had been gathering statistical data for the preceding five years in an attempt to determine the impact on the industry by the entrance into the market of broker-controlled [*390] underwritten title companies. He asserted that "a [*491] decision made here, which can be shown to be not in the long run best interests of the consumer, will have a fairly direct and immediate impact on the availability of the states to defend their regulatory system." He noted that the outstanding characteristic [***9] of the industry is the fact that the real estate broker

⁵ HN1[] This section confers broad investigative powers on the commissioner, enabling the production of evidence "on any subject touching insurance business."

⁶ Insurance Code section 839 provides: HN2[] "The commissioner shall issue a [stock] permit if he finds that: [para.] (a) The proposed plan of business of the applicant and the proposed issuance of securities are fair, just, and equitable. [para.] (b) The applicant intends fairly and honestly to transact its business, and [para.] (c) The securities the applicant proposes to issue and the methods to be used by it in issuing or disposing of them are such as, in his opinion, will not work a fraud upon the purchaser thereof, or upon policyholders or other security holders of applicant. [para.] Otherwise, he shall deny the application and notify the applicant in writing of his decision."

Insurance Code section 839.1 provides: HN3[] "(a) In any case where a domestic insurer is directly affected by the total transaction for some part of which the permit applied for is needed, and the commissioner in his discretion determines that reasonable grounds exist for contentions that such total transaction or any part thereof: [para.] (1) Is a combination of capital, skill, or acts to create or carry out restrictions on or to prevent competition in the insurance business; or [para.] (2) Is a combination (in the form of a trust or otherwise) in restraint of the insurance business; or [para.] (3) Is an attempt to monopolize the insurance business; or [para.] (4) Is a conspiracy to create any of the foregoing; or [para.] (5) That such total transaction, or any part thereof, if consummated will create or result in any of the foregoing or will substantially lessen competition in the insurance business. [para.] Then, in such event, the Insurance Commissioner may make findings with respect to whether such total transaction, or any part thereof, would or would not do or be any of the foregoing. [para.] (b) In the event the Insurance Commissioner makes affirmative findings as provided in subdivision (a) of this section, he may deny the permit applied for."

⁷ The administrative record, consisting of 4 volumes of reporter's transcript and 65 exhibits, was lodged in the superior court file as an exhibit. This record is before us and we have reviewed it.

controls the placement of title insurance in almost every property transfer transaction. He characterized the industry as an "oligopoly."⁸

Plotkin found that the average profit annually was 7.4 percent, although it was extremely volatile, ranging from 2 to 15 percent in any given year. The profit realized was below the ordinary rate of business return. He stated that an operation characterized by high fixed costs -- such as the title industry -- assigns a great deal of value to every marginal bit of business. He emphasized that a sure source of supply of business is extremely valuable in such an industry. Analyzing the financial data submitted by Guardian Title in connection [***10] with its application, Plotkin thought the rate of return (profit) expected was abnormally high, based as it was on significantly lower expenditures by Guardian Title. He made reference to the experience in northern California where entrants to the market that were broker-controlled not only garnered an astonishing percentage of the business from the very beginning, but continued to grow at the expense of the independent title companies who could statistically chart the fact that they were losing ground by the month. The primary example of this phenomena was a group called Founders, broker-controlled and operating in counties of northern California.

Hofflander, who testified at the administrative hearing, was the coauthor of a report entitled "The Distribution of Title Insurance in California," March 1976. He agreed with Plotkin that the main characteristic of the industry is broker control of the basic real estate transaction. He found an analogy in the sale of credit life insurance and concluded that, as in that industry, broker-controlled underwritten title companies would eventually drive prices up while decreasing the quality of the product, i.e., title insurance. He [***11] was opposed to the licensing of Guardian Title -- not only for the anticompetitive impact generated by [*391] any broker-controlled underwritten title companies -- but because his analysis of Guardian Title's financial data, submitted with the application, led him to the conclusion that Guardian Title had been set up primarily as a conduit between Safeco Insurance Company and Coldwell Banker to enable Safeco to pay rebates for insurance business in violation of Insurance Code section 12404. Evidence supporting this view was contained in the underwriting contract between Guardian Title and Safeco, which disclosed that Guardian Title would be collecting fees in some situations without doing any work and would be collecting fees the rest of the time for performing very little work.

From such evidence the Insurance Commissioner could reasonably conclude that a license to Guardian Title would provide the opportunity to Safeco Insurance Company to offer rebates to Coldwell Banker, funneled through Guardian Title, in return for Coldwell Banker's sending all of its title insurance business to Safeco.

Findings of fact and conclusions of law were made and issued by the department hearing [***12] officer on August 16, 1976. The findings tell us that Coldwell Banker was not only a real estate broker, but, through its subsidiaries, was engaged in all facets of real estate and related endeavors.⁹ Particular emphasis was placed upon Coldwell Banker's relationship with its wholly owned subsidiary, Landmark Escrow Services, Inc., which derived 100 percent of its business [**492] from Coldwell Banker and whose escrow charges to customers were 150 percent higher than those of other escrow companies operating in the same area. The department concluded that Coldwell Banker, as a real estate broker, would strive to direct title business to Guardian Title in the same manner as it directed to Landmark Escrow the handling of escrows which are necessary for the consummation of real estate transactions.

Finding No. [***13] 8 declared that, "[with] rare exception, buyers and sellers of residential property either express no preference or look to the real estate broker or salesman (real estate producer) for advice in choosing an escrow holder, a title insurer or other supplier of services ancillary to the transfer of real property. Accordingly, the real estate producer not only has the potential to control, but generally does control, the placement of orders for such ancillary services, . . .".

⁸ Webster's Third International Dictionary, 1966 unabridged edition, defines "oligopoly" as "a market situation in which each of a limited number of producers is strong enough to influence the market but not strong enough to disregard the reaction of his competitors . . .".

⁹ Those subsidiaries mentioned were Forest E. Olson, Inc., Landmark Escrow Services, Inc., Certified Mortgage Company, Inc., Coldwell Banker Management Corporation and Insurance West Corporation.

[*392] It was found that competitive efforts by the title companies are ordinarily directed toward the real estate broker rather than the ultimate seller and purchaser, the consumers, and that the broker involved may select the entities to perform the ancillary functions for reasons other than the welfare of the consumer -- a phenomenon known as "reverse competition." There was a strong inference that petitioner Coldwell Banker, as a real estate broker, would be in a position to steer its customers needing ancillary real estate services in the direction of the providers of such services selected by Coldwell Banker.¹⁰

[***14] It was revealed that 20 title insurers currently held certificates of authority in California to issue title insurance policies, and that 14 of this group utilized underwritten title companies in the process. One hundred and twelve underwritten title companies were currently licensed in California, many of which also offered escrow services.¹¹

The department made an analysis of the economic factors present in the title underwriting business with particular reference to the situation of Guardian Title. In most counties in California, recordings of land transactions are maintained on a grantor-grantee listing basis. A "title plant" of a private corporation is essentially a duplicate of county land records, but reorganized to indicate relevant data on a geographic or parcel-by-parcel basis. Most of the underwritten title companies [***15] (90 percent) either own their own title plant or pay a fixed share of the cost of maintaining a jointly owned title plant. The remainder either use county records, have access to a title plant, or have a "search package" arrangement whereby the requisite information is secured by others. Particularly in densely populated areas, the task of creating, maintaining and using a title plant is costly and time-consuming. Since entry into the title insurance business is dependent upon such an expense, success depends upon the ability to attract a substantial volume of business in a reasonably short period of time.

Obviously, an entrant such as Guardian Title, assured from the outset of referrals from the real estate broker, Coldwell Banker, would [*393] have a substantial economic advantage over those title companies without a ready-made source of business. Guardian Title, the findings stated, due to its contract with Security Title and Insurance Company, would have the additional advantage of not being required to make other than a minimal capital investment in title plant acquisition or maintenance in the four counties in which it proposed to do business, since Security would, [***16] pursuant to the agreement, provide Guardian Title with plant access in Los Angeles and Orange Counties, and with a search package in San Diego and [**493] Ventura Counties (the result in the latter counties being that Guardian Title would have almost nothing to do in those two counties).

The findings from the administrative hearings set forth that dramatic growth in the real estate market has enabled some of the new underwritten title companies to compete successfully with existing companies, but foresaw that "[foreclosure] of the market or an appreciable part of the market to entrants by tie-in sales or comparable arrangements, could pose an insurmountable barrier to entry" The Coldwell Banker-Guardian Title arrangement was seen as a potential threat in the future because potential new entrants without a ready-made source of business might well decide not to enter the market for fear of being at a competitive disadvantage that could not be overcome, even by "offering lower prices, better coverage, or higher quality service."

The Department of Insurance determined that the proliferation of broker-owned underwritten title companies would result eventually in diminishing [***17] competition and lack of incentive to lower prices. Since the margin of profit in the business is small, the market volatile, and fixed expenses very high, there would be continuous pressure to increase the cost of services to the consumer.

It was further found that, although "relatively few" underwritten title companies were presently owned or controlled by real estate producers, the evidence showed that those that were so owned or controlled, "have generally

¹⁰ An analogy was found in the sale of credit life and disability insurance, where the demand is "derived" in the sense that it would not exist except for the underlying transaction, and the cost represents a small percentage (one-half of 1 percent) of the total transaction price. (See *Credit Ins. Gen. Agents Assn. v. Payne (1976) 16 Cal.3d 651 [128 Cal.Rptr. 881, 547 P.2d 993]*.)

¹¹ It was noted that Guardian Title had no intention of offering escrow services, because of the existence of Coldwell Banker's wholly owned escrow service corporation, Landmark.

enjoyed success in terms of market penetration and profitability that is unmatched by [their competitors]. No reason has been shown for the extraordinary success of such underwritten title companies other than their ownership or control by real estate producers." ¹²

[*18] [*394]** Another significant finding was finding No. 29, to the effect that the licensing of Guardian Title would "serve as a significant deterrent to entry and, therefore, would serve to substantially lessen competition in the title insurance business."

Therefore, the conclusion was reached that Guardian Title was not entitled to a stock permit because it would be in violation of Insurance Code sections 839, subdivision (b), and 839.1, subdivision (a)(5). We need not consider the applicability of Insurance Code section 839 -- the general section -- because the record demonstrates that the permit was properly denied under the more specific provisions of Insurance Code section 839.1. Other findings and conclusions concerned the illegality per se of the Guardian Title-Coldwell Banker arrangement as a form of "tie-in sale," the possible violation of Insurance Code sections 12404 and 12412, which prohibit rebates, and the inapplicability of Insurance Code section 790 et seq., which enumerate certain unfair business practices by insurers.

With respect to the language of Insurance Code section 839.1, the department declared that "every domestic insurer" would be "directly affected [***19] by the total transaction [in which Guardian Title would be engaged] to the extent that the granting of this permit . . . portends the end of competition as it is presently known in the title insurance industry in California, . . ." And, it was concluded, that "[the] provisions of § 839.1, although patterned after the [federal] Clayton Act and in part the regulations of the Federal Trade Commission, are unique to the Insurance Code in California law. The Legislature clearly intended the section to be applied prospectively to enable the Commissioner to deny securities permits to insurers, foreign and domestic, in any situation where the Commissioner finds that the total transaction, **[**494]** or any part thereof for which a securities permit is required, will result in any of the anti-trust type violations enumerated in the section."

With the exception of two findings immaterial here, the department's findings and conclusions were adopted by the commissioner, and, on October 27, 1976, the application of petitioners for a stock permit was formally denied upon the grounds that issuance would violate Insurance Code sections 839, subdivision (b), and 839.1, subdivision (a)(5).

[*20] [*395]** Coldwell Banker and Guardian Title then resumed litigation in the superior court, filing a second supplemental and amended petition for mandate and declaratory relief. In it they alleged that, pursuant to the Insurance Code, the issuance of the permit and the license were ministerial rather than discretionary duties of the respondents Department of Insurance and the commissioner; but that if discretion could be exercised by respondents in connection with issuance, it had been abused; and that denial of the applications constituted a denial of due process and equal protection of the laws. The matter came to trial in 1977.

II

The Findings, Conclusions and Judgment of the Trial Court

¹² The evidence upon which the department relied in making this finding concerned experience in northern California rather than any figures relative to market share, market penetration or growth of realtor-owned underwritten title companies in the four southern California counties in which Guardian Title proposed to operate. The northern California experience, however, led the department to conclude that the market share of wholly owned underwritten title companies would be closely aligned to the share of the market controlled by the parent.

As a preliminary matter, all the parties to the litigation agreed that the petition for mandate was sought pursuant to Code of Civil Procedure section 1085.¹³ Coldwell Banker and Guardian Title again offered the testimony of Charles R. Hilton, a California attorney, who identified himself as an employee of Coldwell Banker and president of Guardian Title. Hilton testified that the percentage of the real estate market enjoyed by Coldwell Banker in the four California counties in which [***21] Guardian Title wished to do business constituted 2 percent of the total market, and that Coldwell Banker was able to influence the choice of title insurance companies by its customers in about 50 percent of the sales consummated, with the result that the title insurance business which would flow to Coldwell Banker's subsidiary, Guardian Title, would be in the nature of 1 percent of the real estate market in the four counties.¹⁴

[***22] At one point, the trial court announced that it would apply the substantial evidence rule in reviewing the administrative decision, i.e., that it would determine whether or not the administrative findings, conclusions [*396] and decision were supported by substantial evidence presented at the administrative hearings. But at another point, the trial court declared that, since Insurance Code sections 839 and 839.1 did not require that a hearing be held before an administrative determination was made of their applicability to petitioners Guardian Title and Coldwell Banker, the petition for mandate was before the trial court pursuant to Code of Civil Procedure section 1085. Hence, the trial court, in considering the petition, was entitled to exercise independent judgment regarding the substantiality of the evidence in assessing the factual determinations made at the administrative level and in assessing the "fairness" of the administrative hearing.

The trial court decided in favor of Guardian Title and Coldwell Banker and thus overturned the administrative decision denying the applications for a stock permit and license to do business.

Some of the findings of fact and conclusions [***23] of law made by the trial court concerned the administrative hearing held by respondents. Thus, the trial court found that "[respondents'] administrative hearing, although excessive in scope, was a full and [**495] complete consideration by Respondent of all facts and issues pertinent to the Organizational Application and the License Application." (Finding No. 55.) The trial court also found that Guardian Title and Coldwell Banker had been represented at the hearing by counsel and had been afforded every opportunity to present their case; the findings characterized the administrative hearing as general in nature, concerned with issues which affected not only petitioners but 10 other broker-applicants.

Virtually all of the findings of the administrative decision concerning the nature of the underwritten title insurance business in California and the economic factors which determine entry into the business, were disposed of by the trial court in finding No. 25, which stated: "It is not necessary for the Court to determine whether or not these Administrative Findings of Fact¹⁵ are supported by substantial evidence or the weight of the evidence, since the Court has determined [***24] that, as a matter of law, Guardian's share of the relevant market is too small to substantially lessen competition." (Italics added.) The trial court also found it unnecessary to make findings concerning the large body of evidence [*397] introduced at the administrative hearings because the hearing afforded Guardian Title really concerned a "public policy" question rather than the applications of Guardian Title for a permit and license. The finding that Guardian Title's share of the relevant market was de minimis in terms of substantially lessening competition was the key finding made by the trial court.

¹³  That section provides, in pertinent part for our purposes, that a writ of mandate "may be issued by any court, except a municipal or justice court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, . . . ; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, . . ."

¹⁴ Prior to this testimony, the department and the commissioner objected to it on the ground that Hilton had already testified at the administrative hearing, but then withdrew the objection, raised no further objection to his testifying, and conducted a cross-examination.

¹⁵ Specifically, administrative findings No. 2 through 26 (with the exception of No. 19, not adopted by the commissioner and the first sentence of No. 26).

Also crucial to the trial court's judgment granting the petition of Guardian Title and Coldwell Banker for a peremptory writ of mandate, was the interpretation made of the antitrust provisions of [Insurance Code section 839.1, subdivision \(a\)\(5\)](#). [***25] Declaring that the section contained antitrust provisions analogous to the federal antitrust provisions set forth in the federal Clayton Act ([15 U.S.C. §§ 12-27](#)), the court found the language of the California statute more restrictive than that of the federal law, and noted that such "vertical integration" arrangements as that of Coldwell Banker and Guardian Title were not illegal per se, citing the California Supreme Court case of [Chicago Title Ins. Co. v. Great Western Financial Corp. \(1968\) 69 Cal.2d 305, 324 \[70 Cal.Rptr. 849, 444 P.2d 481\]](#).

The trial court placed great emphasis on the impropriety of the process by which the administrative agency had reached the conclusion that Guardian Title should not be issued a stock permit and license -- specifically that part of the process which involved consideration of the pending applications of 10 other similarly situated broker-owned underwritten title company applicants. Other findings and conclusions concerned abuse of discretion and denial of due process on the part of the department and the commissioner; it was concluded by the trial court that the powers of the Legislature had been usurped by the actions of the department [***26] and the commissioner.

The trial court's judgment ordered the department and the commissioner to issue to Guardian Title an organizational permit and to then issue a license to Guardian Title to enter the underwritten title business in California upon written notification that Coldwell Banker had purchased the securities of Guardian Title pursuant to the organizational permit.

The Department of Insurance and the Insurance Commissioner have appealed from the judgment granting the peremptory writ of mandate.

[*398] III

[CA\(1a\)\[↑\] \(1a\) The Appeal From the Judgment Granting a Peremptory Writ of Mandate Is Not Rendered Moot by After-Judgment Events Nor Is the Only Viable Issue on Appeal the Question of Whether the Department and the Insurance Commissioner Have Exceeded Their Powers by Imposing Conditions on the Permit and License Issued to Guardian Title](#)

Without seeking an augmentation of the record pursuant to [rule 12\(a\), **496\] of the California Rules of Court](#), Guardian Title and Coldwell Banker, respondents on appeal, have, through their reply brief and an appendix thereto, asserted that, following the judgment, an order issued by the trial court and actions of the Insurance Commissioner, [***27] made pursuant to such order, in issuing a conditional stock permit and a license to transact business to Guardian Title, have changed the issues presented for decision on appeal, and have rendered moot the appeal of the department and the Insurance Commissioner from the judgment granting the writ of peremptory mandate. Since the department and the commissioner agree that Guardian Title and Coldwell Banker have accurately set forth the facts with respect to the after-judgment events, we will take judicial notice of these events. ([Evid. Code, §§ 452, subds. \(c\) and \(d\), 459.](#))

The judgment granting a peremptory writ of mandate was executed and entered on November 14, 1977. The department and the Insurance Commissioner filed a notice of appeal on January 13, 1978. The appeal had the effect of staying proceedings on the judgment and the peremptory writ of mandate issued pursuant thereto. ([Code Civ. Proc., § 916; Environmental Coalition of Orange County, Inc. v. AVCO Community Developers, Inc. \(1974\) 40 Cal.App.3d 513, 525 \[115 Cal.Rptr. 59\].](#)) On June 20, 1978, the trial court issued an order setting aside the automatic stay. The order was issued pursuant to [Code of Civil Procedure section 1110b](#) which provides: [HN5\[↑\]](#) "If an appeal be taken from an order or judgment granting a writ of mandate the court granting the writ, or the appellate court, may direct that the appeal shall not operate as a stay of execution if it is satisfied upon the showing made by the petitioner that he will suffer irreparable damage in his business or profession if the execution is stayed."

[*399] The June 20, 1978, order provided, in part pertinent to the issues before us, that "[respondents] [the Department and the Commissioner] are hereby ordered to comply with that Writ of Mandate. This order is hereby

stayed until July 6, 1978, to allow Respondents the opportunity to act as hereinafter provided or to seek such further judicial relief as they desire. [para.] It Is Further Ordered that Respondents may, as an alternative election to the foregoing order, do all of the following: no later than June 30, 1978, approve the Organizational Application of Petitioner Guardian Title Company; upon receipt of written notification by Petitioners that Petitioner Coldwell Banker & Company has purchased the securities of Guardian Title Company pursuant to the organizational permit, [***29] immediately issue a conditional license to Petitioner Guardian Title Company, *which license shall remain in effect even if Respondent's prevail upon appeal and be revocable only in accordance with California law and upon the terms and conditions set forth in the license described hereinafter*. The conditions on this license shall be the same as those set forth and imposed upon those other conditionally licensed underwritten title companies as set forth by way of exhibits to Respondents' Points and Authorities in opposition to the motion herein, *viz.*, that of United Title Company, a conditionally licensed licensee approved by Respondents subsequent to the trial of this action, which are incorporated herein by reference. [para.] It Is Further Ordered that, in the event Respondents elect to conditionally license Petitioner Guardian Title Company as hereinabove set forth, such conditional license shall also be without prejudice to Petitioners' entitlement to an unconditional license as may be finally affirmed in the appeal of the judgment entered by this Court." (Italics added.)

The permit to Guardian Title authorized it to issue and sell 7,000 shares of common stock at \$ [***30] 50 per share to Coldwell Banker in order for the latter to be qualified financially for the issuance of a license to Guardian Title to act as an underwritten title company. The permit to Guardian Title was followed by a license to it to transact business as an underwritten title company. The permit imposed certain conditions. Included was a condition that Guardian Title seek outside referrals (other than from [**497] Coldwell Banker) in an amount constituting 10 percent of its business the first year, with an objective of adding 10 percent each year thereafter until, at the end of 5 years, the share of outside business would constitute 50 percent of Guardian Title's total business.

We now deal with the contention of Coldwell Banker and Guardian Title that the appeal of the department and the Insurance Commissioner [*400] is now moot and that the only issue legitimately before us is whether the imposition of conditions on the permit and license exceeded the powers of the department and the commissioner. No party to this litigation has supplied us with a record which explains the nature of the showing made below by petitioners Coldwell Banker and Guardian Title to obtain [***31] the order vacating the automatic stay on appeal.

At the outset we take note of the fact that the trial judge's order, made after judgment, recites that the conditional license to be issued to Guardian Title pursuant to the trial court's order "shall remain in effect even if Respondents prevail upon appeal and be revocable only in accordance with California law and upon the terms and conditions set forth in the license described hereinafter . . ." (Italics added.)

It is undisputed that the Department of Insurance and the Insurance Commissioner complied with this singular order made below. It is equally manifest that no appeal was taken by the department or the commissioner from it. However, in view of the disposition we make of this matter before us, we need not consider whether such an order is appealable.

CA(2)[] (2) HN6[] It is crystal clear that nothing contained in [Code of Civil Procedure section 1110b](#) empowers the trial court to insulate its previous judgment from judicial review by issuing an order after judgment that purports to render appeal from the judgment meaningless. Such "bootstrapping" is not cognizable under any recognized principle of statutory or decisional law pertaining [***32] to appellate review.

CA(1b)[] (1b) HN7[] It may readily be seen that a *reversal* of the trial court's judgment requires that the parties be returned as close as is possible to that position they occupied prior to the rendering of the erroneous judgment. (See [Code Civ. Proc., § 908](#).) If the judgment is *affirmed*, it is enforceable according to its terms. In other words, our determination here will either result in Guardian Title's entitlement to a stock permit issued *without* conditions, or, it will result in Guardian Title's entitlement to no permit at all. (See [Santa Clara County Dist. Attorney Investigators Assn. v. County of Santa Clara \(1975\) 51 Cal.App.3d 255 \[124 Cal.Rptr. 115\]](#); [Fuller v. San Bernardino Valley Mun. Wat. Dist. \(1966\) 242 Cal.App.2d 66 \[51 Cal.Rptr. 130\]](#).)

[*401] The relief ordered by the superior court under [Code of Civil Procedure section 1110b](#) was purely interim relief, effective during the pendency of this appeal. The superior court had no jurisdiction to do more than that while this appeal is pending. Although the effect of the interim order of the superior court was to authorize Guardian Title to do business under a court-ordered license, [***33] that license will expire when the remittitur of the reviewing court goes down. (See [Selby Realty Co. v. O'Bannon \(1969\) 2 Cal.App.3d 917, 923 \[82 Cal.Rptr. 807\].](#))

CA(3)[[↑]] (3) As for mootness, [HN8\[[↑]\]](#) the general rule is that a party waives the right to appeal if he *voluntarily* complies with the terms of the lower court's judgment. A waiver is implied "only if the satisfaction or compliance is by way of compromise, or is coupled with an agreement not to appeal. Where it is compelled or coerced, e.g., by the threat of forfeiture or seizure of property under execution, there is no waiver." (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 135, p. 4129; see, also, [Reitano v. Yankwich \(1951\) 38 Cal.2d 1, 3 \[237 P.2d 6\]](#); [Lee v. Brown \(1976\) 18 Cal.3d 110, 116 \[132 Cal.Rptr. 649, 553 P.2d 1121\]](#); [Selby Constructors, Inc. v. McCarthy \(1979\) 91 Cal.App.3d 517, 521 \[154 Cal.Rptr. 164\]](#); [Signal Hill Aviation Co. v. Stroppe \(1979\) 96 Cal.App.3d 627 \[158 Cal.Rptr. 178\].](#))

[**498] **CA(1c)[[↑]]** (1c) The burden here is on Coldwell Banker and Guardian Title to demonstrate that the department and the Insurance Commissioner entered into some type of compromise agreement with Coldwell [***34] Banker and Guardian Title which was intended to terminate this litigation pending the appeal. No showing has been made here that such was the case.

It seems clear that once the trial court had vacated the automatic stay of the judgment and made its order directing the issuance of the permit and the license by the department and the commissioner, they were compelled to follow the order or face a citation for contempt. Under these circumstances, the decision to comply cannot be regarded as the *voluntary* act which constitutes waiver of appeal rights. The instant case is not unlike [English v. City of Long Beach \(1950\) 35 Cal.2d 155 \[217 P.2d 22, 18 A.L.R.2d 547\]](#), in which English sought a writ of mandate to compel the city to vacate its order of discharge and reinstate him as a police officer. In rejecting the contention that the appeal had been rendered moot because English had been reinstated during the appeal, the court observed: "The continued employment of English by [*402] the city resulted from the fact that he obtained a court order directing that this appeal should not operate as a stay of execution of the judgment granting the writ of mandate ([Code Civ. Proc., § 1110b](#)), and the city's inability or failure to resist the application for that order was *not* such a voluntary compliance with the writ as to render the issues moot." (*Id. at p. 160.*) (Italics added.) We conclude, therefore, that the appeal before us is not moot.

Furthermore, we decline to review on this appeal the propriety of the conditions imposed by the department and the Insurance Commissioner on the issuance of the permit and license to Guardian Title. Not only did these matters occur after judgment, but, pursuant to our analysis of the impact of our decision on the judgment, the fact that conditions were imposed upon the issuance of the permit and the license pending appellate determination of the correctness of the judgment will prove nonconsequential when the remittitur is received by the trial court.

IV

The Standard for the Trial Court's Review of the Administrative Decision

The department and the commissioner contend on this appeal that the trial court erred in conducting an independent, de novo review of the administrative decision to deny Guardian Title the stock permit it sought. As pointed out previously, it appears from the record that the [***36] trial court, although announcing at one point that it was applying the test of substantial evidence before the administrative tribunal, subsequently declared in its findings of fact and conclusions of law that it was entitled to conduct an independent review of all of the evidence -- that adduced both at the administrative hearings and in the trial court.

We are not dealing here with a statewide administrative agency exercising quasi-judicial power conferred upon it by the California Constitution, but, rather, with a statewide administrative agency exercising power to make certain determinations -- a power conferred upon it by the Legislature. Of some importance is the fact that the Insurance

Code provisions (commencing with § 820) concerning the issuance of stock permits by the commissioner do not provide, as a matter of right, for a hearing upon a permit application. In this instance, however, the [*403] department and the commissioner chose to afford a hearing to Guardian Title.

Although a hearing was held, it was not "required by law" in the sense that would trigger the judicial review contemplated by [Code of Civil Procedure section 1094.5](#), i.e., the administrative mandamus [***37] section. It was agreed by the parties herein, and correctly so, that the petition for mandate was before the trial court pursuant to the traditional mandamus statute -- [Code of Civil Procedure section 1085](#). The question presented is that of the applicable standard of review. Was the trial court limited to reviewing the substantiality of the evidence [**499] introduced before the administrative agency to support the administrative determination, or, was it empowered to reassess all the evidence before the court independently -- the more intrusive standard of review.

Two older California Supreme Court decisions have considered the issue. In [McDonough v. Goodcell \(1939\) 13 Cal.2d 741 \[91 P.2d 1035, 123 A.L.R. 1205\]](#), the factual background of the dispute was that the California Legislature had, by statute, conferred upon the Insurance Commissioner the duty to ascertain and determine the qualifications of an applicant for a permit to conduct a bail bond business; the statute in question was a newly enacted licensing law. Petitioners, long in the bail bond business, made application for a permit, and public hearings were held. The permit was denied, and petitioners sought [***38] judicial review.

In affirming the administrative action, the California Supreme Court stated that [HN9](#) "it is the settled general rule of law in this state that where the legislature has by statute clothed an administrative officer with power to ascertain the facts with reference to the fitness of an applicant for a permit to engage in a business subject to regulation under the police power and has vested in such officer the discretion, based on the facts ascertained, to grant or deny a permit to engage in such business the courts will not interfere with the exercise of such discretion except in the case of an abuse thereof." ([Id. at p. 748](#).) The *McDonough* court proceeds to state that one form of discretionary abuse -- arbitrary action -- would occur "in the event there was no sufficient factual basis for [the administrative] conclusions." ([Id. at p. 749](#).) Applying the rule that judicial review was concerned with the existence of substantial evidence before the administrative agency, whether there were conflicts in that evidence or not, the *McDonough* court upheld the determination made by the Insurance Commissioner.

[*404] In [Drummey v. State Bd. of Funeral Directors \(1939\) 13 Cal.2d 75 \[87 P.2d 848\]](#), the petitioners were duly licensed embalmers, charged with certain violations of the Funeral Directors and Embalmers Law. That law provided for notice and hearing prior to revocation of a license. After hearing, the board suspended petitioners; the petitioners sought judicial review; the trial court determined the issue "on the evidence produced before the board." ([Id. at p. 78](#).) It then ordered the board to reinstate the petitioners. The board appealed.

The *Drummey* court, after deciding that mandamus was the appropriate method of obtaining judicial review, posed the question in this fashion: "[What] weight the courts should give to the findings of the board -- or, stated another way, are the findings of the board, if based on substantial although conflicting evidence, binding on the court . . . ?" ([Id. at p. 84](#).) Reasoning that to hold otherwise would confer quasi-judicial power upon an administrative agency not designated by the California Constitution as an agency so empowered, the *Drummey* court declared that "the court to which application for mandate is made must weigh the evidence, and exercise its independent [***40] judgment on the facts, as well as on the law, if the complaining party is to be accorded his constitutional rights under the state and federal Constitutions . . . for a purely administrative board to deprive a person of an *existing* valuable privilege without the opportunity of having the finality of such action passed upon by a court of law, would probably violate the due process clause of the federal Constitution." (*Ibid.*) (Italics added.)

Both *McDonough* and *Drummey* were decided in 1939 and have not been overruled or questioned. *McDonough*, adhering to the substantial evidence rule, distinguished the *Drummey* holding on the ground that *Drummey* had formulated an exception to the general rule which applied only where it was determined that a party was being deprived of a "constitutional right." More recent case law has recognized that this distinction between the two approaches is dependent upon whether the right involved is "vested" or not. ([Merrill v. Department of Motor Vehicles \(1969\) 71 Cal.2d 907, 914-915 \[80 Cal.Rptr. 89, 458 P.2d 33\]](#).) The denial of a permit to an applicant (the *McDonough* situation) has traditionally [***41] been regarded as involving a nonvested right, while

revocation of a permit or license already granted (the *Drummey* situation) has been regarded as involving a vested right of the permittee or licensee. In the latter case, the trial-court review is conducted on the independent-judgment-on-the-facts basis.

[*405] Both *McDonough* and *Drummey* were decided before the enactment of the Administrative Procedure Act and [section 1094.5 of the Code of Civil Procedure](#) providing for administrative mandamus. Nevertheless, [HN10](#)[↑] the distinction between vested and nonvested rights continues to be of controlling significance not only in cases governed by administrative-mandamus principles but those which are not.

The *McDonough* court's adoption of the substantive evidence rule in vested rights cases has been relied upon in such subsequent decisions as So. [Cal. Jockey Club v. California etc. Racing Bd. \(1950\) 36 Cal.2d 167 \[223 P.2d 1\]](#), and [Crestlawn Memorial Park Assn. v. Sobieski \(1962\) 210 Cal.App.2d 43 \[26 Cal.Rptr. 421\]](#); the *McDonough-Drummey* distinction has been discussed recently in [Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd](#) [\[***421\]](#). [\(1979\) 24 Cal.3d 335, 343 \[156 Cal.Rptr. 1, 595 P.2d 579\]](#). No case has been brought to our attention which specifically considers the power of the Insurance Commissioner to deny a stock permit, and the scope of subsequent judicial review of this administrative decision. The case of [Blood Service Plan Ins. Co. v. Roddis \(1968\) 259 Cal.App.2d 807 \[66 Cal.Rptr. 649\]](#), strenuously relied upon by Coldwell Banker and Guardian Title both in the trial court and on this appeal, did not address the issue of the standard of review; in that context, it is not helpful. In any event, the *Roddis* decision is readily distinguishable from the case at bench. It involved the propriety of administrative denial of a certificate to do business -- a case in which the administrator had conceded that petitioner insurance company had complied with all the applicable criteria for obtaining the certificate. Under those circumstances, the appellate court found that it was an abuse of discretion on the part of the Insurance Commissioner to refuse to issue the certificate.

Most of the decisional law on judicial review has evolved in recent years from administrative proceedings reviewable pursuant [\[***43\]](#) to [Code of Civil Procedure section 1094.5](#), but it has recognized the relevance of the distinction between vested and nonvested rights. In the landmark case of [Bixby v. Pierno \(1971\) 4 Cal.3d 130 \[93 Cal.Rptr. 234, 481 P.2d 242\]](#), the California Supreme Court held that [section 1094.5](#) empowered the Supreme Court to establish standards for determining which cases require an independent-judgment review and which call for only a substantial-evidence review of the entire administrative record. The *Bixby* court makes clear that when the right involved is a *fundamental* vested right, the standard of judicial review is the [\[*406\]](#) independent-judgment review. Agreeing with *Bixby* was [Strumsky v. San Diego County Employees Retirement Assn. \(1974\) 11 Cal.3d 28 \[112 Cal.Rptr. 805, 520 P.2d 29\]](#).

[CA\(4\)](#)[↑] (4) [HN11](#)[↑] The *Bixby-Strumsky* rule of judicial review was explained by [Anton v. San Antonio Community Hosp. \(1977\) 19 Cal.3d 802, 822 \[140 Cal.Rptr. 442, 567 P.2d 1162\]](#), in the following fashion: "That rule, as stated by us in *Strumsky*, provides that if the subject order or decision 'substantially affects a fundamental vested right, the court, in determining under [\[***44\]](#) [section 1094.5 of the Code of Civil Procedure](#) whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. If, on the other hand, the order or decision does not substantially affect a fundamental vested right, the trial court's inquiry will be limited to a determination of whether or not the findings are supported by substantial evidence in light of the whole record.'" It is [\[**501\]](#) manifest that the difference between the two standards of judicial review is of substantial significance.

[CA\(5\)](#)[↑] (5) Since, in the case at bench, the trial judge applied the independent-judgment-on-the-evidence standard, the issue before us is "whether or not the administrative decision here in question 'substantially affects a fundamental vested right.'" ([Anton, supra, 19 Cal.3d 802, 823](#).) The question presented is twofold: Was the right or interest of Coldwell Banker, a real estate broker, to form Guardian Title and have the latter apply for a permit to issue stock and a license to engage in the underwritten title [\[***45\]](#) company business a right or interest which is "fundamental"? But even assuming that the interest or right involved is "fundamental," the second aspect of the question is whether the right or interest is a "vested" interest or right.

The concept of a "fundamental" right has not been precisely defined. The *Bixby* court used language that [HN12](#) [in] determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation." ([Bixby, supra, 4 Cal.3d 130, 144](#)) Similarly, a "vested" right has not been defined with complete precision. The *Bixby* court defined the "vested" fundamental right in terms of a contrast between a right possessed and one that is merely sought. [And], if it is such a fundamental right, whether it is possessed by, and [*407] vested in, the individual or merely sought by him. In the latter case, since the administrative agency must engage in the delicate task of determining whether the individual qualifies for the sought right, the courts have deferred to the administrative expertise of the agency. If, however, the [**46] right has been acquired by the individual, and if the right is fundamental, the courts have held the loss of it is sufficiently vital to the individual to compel a full and independent review." ([Bixby, supra, 4 Cal.3d 130, 144](#).)

In *Anton*, the court applied the *Bixby-Strumsky* definitions and concluded that a physician's right to renewal of hospital and staff privileges which had been renewed annually for a number of years before, and which was now denied by a decision of the hospital's board of directors, was "both fundamental and vested within the meaning of *Bixby* and *Strumsky*." ([Anton, supra, 19 Cal.3d 802, 825](#).) The *Anton* court thus continues the traditional distinction made between an application for a license (a "privilege") and the revocation of a license (a "vested right").

We conclude, therefore, that, under *Bixby*, *Strumsky* and *Anton*, the right or interest of Coldwell Banker and Guardian Title, which was affected by the decision of the department and the Insurance Commissioner, was neither a "fundamental" right nor a "vested" right. The appropriate standard of judicial review by the trial court below was thus the substantial-evidence [**47] test and not the independent-judgment test. It was thus error for the trial court to apply the independent-judgment test in the case before us. The trial court should not have admitted additional evidence and then relied upon it in reaching its decision. Basically the trial court reached its decision by holding that the department and the Insurance Commissioner had misinterpreted and misapplied [Insurance Code sections 839](#) and [839.1](#) of the Insurance Code and, in so doing, had denied to Guardian Title and Coldwell Banker their constitutional due process rights.

Since the trial court employed the wrong standard of judicial review, its findings of fact become irrelevant to a consideration of the issue of whether the administrative decision in question is supported by substantial evidence on the whole record before the administrative agency. [CA\(6\)](#) [6] But even when the substantial-evidence standard is applicable, the trial court must look to the entire administrative record not only to determine whether the findings are supported by substantial evidence, but also to determine "whether the agency committed any errors [**502] of law." ([Bixby, supra, 4 Cal.3d 130, 144](#).)

[*408] We [**48] next consider whether the trial court was correct in holding that the department and the Insurance Commissioner had committed errors of law in interpreting their powers under the relevant Insurance Code section. We also consider, in view of the trial court's failure to do so, whether a review of the entire administrative record establishes that the findings and decision are supported by substantial evidence.

V

The Administrative Decision Does Not Involve Any Errors of Law and the Administrative Findings of Fact and Decision Are Supported by Substantial Evidence on the Whole Record

Of crucial importance in this litigation is the meaning to be attributed to [section 839.1 of the Insurance Code](#). It is true that, insofar as we have been able to discover, no legislative guidance in the form of committee reports or other materials exists with respect to this 1965 enactment of the Legislature.¹⁶ Thus, we must turn elsewhere for aids to appropriate interpretation.

¹⁶ [Section 839.1](#) was enacted into law as set forth in Senate Bill No. 559, introduced by Senator Dolwig on February 18, 1965. The Legislative Counsel's Digest merely summarizes its content.

[***49] [CA\(7\)](#) (7) A review of article 8 of the Insurance Code, commencing with section 820, and concerned with the issuance of securities by insurers, reveals that the department and the Insurance Commissioner have been charged with the duty and responsibility of monitoring the issuance of such securities in broad terms, rather than in terms of limitation. The legislative objective appears to be not only to safeguard the rights of shareholders but other important members of the public -- the consumers.

[CA\(8\)](#) (8) The Legislature, as it is entitled to do, has delegated broad powers to the department and the Insurance Commissioner -- powers which include the power to determine not only the present danger but *potential* danger to competition in the insurance industry presented by various business combinations and arrangements. The language of [Insurance Code section 839.1](#) does not suggest that the section was intended to deal only with mergers but rather with *any* business combination likely to have damaging economic consequences; there is no [*409] language in the section which supports the view that only *horizontal* arrangements were to be subject to administrative scrutiny.

Among the distinguishing [***50] features of [section 839.1](#) is the fact that administrative antitrust inquiry may commence at the critical stage *prior* to the issuance of a stock permit to an insurer applicant. Much was made below of the purportedly erroneous process employed by the department and the commissioner at the administrative level of taking into account the existence of a number of applications pending which were similar to those of Guardian Title in assessing the impact of the business arrangement involved on competition in the title insurance industry. Under [Insurance Code section 839.1](#), we deem it appropriate -- and indeed, necessary -- for the department and the commissioner to make the scope of their inquiry include the factor of similar pending applications. To hold otherwise and to limit the administrative decision-making power to consideration of each application in a vacuum, requiring the administrative agency to ignore that application's significance as part of a trend toward an unhealthy concentration of economic power, would rob [section 839.1](#) of much of its effectiveness.

The narrow construction of [Insurance Code section 839.1](#), favored by the trial court on this issue, led, in turn, to [***51] a misguided search for antitrust principles applicable to single entities rather than a consideration of the many elements which attain significance with respect to an entire industry.

All of the parties to this litigation recognized, and quite reasonably so, that the [**503] language of [Insurance Code section 839.1, subdivision \(a\)\(5\)](#), referring to a denial of a permit in the case of those business arrangements which "will substantially lessen competition in the insurance business" was similar to that employed in the federal antitrust legislation, i.e., the Sherman Act ([15 U.S.C. §§ 1-7](#)) and the Clayton Act ([15 U.S.C. §§ 12-27](#)), and that the case law interpreting federal antitrust legislation would offer some assistance to the task of interpreting [section 839.1](#).

While Guardian Title and Coldwell Banker have characterized [section 839.1](#) as a "little Clayton Act," such a description is overly simplistic. [CA\(9\)](#) (9) As a preliminary matter, it is to be noted that our statute is unlike the federal Sherman and Clayton Acts because it operates in the context of permit issuance; the burden of compliance with its terms is on the applicant, rather than on the government or a complaining party to [***52] establish antitrust violation pursuant to federal law.

[*410] Nor do we accept the interpretation, urged below by Guardian Title and Coldwell Banker, that [section 839.1](#) is more restrictive in its language than the federal legislation because of the section's use of the word "will"; that usage merely portends that the department and the commissioner have the power and the duty to consider *potential* threat to competition in addition to *current* danger.

In pursuit of analogies, Guardian Title and Coldwell Banker urge that the most appropriate reference in federal law is that contained in section 3 of the Clayton Act ([15 U.S.C. § 14](#))¹⁷ and concerned with the monopolistic effect of

¹⁷"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale . . . or 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, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease,

exclusive dealing contracts. We are urged to view the Coldwell Banker-Guardian Title arrangement as such a contract, and invited to accept the holding of [Tampa Electric Co. v. Nashville Co. \(1961\) 365 U.S. 320 \[5 L.Ed.2d 580, 81 S.Ct. 623\]](#), as dispositive of the case at bench.

[***53] The *Tampa* case was concerned with the antitrust implications of a requirements contract entered into between a public utility and a coal producer. *Tampa* is particularly helpful here in that it discussed the type of evidence necessary in antitrust litigation to assist a court in determining what constitutes "substantial" lessening of competition. That evidence was described in *Tampa* in the following terms: "First, the line of commerce, i.e., the type of goods, wares, or merchandise, etc., involved must be determined, where it is in controversy, on the basis of the facts peculiar to the case. Second, the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies. In short, the threatened foreclosure of competition must be in relation to the market . . . [para.] Third, and last, the competition foreclosed by the contract must be found to constitute a substantial share of the market. That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited [***54]" ([Tampa, supra, 365 U.S. 320, 327-328 \[5 L.Ed.2d 580, 587\]](#); fn. omitted.)

[*411] The *Tampa* court proceeds to state that "[to] determine substantiality in a given case, it is necessary to weigh the *probable* effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the *probable* immediate and future effects [**504] which preemption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence." ([Id. at p. 329 \[5 L.Ed.2d at p. 588\]](#).) (Italics added.) In *Tampa*, it was held that evidence establishing that the contract when performed would only constitute 1 percent of the total volume of business in the relevant market area precluded the conclusion of antitrust violation, because the 1 percent was considered de minimis as a matter of law in terms of competitive effect.

CA(10a)[↑] (10a) In the case at bench, the trial court ruled, [***55] as a matter of law, that 1 percent of the market was also de minimis and, as a consequence, refused to weigh the large body of administratively adduced evidence emphasizing the economic factors extant in the title insurance industry in California which led to the administrative conclusion that the Coldwell Banker-Guardian Title arrangement would eventually foreclose a substantial portion of the market to competition not similarly situated.

We conclude that neither the trial court's *factual* determination with respect to the purported 1 percent -- which was beyond the scope of its review power -- nor the legal conclusion of de minimis can be supported on the record before us.

As to the factual determination, it rests on the in-court testimony of Charles R. Hilton, president of Guardian Title, which was substantially the same as that presented at the administrative hearing. At the administrative hearing, Hilton was asked: "In Los Angeles County do you have any idea what percentage of the real estate market that Forest E. Olson [a subsidiary] and Coldwell Banker and its other subsidiaries have?" Hilton answered as follows: "A. I can answer that this way: It would take a lot of [***56] extrapolation. It would be conjecture on my part. I can go back to 1969 when Forest E. Olson was acquired by Coldwell Banker. We had a Justice Department inquiry at that time because of the merger of two leading real estate firms and we hired a fellow [*412] -- don't recall his name -- to do a survey to see what percentage of the reported real estate activities there was. He reported to the Justice Department that that was somewhere in the area of 1 percent. [para.] Q. Total? [para.] A. Total. [para.] Q. In Los Angeles? [para.] A. I think that was for the whole state. I believe it was for the whole state because the inquiry was related to the state. Coldwell Banker has offices in the North and the South. [para.] Q. Right. Don't you as some sort of business practice try to get some ball park figure as to the percentage of the business you are getting? [para.] A. No, because it is a very bifurcated business because we don't do so much work in Los Angeles County. The county figures would be meaningless."

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 commerce."

We note that trial took place in 1977; in the annual report of 1974 Coldwell declared that, since the acquisition of Forest E. Olson Company, [***57] it was the largest residential brokerage firm in Los Angeles County. The problem which is presented, however, is not necessarily that of the credibility of the witness. The problem is that this testimony is practically meaningless because "the market" is not identified in terms of whether the percentage reference is to the *number* of sales transactions or to the *dollar volume* of those transactions. The testimony appears to be limited to the number of sales, rather than to all facets of real estate transactions such as the dollar volume and the size and character of the real estate involved in each transaction. Testimony based upon a "survey" done by some unnamed party in 1969 has little, if any, relevance to the business position enjoyed by Coldwell Banker in 1977. Certain minimal requirements of precision must prevail in the quality of evidence which supports a factual finding. It must be evidence which possesses "solid value." The Hilton testimony did not meet this standard. The Insurance Commissioner was not required to accept and give substantial weight to this kind of flimsy, conjectural and insubstantial evidence.

In addition, the trial court's legal conclusion [***58] that "1%" was de minimis as a matter [**505] of law was erroneous in the context of the present case. A more appropriate analogy in federal **antitrust law** is found in section 7 of the Clayton Act ([15 U.S.C. § 18](#)),¹⁸ and the case law which interprets [*413] it. In *Brown Shoe Co. v. United States* (1962) 370 U.S. 294 [8 L.Ed.2d 510, 82 S.Ct. 1502], it is made perfectly clear that no one definition of "substantially," insofar as lessening competition is concerned, was intended by the Congress to control the assessment of mergers, "whether in quantitative terms of sales or assets or market shares or in designated qualitative terms, by which a merger's effects on competition were to be measured." ([*Id. at p. 321 \[8 L.Ed.2d at p. 533\]*](#).) One very important element perceived in *Brown* was the special situation that prevailed in the particular industry involved. The special situation would take into account factors such as the economic motivation behind the arrangement, its "nature and purpose," and "the trend toward concentration in the industry."

[***59] To the extent which the Coldwell Banker-Guardian Title arrangement can be regarded as "vertical," *Brown* aptly points out that "[every] extended vertical arrangement by its very nature, for at least a time, denies to competitors of the supplier the opportunity to compete for part or all of the trade of the customer-party to the vertical arrangement. However, the Clayton Act does not render unlawful all such vertical arrangements, but forbids only those whose effect 'may be substantially to lessen competition, or to tend to create a monopoly' . . ." ([*Brown, supra, 370 U.S. 294, 324 \[8 L.Ed.2d 510, 535\]*](#).)

Guardian Title and Coldwell Banker also relied below on a single statement contained in *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 324 [70 Cal.Rptr. 849, 444 P.2d 481], a pleading case. The statement sets forth that "[not] only are vertical distribution agreements in this instance contemplated by the Insurance Code, but [it] seems clear to us that vertical integration, as such without more, cannot be held violative of the Sherman Act." But the *Chicago Title* case was not concerned with vertical business arrangements [***60] and potential application of *Insurance Code section 839.1. CA(11)* [11] In addition, we agree that a vertical business arrangement per se connotes nothing unlawful, but the contrary may be true when the arrangement is assessed in relation to a particular set of facts in a particular industry.

The *Brown* court emphasizes the multiplicity of factors present in antitrust determinations -- factors of the kind developed by witnesses, including experts, at the administrative hearings held in the case at bench. *CA(10b)* [10b] We hold that the Insurance Commissioner was not required to single out one factor and reject consideration of all other [*414] factors in arriving at his conclusion. Much of the evidence at the administrative hearings was uncontested and there is no basis in the administrative record for any finding by the trial court that the administrative decision was *not* supported by substantial evidence on the whole record.

¹⁸ *HN13* [13] That section provides, in pertinent part, that "[no] corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be *substantially* to lessen competition, or tend to create a monopoly." (Italics added.)

As our discussion indicates, we have also concluded that the trial court's error in applying the wrong standard of review was compounded by misinterpretation and misapplication of section 839.1 of the Insurance Code. This section, despite Guardian Title's and Coldwell [***61] Banker's characterization of it as unconstitutionally vague, clearly demonstrates legislative intent to confer upon the department and the Insurance Commissioner the duty and the power to investigate potentially dangerous business combinations and arrangements which threaten healthy competition in the title insurance industry. The language of the section contemplates the exercise of discretion by the administrative entities involved. That discretion [**506] was employed to consider that the "total transaction" referred to in Insurance Code section 839.1 included recognition of trends toward concentration of economic power portended by other similar pending applications. While discretion is not without limitation, we hold that it was properly exercised by the department and the commissioner in the case at bench in the decision denying Guardian Title's applications for an organizational permit and a license to transact business as an underwritten title company. The decision is amply supported by substantial evidence in light of the entire record.

The judgment is reversed.

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